

Agenda

Committee of the Whole

City and Borough of Juneau

Ben Haight, Chair

December 11, 2018

Assembly Chambers

5:30 PM

I. ROLL CALL

II. REGULAR AGENDA

A. AME2018 0009: Proposed amendments to 49.30 - Nonconforming Development

III. OTHER BUSINESS

IV. REPORT OF REGULAR AND SPECIAL COMMITTEES

V. ADJOURNMENT



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November 27, 2018

Memorandum

To: Planning Commission Committee of the Whole

From: Beth McKibben, AICP, Senior Planner

A handwritten signature in black ink, appearing to read 'BMc', is positioned to the right of the 'From' line.

RE: AME2018 0009 Proposed amendments to 49.30 – Nonconforming Development

Attachments:

A – Proposed language

B – Title 49 minutes –10/9/18

C – October 5, 2018, memorandum to Title 49 Committee with following attachments:

- Title 49 minutes – 07/19/17, 08/16/17, 09/20/17, 10/11/17
- June 21, 2017, memorandum to Planning Commission and attachment - American Planning Association Planning Advisory Service Quick Notes

D – Real Estate Law Journal article – “Abandonment, Discontinuance and Amortization of Nonconforming Uses: Lessons for Drafters of Zoning Regulations”

Introduction

The Title 49 Committee met on October 9, 2018, to further consider the proposed amendments to 49.30, Nonconforming Development. The background and summary information provided at that meeting are not revisited in this memorandum.

Discussion

The proposed language would repeal and replace all of 49.30. The proposed language clarifies and defines the following non-conforming situations:

- Nonconforming use,
- Nonconforming residential density,
- Nonconforming structure,
- Nonconforming lot, and
- Nonconforming parking.

Nonconforming signs are addressed in 49.45. Staff proposes to address signs when that section of Title 49 is amended. Language for nonconforming development in stream buffers will be developed with the work on stream buffers.

It is possible for a site to have more than one nonconforming situation or a combination of several nonconforming situations.

The regulations apply only to those nonconforming situations that have established “legal nonconforming status”. Nonconforming situations which were not allowed, have not been approved, or have not been maintained over time have no legal right to continue. Nonconforming situations may be changed to a conforming situation through the appropriate permitting process (by right). Once that happens, the nonconforming rights are lost and the nonconforming situation may not be reestablished.

Nonconforming Use

Nonconforming use, in general, is a use that was allowed or legally permitted when established but due to changes in zoning or zoning regulations is no longer allowed. The proposed language allows for nonconforming uses to continue to operate. Following the October 2018 Title 49 Committee meeting, changes were made to allow changes in the operation so long as the external impacts of the changes comport or harmonize with the neighborhood. A nonconforming use could be changed to another nonconforming use through a nonconforming situation review (discussed later). In the previous draft, this was to be approved by the Director. Additionally, in the residential zoning districts, through a nonconforming situation review a nonconforming, nonresidential use could be changed to an allowed residential use that exceeds the allowed density. This is one method to remove more egregious nonconforming uses from residential areas and promote more housing. A nonconforming use may change to a conditional use allowed in the zoning district with an approved Conditional Use Permit. In this case, the nonconforming rights would then be lost. Nonconforming uses may be expanded within the existing original building but may not be expanded to other buildings or take up a greater area of land. New language has been added that addresses the loss of nonconforming use status. Once a nonconforming use is abandoned, subsequent uses must comply with current code unless the use is reestablished through the nonconforming situation review. When a nonconforming use is accidentally destroyed and the cost of repair is more than 75% of the cost of replacement, then the nonconforming use cannot be reestablished. At the October Title 49 Committee meeting, there was some discussion about the 75% threshold. This is what is currently in code. This will be discussed in more detail later in this report.

Nonconforming Residential Density

Nonconforming residential density is a new concept introduced in the proposed language. This is when a residential use is an allowed use in the zoning district and was constructed at a lawful density at the time but due to changes in the zoning or zoning regulations now has greater density than is currently allowed in the district. This nonconforming situation is not currently recognized by code. The addition of this concept implements the Housing Action Plan by preserving existing housing. Additionally, it addresses the problem of owners of nonconforming densities struggling to sell their homes because lenders are reluctant to lend money when the units cannot be reconstructed in the event of a catastrophe. The reconstruction of nonconforming residential densities may be approved with approved proof of nonconforming status. Nonconforming densities may not be altered or reconstructed until proof of nonconforming status is established. Nonconforming residential density rights continue even if a building is unoccupied for any amount of time. If the building is accidentally destroyed or damaged, as long as it is reconstructed within three years the nonconforming density rights are maintained. Furthermore, this reconstruction can be in the same footprint on the original location if the structure was nonconforming for setbacks or lot coverage. However, the reconstructed building cannot encroach into rights-of ways or across property lines. There is no threshold for the cost repair as there is for reconstruction of nonconforming uses or nonresidential structures. If the reconstruction is not substantially complete within three years, nonconforming density rights are lost, the site is considered vacant, and redevelopment must comply with current codes. For sites with only one unit that are nonconforming for density, the nonconforming dwelling unit may not be reconstructed when the cost of repairs exceeds 75% of the cost of replacement

of the building. Currently only the Industrial and Waterfront Industrial zoning districts would have a situation of a nonconforming single dwelling unit. These are treated more strictly than other nonconforming residential densities because there is a need for industrial land in Juneau, and residential uses are generally incompatible with industrial uses. Nonconforming residential density rights are lost when the structure is intentionally destroyed.

Nonconforming Structure

Nonconforming structures are those that do not meet one or more of the dimensional standards such as height, setbacks, or lot coverage. These structures can be continued and maintained. They may be expanded, but only if the change does not increase the nonconformity. An example of this is a structure that is nonconforming because it does not meet the current front yard setback. An addition to the rear or side of the building could be added if it complies with the current setback requirements. CBJ 49.25.430(4)(M) provides that nonconforming structures may add additional stories with an approved Conditional Use Permit. No amendments are proposed to this. If a nonconforming structure is moved, it must conform to current code requirements. As discussed above, a nonconforming structure with nonconforming density may be reconstructed on the original location. All other nonconforming structures must be reconstructed in compliance with current regulations when they are accidentally damaged and the cost of repair is greater than 75% of the cost of replacement. If a nonconforming structure is intentionally destroyed, it may only be reconstructed in accordance with current codes. This is the same as nonconforming uses and a nonconforming single residential dwelling, which can only be reconstructed when the damage is accidental. It is different than nonconforming density (more than one unit) which can be reconstructed regardless of the cost of replacement when it is damaged accidentally. When a nonconforming structure is abandoned or brought into conformity, the nonconforming status is lost. Previous drafts provided for the reconstruction of nonconforming structures to be the same whether the damage was accidental or intentional. Staff recommends that nonconforming rights be lost when the damage is intentional.

Nonconforming Lot

A nonconforming lot is one that does not comply with the minimum lot area, depth or width, or other lot requirements for the district in which it is located. The current language reflects the discussion of the Title 49 Committee in October. Any nonconforming lot can be used for any permitted use in the district if the use does not require a minimum lot size greater than the minimum lot size required by the zoning district. The concepts currently under discussion for the Auke Bay area zoning project include the concept of a minimum lot size for certain uses that is larger than the minimum lot area for the district. Additionally, nonconforming lots may be developed for any use permitted in the district if any associated district requirements can be met, such as setbacks and parking. In order for these lots to be developed, they must be accepted as legally nonconforming. Structures on these lots may be reconstructed on the same footprint, except they may not encroach onto rights-of-ways or onto adjacent property. As current code allows, when an undeveloped nonconforming lot adjoins and has continuous frontage with one or more undeveloped lots and they are under the same ownership, each lot may be developed with a single family dwelling.

Nonconforming Parking

As currently provided for in code, a use may be replaced or reconstructed with the same number of off street parking spaces as were provided for the original building. New language is proposed that clarifies that when a use had nonconforming parking and later becomes more conforming for parking, it may not revert back to the less conforming parking. An example of this is a single family home that was built prior

to the requirement for two off street parking spaces. Later, a single car garage was added to the site, providing one off street parking space. The garage cannot now be converted to living space and thereby eliminate the one off street parking space, unless another off street parking space is provided or a parking waiver is approved.

Overcoming the Presumption of Abandonment

New language has been added since the Title 49 Committee's last review. This provides a method for a property owner to "overcome" a determination that a nonconforming situation has been abandoned. This would be approved by the Director and could be protested to the Board of Adjustment through a nonconforming situation review.

Nonconforming Status

The proposed language creates a process called "proof of nonconforming status". This is a review process to establish legal nonconforming status. It places the responsibility on the property owner to provide evidence proving that the nonconforming situation was allowed when it was established and has been continuously maintained over time. Legal nonconforming status is approved by the Director and may be protested to the Board of Adjustment through the nonconforming situation review. Examples of standard evidence to prove the nonconforming situation is listed, as are examples for proving the situation was maintained over time.

Nonconforming Situation Review

A nonconforming situation review (NCSR) is a new process that allows the Board of Adjustment to review, limit, or deny the following:

- A change of use to a different use which is prohibited by the base zone.
- Expansion of nonconforming use.
- A change from a nonconforming, nonresidential use to an allowed residential use that exceeds the allowed density in RR, D1, D3, D5, D10SF, D10, D15 and D18 zones.
- Reconstruction of the non-conforming dwelling units on sites that exceed the maximum residential density standards when an applicant does not provide standard evidence for a Proof of Nonconforming Situation or when the Director does not find the evidence to be satisfactory.
- A Director determination that the evidence provided did not satisfactorily overcome the presumption of abandonment when the Director does not find the evidence to be satisfactory.

The procedure for the NCSR has not yet been worked out. It likely will be based on the variance process, requiring a pre-application conference and public notices, including the on-site public notice sign. The Board of Adjustment may apply conditions to approvals. Findings must be made that consider the appropriateness of the proposal to the area, impacts to future development, external impacts of proposals, and neighborhood characteristics.

Miscellaneous

CBJ 49.15.590 addresses right-of-way acquisitions. Prior to the adoption of Ordinance 2015-03(AM), CBJ could not approve right-of-way acquisitions that created nonconforming situations such as lots less than the minimum lot size or buildings that would no longer meet required setbacks. The adoption of this ordinance provides the opportunity for the Planning Commission to approve right-of-way acquisitions that create nonconforming situations if each lot has at least one practical building site that can be reasonably developed. The proposed nonconforming regulations will not affect this section of code. The

nonconforming situations created by these acquisitions will be considered legally nonconforming and should be documented as such.

Staff was asked if CBJ has powers separate from the nonconforming section of code to address uses that are deemed a public hazard. In general, a legally nonconforming use that is well operated and maintained has the right to continue operating. Some nonconforming codes provide for amortization of nonconforming uses, meaning the nonconforming use is given a period of time, such as three or five years, to become conforming or move. If a nonconforming use is not being maintained or well operated, there are other processes outside of Title 49 that can be used to address these uses.

At the October Title 49 Committee meeting there was discussion about language currently in code stating "...the repair cost of the structure is more than 75 percent of the cost of the replacement of the entire building, exclusive of foundations, using new materials. The extent of building damage shall be determined by the building official." The current proposal addresses reconstruction as follows:

- Nonconforming use – If intentionally destroyed, nonconforming rights are lost, and the redevelopment must comply with current regulations. If accidentally destroyed to the 75% threshold, then the nonconforming use cannot be reconstructed/developed.
- Nonconforming density for more than one dwelling unit – If intentionally destroyed, nonconforming density rights are lost. If accidentally destroyed, there is no replacement cost threshold, and nonconforming density may be reconstructed.
- Nonconforming density for one dwelling unit – If intentionally destroyed, nonconforming density rights are lost. If accidentally destroyed to 75% cost threshold, the nonconforming density cannot be reconstructed.
- Nonconforming structure – If intentionally destroyed, nonconforming rights are lost and the new structure must comply with current regulations. If accidentally destroyed to the 75% threshold, the reconstruction must comply with the current dimensional standards.

In general, the goal is when a nonconforming situation is destroyed, it is to be replaced in conformity with the current regulations. If the nonconformity that was destroyed was a use, the objective is to have it redeveloped in an area where it could legally be permitted. Research show that communities use different values for determining when nonconforming rights are lost, with 50% being the most common. Juneau's 75% is on the high end of the range. At the October Title 49 Committee meeting, there was also discussion about using a different criterion than the cost of reconstruction. Cost of reconstruction is not difficult to obtain and is not subjective. It was suggested we consider the cost of making the site useful for something else. This would be challenging information to obtain because of the wide variation of future development options.

1
2 **Purpose**

3 When a zoning ordinance or other land use regulation is adopted or amended, or when the
4 zoning district designation applicable to a lot changes, then as a result a previously lawful lot,
5 structure, density or use may no longer be allowed. Such previously lawful use, density,
6 structure or lot shall be considered a nonconforming use, density, structure or use. Such
7 nonconformities may continue, subject to the requirements of this chapter and any other
8 provisions of this Code that expressly apply to nonconforming lots, structures, density or uses.

9 This chapter provides methods to determine whether situations have legal nonconforming
10 status. This is based on whether they were allowed when established, and if they have been
11 maintained over time. This chapter also provides a method to review and limit nonconforming
12 situations when changes to those situations are proposed. The intent is to protect the character
13 of the area by reducing the negative or undesired impacts from nonconforming situations. The
14 regulations ensure that the uses and development may continue and that the zoning
15 regulations will not cause unnecessary burdens to property impacted by the zoning change.

16 Nonconforming situations that have a lesser impact on the immediate area have fewer
17 restrictions than those with greater impacts. Nonconforming nonresidential uses in residential
18 zones are treated more strictly than those in commercial or industrial zones to protect the
19 livability and character of residential neighborhoods. In contrast, nonconforming residential
20 developments in residential zones are treated less strictly because they do not represent a
21 major disruption to the neighborhood and they provide needed housing opportunities.

22 **Nonconforming Situations**

23 A specific site may be nonconforming because it contains a nonconforming use, a, an allowed
24 residential use that exceeds the allowed density, nonconforming structure, nonconforming lot,
25 or a combination of these. Nonconforming uses, nonconforming residential densities,
26 nonconforming structures and nonconforming lots are defined in Chapter 49.80, Definitions.

27 **Applicability**

Page 1 of 13

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28 The nonconforming situation regulations apply only to those nonconforming situations which
 29 were allowed when the situation was established or which were approved through a land use
 30 review. Additionally, they must have been maintained over time. These situations have legal
 31 nonconforming status. Nonconforming situations which were not allowed when established or
 32 have not been maintained over time have no legal right to continue and must be removed.

33 **Ownership.** The status of a nonconforming situation is not affected by changes in ownership.
 34

35 **Change to a conforming situation.** A nonconforming situation may be changed to a conforming
 36 situation by right. Once a conforming situation occupies the site, the nonconforming rights are
 37 lost and a nonconforming situation may not be re-established.
 38
 39

40 **Maintenance.** Normal maintenance and repair of nonconforming situations is allowed.
 41

42 Nonconforming Uses

43
 44 **Continued operation.** Nonconforming uses may continue to operate. Changes in operations,
 45 such as changes in ownership, hours of operation and the addition or subtraction of permissible
 46 accessory uses, are allowed provided exterior changes, and changes in hours of operation, or
 47 other external impacts of such changes comport with the neighborhood.
 48

49 **Change of use.** Any nonconforming use may be changed to another nonconforming use
 50 through the nonconforming situation review.

51 In RR, D1, D3, D5, D10, D15 and D18 zones, a change from a nonconforming
 52 nonresidential use to an allowed residential use that exceeds the allowed density may be
 53 allowed through a nonconforming situation review.
 54

Comment [BM1]: An example of this is conversion of a storefront in a D5 zone (nonconforming use) to a triplex (allowed use, nonconforming residential density).

55 **Change to conditional use.** A nonconforming use may change to a conditional use if approved
 56 through a conditional use review. Once an approved conditional use occupies the site, the
 57 nonconforming rights are lost and a nonconforming use may not be re-established.

58
 59 **Expansions.** A use made nonconforming due to a change in the zone or zoning regulations may
 60 be expanded throughout any portion of the existing building.

61 A nonconforming use may not be expanded to other buildings or to land outside the original
 62 building and a nonconforming use of land may not be enlarged or increased or extended to
 63 occupy a greater area of land than was occupied at the effective date of adoption or
 64 amendment of the regulations that make the use nonconforming except when such expansion
 65 is approved through a nonconforming situation review. Expansion of nonconforming uses, land
 66 or structures, cannot be considered until proof of nonconforming status is established.

67
 68 **Loss of nonconforming use status.**

69 A nonconforming use shall be presumed abandoned and its nonconforming rights extinguished
 70 where any one of the following has occurred:

- 71 The owner has indicated, in writing intent to abandon the use.
- 72 A conforming use has replaced the nonconforming use.
- 73 A different nonconforming use has been approved by the Board of Adjustment through
- 74 the Nonconforming Situation Review.
- 75 The building or structure that houses the nonconforming use has been removed.
- 76 The use has been discontinued, has been vacant, or has been inactive for a continuous
- 77 period of at least one year, unless the owner can demonstrate that the owner has been making
- 78 substantial efforts to continue the use.

79
 80 **Discontinuance.** Once abandoned, the prior legal nonconforming status of the use shall
 81 be lost and any subsequent use of the property shall comply with all applicable provisions of
 82 this title, unless the nonconforming use is reestablished through the nonconforming situation
 83 review.

84 A nonconforming use that has been discontinued may request re-establishment through a non-
85 conforming situation review. Such request must be made within 365 days of cessation of the
86 use.

87
88 **Accidental destruction.** When a nonconforming use is damaged by fire or other causes beyond
89 the control of the owner, the re-establishment of the nonconforming use is prohibited if the
90 repair cost of the structure is more than 75 percent of the cost of the replacement of the entire
91 building, exclusive of foundations, using new materials. The extent of building damage shall be
92 determined by the building official.

93
94 **Intentional destruction.** When a structure containing a nonconforming use is intentionally
95 damaged by fire or other causes by the owner, the reestablishment of the nonconforming use is
96 prohibited.

97
98 **Nonconforming Residential Densities**

99
100 **Changes to dwellings.**

101 Generally. Existing dwelling units may continue, may be removed or enlarged, and amenities
102 may be added to the site provided that existing dimensional requirements such as setbacks and
103 lot coverage are met.

104
105 **Sites that exceed the maximum residential density standard.** On sites that exceed the
106 maximum residential density standards, reconstruction of the non-conforming dwelling units
107 may be approved once proof of nonconforming status is established.

108
109 Nonconforming densities may not be altered or reconstructed until proof of a nonconforming
110 status is established.

111 No increase in the number of units from that established through the proof of nonconforming
112 status.

113 The Director's decision on number of dwelling units established by the proof of nonconforming
114 status may be protested to the Board of Adjustment through a nonconforming situation review.

115 **Discontinuance and damage.**

116 **Building unoccupied but standing.** Nonconforming residential density rights continue even
117 when a building has been unoccupied for any length of time.

118 **Accidental damage or destruction.**

119 **More than one dwelling unit.** When there is more than one dwelling unit on a site, and when
120 the site is nonconforming for residential density, the following applies if a structure containing
121 dwelling units is damaged or destroyed by fire or other causes beyond the control of the owner:

122 If the structure is substantially complete within 3 years, nonconforming residential
123 density rights are maintained;

124 If the structure is not substantially complete within 3 years, the nonconforming
125 residential density rights are lost, and the site is considered vacant;

126 If the structure is also nonconforming such building may be replaced or reconstructed to
127 the same footprint on the original location with the exception of encroachments into public
128 rights-of-way or adjacent property.

129

130 **One dwelling unit.** When there is only one dwelling unit on a site, and when the site is
131 nonconforming for residential density, the following applies if the structure containing the
132 dwelling unit is damaged or destroyed by fire or other causes beyond the control of the owner:

133 If the repair cost is more than 75, percent of the cost of the replacement of the entire
134 structure, exclusive of foundations, using new materials, nonconforming residential density
135 rights are maintained and the structure may be rebuilt within 3 years if it complies with the
136 existing associated district-specific, dimensional, and development and design standards such
137 as setbacks, parking, landscaping, etc. (except for density) that would apply to new

Page 5 of 13

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138 development on the site. The extent of building damage shall be determined by the building
 139 official. If the structure is not rebuilt within 3 years, the nonconforming residential density
 140 rights are lost, and the site is considered vacant.

141 Nonconforming densities may not be altered or reconstructed until proof of
 142 nonconforming status is established. Density shall not be increased from that established
 143 through the proof of a nonconforming status, except in accordance with this title.

144 **Intentional damage, destruction or demolition.** When a structure that is nonconforming for
 145 residential density is intentionally damaged, destroyed or demolished by fire or other causes
 146 within the control of the owner, the nonconforming residential density rights are lost, and the
 147 new development must meet all development standards for the site.

148 **Nonconforming structures**

149
 150 **Nonconforming structures.** A nonconforming structure may be continued so long as it remains
 151 otherwise lawful, subject to the following provisions:

152 A nonconforming structure may be enlarged or altered, but only if it does not increase
 153 its nonconformity.

154 A nonconforming structure may add additional stories in accordance with
 155 49.25.430(4)(M).

156 If a nonconforming structure is moved for any reason for any distance whatsoever it
 157 shall thereafter conform to the code provisions applicable in the zone in which it is located after
 158 it is moved;

159 Nonconforming structures with nonconforming density may reconstructed in
 160 accordance with XX.XXX (section above in nonconforming density)

161
 162 **Accidental destruction.** When a nonconforming structure or nonconforming portion of a
 163 structure is damaged by fire or other causes beyond the control of the owner to an extent of
 164 more than 75 percent of its replacement cost at time of the damage, it shall not be
 165 reconstructed except in conformity with the provisions of this code. The extent of building

166 damage shall be determined by the building official. This does not preclude the reestablishment
167 of nonconforming residential density as allowed by 49.XX.XXX.

168

169 **Intentional destruction.** When a nonconforming structure or nonconforming portion of a
170 structure is intentionally damaged by fire or other causes by the owner, the reestablishment of
171 the nonconforming use is prohibited.

172 If at any time a nonconforming structure is abandoned or brought into conformity with
173 this title, the structure shall thereafter conform to all the regulations of the zone in which it is
174 located.

175 Tenant improvements or renovations within an existing structure shall not be
176 considered an enlargement or an alteration as described in subsection XX above.

177 This subsection shall not be construed to allow the expansion of a nonconforming
178 density or use of structure, which is governed by sections XXXX.

179 A nonconforming structure may not be enlarged, altered or reconstructed until proof of
180 nonconforming status is established.

181

182 **Nonconforming Lots and Lot Fragments**

183 A lot rendered substandard in size by the adoption of this title may nonetheless be used
184 provided if all of the following can be met:

185 The use does not have a minimum lot size greater than the minimum lot size required
186 by the underlying zoning district;

187 Any associated district-specific, dimensional, and development and design standards
188 such as setbacks, parking, landscaping, etc. are met; and

189 The lot is accepted as legally nonconforming with proof of nonconforming status.

190

191 When a nonconforming lot or lot fragment contains a dwelling unit that is damaged or
192 destroyed for any reason the structure may be rebuilt to the same footprint on the original
193 location with the exception of encroachments into public rights-of-way or adjacent property.

194 When an undeveloped nonconforming lot adjoins and has continuous frontage with one or
195 more other undeveloped lots under the same ownership, each lot may be developed with
196 single-family dwellings.

197 The manner in which the lots were acquired or the fact that the lots were separately described
198 on a deed shall not be considered.

199
200 **Nonconforming parking.** A building may be replaced or reconstructed under this subsection
201 with the same number of off-street parking spaces as were provided for the original building.
202 Any use that had non-conforming parking and later became more conforming may not revert to
203 the original, lesser, non-conforming parking. Such uses may apply for a parking waiver in
204 accordance with 49.40.210(d) Exceptions (6) Parking Waivers.

205
206 **Nonconforming signs.** 49.45.400

207
208 **Overcoming presumption of abandonment.** A presumption of abandonment based on
209 evidence of abandonment may be rebutted. The Director will determine that all of the
210 following have been met:

211 The owner has been maintaining the land and structure in accordance with all applicable
212 regulations, including applicable building and fire codes;

213 The owner has been maintaining or pursuing all applicable permits and licenses;

214 The owner has filed all applicable tax documents; and

215 The owner has been engaged in activities that would affirmatively prove there was no
216 intent to abandon, such as actively and continuously marketing the land or structure for sale or
217 lease.

218 The Director's determination may be protested to the Board of Adjustment through a
219 Nonconforming Situation Review.

220

221 **Proof of nonconforming status**

222

223 **Purpose.** This review will determine if a use or site has legal nonconforming situation rights. In
 224 addition, it will determine what the current legal use is, based on the use categories in Chapter
 225 49.XX.XXX. It is the responsibility of the owner to produce evidence proving the nonconforming
 226 situation was allowed when established and has been continuously maintained or used over
 227 time.

228

229 Upon presentation of such proof the Director may formally approve each nonconforming
 230 situation. If approved, the Director shall issue a written decision that includes a complete
 231 description of each approved nonconforming situation.

232 No permit may be issued under 49.15 for any activity on a lot prior to Director approval of each
 233 nonconforming situation existing on the lot.

234 Standard evidence that the situation was allowed when established includes:

- 235 1. Building, land use, or development permits;
- 236 2. Zoning codes or maps;
- 237 3. Recorded plats;
- 238 4. Sanborn Maps.

239

240 **Situation maintained over time.** Standard evidence that the use has been maintained over
 241 time includes but is not limited to:

- 242 1. Utility bills;
- 243 2. Income tax records;
- 244 3. Business licenses;
- 245 4. Listings in telephone (record? books?), business;
- 246 5. Advertisements in dated publications;
- 247 6. Building, land use, or development permits;
- 248 7. Insurance policies;
- 249 8. Leases;
- 250 9. Dated aerial photos;

Page 9 of 13

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10. Insurance maps that identify use or development, such as the Sanborn Maps; or

11. Land use and development inventories prepared by a government agency.

Nonconforming Situation Review

Purpose. A nonconforming situation review provides an opportunity for the Board of Adjustment to review, limit, or deny proposed changes to certain nonconforming situations.

Applicability. The following may be allowed through a nonconforming situation review:

A change to a use in a different use which is prohibited by the base zone.

Expansion of nonconforming use.

In RR, D1, D3, D5, D10SF, D10, D15 and D18 zones, a change from a nonconforming nonresidential use to an allowed residential use that exceeds the allowed density.

Sites that exceed the maximum residential density standards, reconstruction of the nonconforming dwelling units when an applicant does not provide standard evidence for a Proof of Nonconforming Status or when the Director does not find the evidence to be satisfactory.

Overcoming the presumption of abandonment when the Director does not find the evidence to be satisfactory.

Procedure. A nonconforming situation review is processed..... Refer to public notice section – red sign, newspaper, mailing to property owners...

Approval criteria. The request for a non-conforming situation review will be approved if the requirements of this subsection are met. Any non-conforming situation review granted under this subsection shall be in writing and shall include the following required findings and any conditions, such as public amenities, imposed by the Board of Adjustment that are consistent with the purpose of this title:

276 The proposed nonconforming use is more appropriate to the district than the existing
277 nonconforming use and does not significantly jeopardize future development of the area in
278 compliance with the intent of the zoning district;

279 Any characteristics of use that are out of compliance with this title are not changed to
280 become less compliant with the requirements of this title;

281 The nonconforming use will not result in the creation of additional nonconformities or
282 the need for any variances.
283

284 With mitigation measures, there will be no net increase in overall detrimental impacts (over the
285 impacts of the last legal use or development) on the surrounding area taking into account
286 factors such as:

- 287 a. The hours of operation;
- 288 b. Vehicle trips to the site and impact on surrounding on-street parking;
- 289 c. Noise, vibration, dust, odor, fumes, glare, and smoke;
- 290 d. Screening, public safety, neighborhood harmony;
- 291 e. The amount, location, and nature of any outside displays, storage, or
292 activities.

293 If the nonconforming use is in a D1, D3, D5, D10SF, D10, D15 or D18 zone, and if any changes
294 are proposed to the site, the appearance of the new use or development will not lessen the
295 residential character of the area. This is based on taking into account factors such as:

- 296 a. Building scale, placement, and facade;
- 297 b. Parking area placement;
- 298 c. Buffering (screening?) and the potential loss of privacy to abutting residential
299 uses; and
- 300 d. Lighting and signs.

301 Nonconforming residential density will have no net increase in overall detrimental impacts on
302 the surrounding area taking into consideration factors such as:

- 303 a. Vehicle trips and impact on surrounding on street parking

Page 11 of 13

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304 b. Lot coverage, vegetative cover, anything else? Conformity with future land
305 use maps maybe?

306 The proposed expansion of a nonconforming use

307 Will not result in the creation of additional nonconformities or the need for any
308 variances.

309 Any characteristics of use that are out of compliance with this title are not changed to
310 become less compliant with the requirements of this title;

311
312 When located in a D1, D3, D5, D10SF, D10, D15 or D18 district the proposed expansion
313 will not lessen the residential character of the area.

314

315 **49. 80 Definitions**

316 Nonconforming building or structure. A building or structure that does not meet one or more
317 height, setback, building coverage, , or other dimensional requirements for the land use district
318 in which it is located.

319 Nonconforming lot. A lot which legally existed prior to the adoption, revision, or amendment of
320 this Code does not comply with current minimum lot size, lot depth, lot width requirements or
321 other lot requirements of the district in which the lot is located.

322 Nonconforming Residential Density. A residential use that is an allowed use in the zone and
323 that was constructed at a lawful density, but which subsequently, due to a change in the zone
324 or zoning regulations, now has greater density than is allowed in the zone.

325 Nonconforming Situation means a nonconforming lot, use or structure, density, or any
326 combination thereof.

327 Nonconforming Use. A use that was allowed by right when established or a use that obtained a
328 required land use approval when established, but that subsequently, due to a change in the
329 zone or zoning regulations, the use or the amount of area devoted to the use is now not
330 permitted under the current zone designation.

Page 12 of 13

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331 Abandon means (a) with respect to a use, the cessation of such use for any length of time,
332 combined with intent to indefinitely cease such use, or (b) with respect to a structure, the
333 cessation of occupancy of such structure for any length of time, combined with intent to
334 indefinitely cease occupancy of such structure.

335 Change means, with respect to a nonconforming use, that the nonconforming use has been
336 converted to a different use for any period of time, regardless of intent.

337 Discontinued means that a nonconforming use has ceased, and has not substantially resumed,
338 for a period of 365 consecutive days regardless of intent.

339 Occupy or occupancy means actual physical occupancy of a structure or lot, regardless of
340 intent.

341 Primary use means the primary activity actually conducted in a serious, substantial, and
342 ongoing manner on a lot or in a structure, and for which the lot or structure is actually and
343 primarily occupied and maintained, regardless of intent.

344 Substantially resumed means substantial and continuous resumption of the use as the primary
345 use for a period of at least 60 consecutive days. Activity that does not meet this standard is not
346 sufficient to interrupt a period of discontinuance.

347 Use means activity actually conducted on a lot or in a structure, and for which the lot or
348 structure is actually occupied and maintained, regardless of intent.

349 **49.85 Fees**

350 Proof of Nonconforming Situation – staff review \$200 (similar to letter of zoning compliance)

351 Nonconforming Situation Review – to PC \$400 (similar to variance and ADOD) plus public notice
352 fees...NOTE NSR should refer to public notice section.

353

354

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

Tuesday, October 9, 2018
City Hall Assembly Chambers
5:30 – 7:00 pm

Members Present:

Nathaniel Dye, Michael Levine, Dan Miller, Paul Voelckers, Benjamin Haight

Members Absent:

Carl Green

Staff Present:

Laura Boyce (CDD Planner), Jill Maclean (CDD Director), Jane Mores (CBJ Attorney), Beth McKibben (CDD Planning Manager), Marjorie Hamburger (CDD Admin)

Public Present:

Marna McGonegal

I. Call to Order

Meeting called to order at 5:39 pm.

II. Approval of Agenda

The agenda was approved as is.

III. Approval of Minutes

A. September 17, 2018 Draft Minutes

MOTION: *by Mr. Voelckers to approve the September 17, 2018 minutes.*

The motion passed with no objection.

IV. Agenda Topics

A. AME2018 0009: Proposed amendments to 49.30, Nonconforming Development

Ms. McKibben walked committee members through the memo and said most of the content was to refresh their memories. It was not new information. The nonconforming section in code is not well written, is difficult to use or explain, and does not differentiate between different types of nonconforming situations. Repealing and replacing this section of code is what is proposed, creating processes to evaluate nonconforming uses, nonconforming lots, nonconforming structures and nonconforming density.

Ms. McKibben said that nonconforming density is a category not previously found in code. The language for this was borrowed from Portland, Oregon.

Zoning is a policing power intended to protect public health, safety, and welfare, said Ms. McKibben. Nonconforming is something that was legal when it was created, built, etc. but a zoning change has now made it not legal. This is seen most noticeably in the historic areas of Juneau. Lot sizes have become too small and don't conform to setback requirements in the zoning areas. Also a property may have more dwelling units than the new zoning allows and so has become nonconforming in terms of density. Aurora Arms, a condominium property on Glacier Highway, is one such situation, she said. The city is figuring out how to help them continue to finance sales of these units, since the current nonconforming code makes this difficult. Another example is a 4-plex in the Valley that under current code could not be rebuilt as is.

The language in the draft ordinance provides a process for a property owner to establish that a given nonconforming situation was legal when it was created, which if true may allow for development. This places the burden on the property owner rather than the Community Development Department, said Ms. McKibben. This is a significant change from any process now in place and it helps appraisers to show that a property is legally nonconforming.

Ms. McKibben said that another thing created in this new ordinance is a nonconforming situation review process, to take place in front of the Planning Commission. Nonconforming densities or uses could be reestablished via this process. She said her favorite example was Amerigas on Mendenhall Loop Road which was permitted but is located in a residential zone.

Nonconforming situation review is appealable to the Planning Commission to consider changes of use within the same use category which do not comply with zoning standards or when the director determines that an increase in off-site impacts can reasonably be anticipated. An example might be an office building in a D1 zone that wants to become a 4-plex residence.

Ms. Maclean said she wanted to clarify that what was before the committee was not the ordinance but was draft language. She asked that members look to getting the concepts clear so Law can draft the ordinance. Stick to policy or concept at this point, she cautioned.

Page 4 of the memo includes the key policies for discussion, said Ms. McKibben. The committee needs to resolve the definition of "normal maintenance", and she put some sample language on this page from Anchorage. She pointed out that this language was different from the committee's previous conversation, however it allows for flexibility. She said that the concept about violating setbacks needs to be worked on. Existing code allows reconstruction on an existing footprint when damaged up to 75%. Is that the right number, she asked the committee? Would we want to go to 100% to make it easier for a property owner to reconstruct?

Purpose

Mr. Haight asked if the creation of nonconforming lots which occur when roads are reconstructed should be addressed here or is this situation already incorporated into the concepts? Ms. McKibben said that when a lot becomes nonconforming by an expansion of a right-of-way then it is a legally nonconforming lot and this language would apply. New lots that are created via a subdivision are not allowed to be nonconforming.

Ms. Maclean said that if part of a property is lost that will effect setbacks or lot size and make the situation nonconforming, this might impact density but would be cared for within this ordinance and be legally nonconforming.

Mr. Dye said that Mr. Miller discussed lots becoming nonconforming with the installation of a new road such as Glacier Highway or Fritz Cove Road. There was not a process to address this for the Planning Commission. Ms.

Boyce said that the Department of Transportation gave additional land behind the houses to offset the loss and there should have been a lot consolidation which did not happen. However now there is language that addresses this type of situation.

Mr. Dye said that in Fritz Cove some lots are now nonconforming and asked how these are being utilized? Ms. Maclean said any substandard lot is allowed to have at least one single family home and Fritz Cove is zoned D1. Ms. McKibben said that this will be preserved with this concept. She also made a note to clarify with Law that this ordinance and right-of-way acquisition methods play nicely together.

Mr. Voelckers said he thought paragraph 3 (lines 16-21) was not useful; there was not a specific utility to it. What are we trying to get at, he asked? Ms. McKibben said it is useful to explain the code to the public and provide some reference to future planners to understand how to read it and what the intent is. It helps the public understand why it is the way it is.

Nonconforming Situations

Mr. Voelckers asked if a "situation" is always just a site rather than a building. Ms. McKibben said that a site could have a nonconforming lot that was too small and could contain a nonconforming structure that did not meet setbacks as well as a nonconforming use or density. The site could have all of these but each would be evaluated independently.

Mr. Miller asked if the ordinance was titled "nonconforming situations". He suggested that Line 24 ought to list all of the types of situations that could be nonconforming. Line 23 says "contains a nonconforming use" but these are not listed one after the other. Line 25 does have them all listed but he suggested starting the paragraph with that sentence. Mr. Voelckers asked if the title is *Nonconforming Situations*. Ms. McKibben said she did not know. Ms. Boyce said the working title is *Nonconforming Development* now. Mr. Voelckers said he felt the word "situation" worked better for use than "development". There was more discussion about the language for the title. Ms. McKibben pointed out that there are other nonconforming situations like signs and vegetative cover.

Applicability

Mr. Voelckers and Mr. Dye asked if the statement "a nonconforming situation may be changed" (Line 35) meant by a Planning Commission hearing? Ms. McKibben said that an example might be if a nonconforming propane store wants to become a childcare facility, a Conditional Use Permit might need to be obtained. Mr. Voelckers asked if they are not appropriate for the zoning as a propane store, why would there be any action for a different use. Ms. Maclean said this could also be the same situation as a 4-plex on Star Hill that wants to become a single family home. Now the property owner just obtains a building permit but this language states that once a situation becomes conforming, nonconforming rights are lost. The property cannot go backwards.

Mr. Dye asked if once a permit is pulled, the property owner loses it all, not just after 365 days. Ms. McKibben said yes, there is no clock; once the change is done it is done. Mr. Dye said that it seemed contrary to him that if someone can cease nonconforming operations but after 200 days decide the new use is not working, they cannot go back to the original use. Ms. Maclean confirmed that no, at that point the owner has relinquished the grandfathered rights. On other hand, she said, if the business were to close up shop for up to 365 days, for example due to personal hardship, but they did not choose to become a different business that was conforming, this would not be abandoning the rights to remain legally nonconforming. Ms. McKibben said that over time the city wants things to become conforming if possible.

Mr. Dye asked what happens if a Conditional Use Review is not approved? Mr. Voelckers asked if when there is an application for a change of use does that include the nonconforming review? Ms. McKibben said no, nonconforming review is a new process. If a nonconforming propane store wants to change to a conforming use a nonconforming review is not needed. Mr. Voelckers asked if during a nonconforming situation review someone requests greater density and it is approved, does that become a conforming use thereafter? Ms. McKibben said that if the fundamental status is changed, the density can be a 4-plex into perpetuity. Mr. Dye asked if for something like the nonconforming propane store, can they apply for a Conditional Use Permit for something else which is not allowed in that zoning area? Ms. Maclean said that a nonconforming review is to make a nonconforming situation legally nonconforming. Ms. McKibben said she sensed that the next time this topic was discussed, she needs to walk the committee through these processes using hypothetical examples to help explain.

Mr. Miller asked if something is made legally nonconforming and burns down, can it be rebuilt? Ms. McKibben said yes, if it is rebuilt within 365 days. Mr. Miller asked if there is a nonconforming lot, containing a nonconforming use, taking place in a nonconforming structure is that legally nonconforming? Ms. McKibben said that would trigger two processes. The applicant/owner would need to provide information showing that the situation was legally nonconforming such as a plat created in 1958 when the area was zoned differently. This would prove that the situation was created legally. Mr. Miller asked if the structure is burnt or abandoned can it be rebuilt? Yes, if it is determined to be a legally nonconforming structure, said Ms. McKibben. However, she said, the use happening inside is a different nonconforming situation. Proof would need to be provided to demonstrate that a business had been operating at the location and evidence such as tax returns could prove the length of time of the nonconforming use. In other words, there would need to be proof of each nonconforming situation individually. Mr. Miller asked if the use was abandoned for a year, can it be lost? Yes, said Ms. McKibben. However the building could remain as a nonconforming structure.

Mr. Voelckers asked if the city has powers separate from the ordinance language so that if a use is deemed to be a public hazard that use can be removed. The example of propane in a residential zone is close to that type of situation; should there be a mechanism for this sort of authority, he asked? Ms. McKibben said that some situations are regulated by other agencies for example an asphalt plant is regulated by DEC, however she was not sure of the answer. Mr. Voelckers gave an example of the fuel tanks which were located where the SLAM building is now. He said there was a time when the neighborhood had to be evacuated. He said he felt that this topic should be explored.

Continued Operation

Mr. Dye wondered where the “hours of operation between 11 pm to 6am” came from in this section. Ms. McKibben said that this was open for discussion. The concept is that nonconforming uses in residential zones might need to have limited hours in order to limit impacts on the neighborhood. Mr. Dye wondered how this might work for a use currently operating in the evening. Ms. McKibben said there was flexibility to change this language. Mr. Dye asked if noise was the intent because there is already a noise ordinance elsewhere in code. Ms. McKibben said that it could depend on the use; truck deliveries happening at 5 am might not be appreciated by the neighbors. Mr. Voelckers said he also found this kind of weird and also the phrase “may not extend” is imprecise. He felt that this was in need of clarification.

Mr. Levine noted that there is a possibility that creating this time limit might deprive someone of their use. He felt it was better to phrase it more generally as in “must comport to the neighborhood” because otherwise the language could run afoul. Mr. Miller proposed the idea that nonconforming uses in places where it is benign ought to become legal. There might be a situation where the use only operates from 11 – 6 am and is completely benign. Perhaps the proof is on the owner, he suggested.

Mr. Dye asked for clarification asking if the city cares about a legally nonconforming status if a review process is not initiated? Ms. Maclean said typically there is enforcement, especially if there has been a complaint.

Change in Use

Mr. Levine addressed the issue of a use being “allowed by right” and asked why the language should not include the ability to review it? Mr. Dye asked if this section alluded to the Table of Permissible Uses. Yes, said Ms. McKibben. Mr. Levine said he thought the ordinance should give the Planning Commission the opportunity for review. For Lines 58-62, you want them all to receive that determination, asked Ms. McKibben? Mr. Levine said he thought that if there is an unusual situation or a problem, the language should not surrender the right to have a conversation. Mr. Voelckers said he thought it appropriate to keep the burden of proof on whoever is proposing the changes.

Ms. McKibben asked if the committee members felt the review should be done by the director or the Planning Commission. Should the director review first with the option for an appeal to the Planning Commission or should all come before the Planning Commission? Ms. Maclean said she was in favor of a first review by the director and the second level being the Planning Commission or the Board of Adjustment. Mr. Levine said he thought it should just be the director; he did not see the need to come to the Planning Commission. Ms. McKibben said for changes of use in the same category, the director would review in order to confirm there would be no increase in off-site impacts. If such impacts were discovered, then the issue could come before the Planning Commission.

Mr. Voelckers said that Line 60 included an implied “where”.

Change of use in a different category

Ms. McKibben pointed out the new ideas in this section, but Mr. Dye said he did not understand them. Ms. McKibben gave an example of a nonconforming use – a dog grooming business in the middle of a residential neighborhood decides to discontinue the business but does not want to become a single family home. The owner wants the building to be converted to a 4-plex structure. The property owner could be allowed to have more density than the zoning allows. Mr. Dye asked why. Mr. Voelckers said perhaps this might be a way to talk the owner out of a greater nuisance; it may be better to add more density than more commercial activity in the neighborhood. Ms. Maclean said yes. Mr. Levine asked if there was a real-world example of this in Juneau. None that she was aware of, said Ms. McKibben. One goal is to provide more opportunities for more density. Ms. Maclean said that when the NOAA lab closed in the D1 zone is Auke Bay, is it reasonable to tell them they can only have a single family home on the property now that it is not a laboratory? Mr. Miller said he wanted to think about this idea and see it again next time. It is a powerful thing, he said, for a person in a D1 or D3 zone who has a nonconforming use to get an opportunity that no one else in the borough gets. He said he was trying to wrap his head around this type of situation. Mr. Dye said that it brought to his mind the efforts to rezone Auke Bay. This language seemed contrary to that effort, to him. It felt like a get-out-of-jail-free card, and so he was struggling with this paragraph. Mr. Levine said he was not adverse to this idea but felt it may need some limits in terms of increasing density. He suggested that a disincentive might be created so that people would be unlikely to seek out nonconforming situations to take advantage of. There needs to be some sort of sideboards, he felt. Ms. McKibben said she might feel comfortable with a nonconforming review including the consideration of these things.

Expansions

Mr. Dye addressed the phrase “manifestly designed” and asked if there is to be no change to the exterior, does it matter? He asked if CDD would want to argue with people about this. He suggested putting a period after “existing building” and leaving it at that. Mr. Levine asked how much concern is there about this? Ms. McKibben

said the concept is not wanting nonconforming uses to get bigger. Ms. Maclean said that a neighbor might care. Mr. Levine said he could imagine a situation where someone comes in with a great idea involving their shed but is not allowed to do it. Mr. Voelckers suggested chopping “manifestly” to imply junk shed. Ms. McKibben said a situation of this sort is Gastineau Humane Society, which is a nonconforming use and cannot expand their dog runs out back of the building. Mr. Levine said he also wanted sideboards here. Mr. Dye asked about the zoning of the doctor’s office which is next door to Gastineau Humane Society? He said his concern is if the nonconforming section is too liberal, it might be better to get a rezone. Ms. McKibben said the best fix is having zoning that works, but over time zoning is how the community changes and becomes the community we want. When Amerigas was permitted, the valley was undeveloped and so it seemed ok, but the plans were for a developed residential area. Mr. Dye said that if there is allowance for too much nonconforming in code, this does not allow the code to fix itself.

Mr. Voelckers said this needed to be clarified, by right or by situational review. Is the committee happy with it being by right? Situational review is firmer, he said.

Discontinuance

Mr. Dye asked why a year was selected as the amount of time. Isn’t the burden of proof on the applicant to convince the city that the nonconforming use should be continued? What if they work 1 day out of a year just to keep this open, he asked? Mr. Miller suggested if the use ceases operation for 365 days, the use can be discontinued but the last sentence says the review must take place within 3 years. He said he did not understand how someone could lose their use in a year but come back in 3 years for review. Does this mean they can get it back? Ms. McKibben said yes. Mr. Miller said the reason to have the 3 years is to allow someone to get back on their feet if they need to close for a year due to illness or something. Mr. Levine said it made sense to him but that he did not like uncertainty with the dates and does not want to fight with the director about that. A better way could be to say the right can be preserved by notice within 365 days instead of arbitrary deadlines, he said. Ms. Maclean asked how people will know that. Mr. Levine asked what the importance was of 3 years, if the business plans to resume when the owner gets back to town. Ms. McKibben said the only nonconforming uses are those that can show they are legally nonconforming but she is not sure that language is in there. In Homer there was a situation where operations ceased for period of time and a complaint was filed when the business reopened. Time was spent to showing it was not closed for 365 days. So, she looks at this as if the nonconforming uses ceases and then neighbors complain, there would be a need to explain that the owners can apply for the use to be reestablished. Ms. McKibben said she did not know how this works in practice in other communities but this draft ordinance asks for documentation in order to move on to review. Mr. Miller said the concern remains that people likely won’t know this option. A year later when they start back up they might come up against new neighbors who were not aware of a business operating next door. Had the business owners known about the 365-day drop dead deal, they might have made a different decision. Mr. Voelckers said he thinks this section is well written and is close, philosophically. After a year of non-use the owner does not have the right to continue but there is a reasonable comfort zone to reclaim it by making their case.

Accidental destruction

Mr. Voelckers asked why do we care if the destruction happened by fire or arson or whatever. If there is a need to rebuild why differentiate? Ms. McKibben said we care if something happens which is unintentional. In that case we want them to be able to rebuild. However intentional destruction is different. The list is not intended to be exhaustive. Mr. Voelckers said he did not feel the need to list the causes if the dividing knife blade is unintentional or intentional. Mr. Miller said he did not agree with Mr. Voelckers; some people might not realize what they are looking at in their building, such as rot. He described a job he did where the bottom row of siding was buckling and it turned out that when the crawl space was insulated, the contractor used bad materials and

an incorrect method so all the moisture from the dirt had condensed in the rim joints for 2 years resulting in lots of rot. There was no way to prove intention when the owner hired people to insulate her basement.

Mr. Levine has a comment about the two different categories. It seemed clear to him the situations where the city would not want to allow the owner to rebuild, like in the case of arson, but others seemed to him more difficult to pinpoint. It might help if the default is if it can't be proven to be intentional, then it was not. Ms. McKibben pointed out that this language is for nonconforming use but later in the document there is language that fits. Mr. Levine said that someone has to determine the status – intentional or maybe it could be ordinary lax care of a house resulting in significant damage. Mr. Levine said he was in favor of not letting people rebuild if they have not been taking care of their house at all. Mr. Dye asked what happens when a property changes hands and the previous owner was the culprit. Mr. Levine said a buyer would need to figure out the condition of a building before buying.

Mr. Miller pointed out that the percentage of 75% keeps coming up. He said he thought this was too low a number because people can't rebuild at that percentage. Ms. Maclean said there were important distinctions to point out. This is section about uses and so 75 % is appropriate here, she said. Ms. McKibben said that in the example of the propane store if a fire destroyed 50% of the store, under this section the owner could rebuild and continue this nonconforming use. Ms. Maclean said that nonconforming uses are the things the city really wants to make conforming. It is not so much the size of a lot that is egregious to neighbors, rather uses are. If it costs more than 75% to reconstruct for a nonconforming use, it might be better to relocate the nonconforming use to an appropriate zoning area. Mr. Levine asked if the whole thing blows up and leaves an empty property, does this mean the owner cannot rebuild the business there. Yes, said Ms. Maclean. Mr. Dye said the owner could get a density bonus and rebuild apartments instead, but he has heartache about this thinking that due to a catastrophic incident an owner would not be able to rebuild his/her livelihood. Mr. Haight suggested moving on saying it might make more sense as the discussion plays through the other categories. Mr. Levine said 75% makes less sense; he felt there was a cost inequality. Ms. McKibben said that 50% is common, and she has not seen more than 75%. Mr. Levine said it was worthwhile to think about the cost of making the site useful for other purposes.

Nonconforming residential densities

Ms. McKibben said this was a brand-new concept and a new nonconforming situation. An example is a 4-plex in a D5 zone that could be reconstructed even though the current zoning only allows for a duplex; even if the structure was vacant for 5 years the nonconforming density would not be lost. Mr. Dye asked why nonconforming density should run with the land. Ms. Maclean said the city created quite a few nonconforming situations through applied zoning which might not have been appropriate. Valley zoning placed downtown does not work. Aurora Arms was a conforming density when it was built but after valley zoning was in place it became nonconforming. To add to that, housing is needed so this is an easy way to keep housing in a neighborhood without getting complaints about the density. Mr. Dye asked why, if Aurora Arms were to be abandoned for a number of years, can the property resume that density later? Nonconforming density runs with the land, said Ms. Maclean. If a property owner can prove that the land once had a higher density, they can reclaim that density, but if it becomes conforming, then they cannot go back to nonconforming. The current situation is that many places cannot get mortgages and can't sell or rebuild which is why there is this attempt to address these situations. There are little to no complaints about residential uses, she said. Mr. Levine said that there was an inconsistency between lines 99 and 108. This is the section that needs a guarantee that the property owner can rebuild, he said.

Ms. Maclean said that a property such as Aurora Arms could come in the day after the adoption of this ordinance and apply for a nonconforming review. Mr. Levine said that made sense but was not what he read

here. He said he likes the concept but it is not understood via the language in this section. Ms. McKibben said she assumed tighter lending practices have caused trouble but the APA service has not heard about this problem which indicates it might not be a national lending challenge. She is interested to hear about Portland's practice. Mr. Levine said that the situation had more to do with words in the code rather than interpretation and practice, so the words need to be totally clear in order to assist people who are trying to get financing. Ms. McKibben said that the nonconforming code is pretty generous, so it is interesting that this problem exists. Ms. Maclean said that the number of 75% is a trigger on mortgages; people don't have the absolute assurance that they can rebuild. Mr. Dye asked why nonconforming density is not sunsetted? How does this help? Lending practices are about rebuilding in the event of a catastrophic and have nothing to do with keeping density in perpetuity. Why is nonconforming use valued differently than nonconforming density? Why limit the code in shaping the future, he asked?

Ms. Maclean said that the reason may be the need for housing and zoning that does not fit the area or has been misapplied like downtown. Some locations have not been up-zoned even if sewer/water has been extended. The Comprehensive Plan has not caught up. Mr. Miller said that fixing this is not shaping future; it is fixing the past and trying to make it all legal because it once was. He said that he likes the density part of it but he was confused about lines 111-117 where it says more than 1 dwelling unit, but line 118 says one dwelling unit then returns to the 75% figure. He said he thinks that ought to go away. If a building is destroyed by fire, lending institutions need to know the structure can be rebuilt. In 2009, it cost 115% of appraised value to build a new home, after the 2008 crash. He felt that the percentage in this section should be deleted. Ms. McKibben said this only applies to buildings in WI and I zoning. All other zones get at least a single family home, she said. Ms. Maclean said if a single family home in an Industrial district burns down, this is the only time it applies because the city wants to transition away from residential uses in an industrial zone. Mr. Miller asked why can't an owner rebuild a family house? Mr. Levine asked what does it matter about the costs? The language says an owner can only rebuild if more than 75% of the cost to rebuild? If the city wants to make it more difficult to rebuild a family home, there should be reasons listed, like to save WI zones for other uses. He said he felt the language included the wrong criterion. He said he was inclined to go the other way and say if a cabin in WI burns down, that is too bad but now the owner must use that parcel for something else. He felt this was a better way to achieve the zoning aims, rather than the 75% figure; it would be more direct. Maybe the issue is more about harmony in a location, rather than cost.

Mr. Miller commented that he did not understand until just now that the only zones not conforming are WI and I, and he has been on the Planning Commission for 11 years. This indicated to him that the language is not clear. If the language states that it applies only to WI or I where residential uses are not allowed, that takes the ambiguity out. Ms. Maclean said that this might be true for today at least, but it could change.

Mr. Levine asked why on line 105 is it stating just that one way something can be illegal when there are more ways to be illegal? Ms. McKibben said maybe it was not self-evident when she was writing it and suggested this be crossed out.

Mr. Levine suggested including "damaged by owner", because it could be damaged by someone else.

Mr. Miller said he liked the way lines 132-135 were written, but on page 4 he wanted to use similar language as on page 5.

Nonconforming structures

Ms. McKibben said that a lot of this section is already in current code.

One concept not in here, said Ms. McKibben, is nonconforming structures with residential uses and allowing them to be reconstructed on the existing footprint. She asked the committee members what they wanted to do about that. Mr. Miller said yes, these should be allowed. In Anchorage, he said, there is flat land everywhere and in Portland too but here we need to make every piece of buildable land count. Ms. McKibben said this would not allow encroachments into ROWs and adjacent property, and she will work on incorporating that language. Mr. Dye said he sees references to other code sections and was concerned about that if those other sections change. Mr. Levine said he wanted to incentivize creating more conformance on a lot.

Mr. Miller asked where the maintenance discussion comes in. Ms. McKibben said it is in here somewhere, and this was talked about quite a bit before.

Mr. Miller said that the non-bearing part needs more definition. Ten percent is normal maintenance. Mr. Dye asked about the purpose of defining "maintenance". Ms. McKibben said there is a distinction between maintenance and reconstruction. Ms. Maclean said an example is an historic building where all but one wall is demolished but the project is labeled "maintenance" when, in fact, it was demolition. Having a definition of normal is useful. Ms. McKibben said more work is needed in this section.

Nonconforming lots and lot fragments

Ms. McKibben said that any nonconforming lot can have a single family home. There are situations of two nonconforming lots under the same ownership existing side-by-side, but one home is vacant and so this is treated as one property. The proposed language provides some options, lines 171-184. If there is a house on one lot with a vacant lot next to it, together they become conforming or almost so and shall be treated as one lot. The language says that in order to be treated as separate lots, the owner would have to go through the director process. Mr. Levine said he lived on exactly this situation in the Casey Shattuck neighborhood; he had a giant lot in the middle of the flats. He did not think this criteria should have been used to determine if he could put a second house on his front lawn since having two dwellings on these parcels would be in harmony with the neighborhood. Why put these criteria here, he asked? He said he was not adverse to the director process but thought these were not the right conditions, especially when the city wants to incentivize housing, especially small, affordable housing.

Ms. McKibben said if an owner wanted to build separate detached garage they would be asked to consolidate the lots or make the garage be attached to the house. Mr. Miller said he felt the potential should not be taken away. Mr. Levine said his vote was to allow this with director approval and other conditions like neighborhood harmony. Ms. Maclean said the idea is striving to get to conformity and so unless someone can prove there is intention to keeping the lots separate, the lots should be combined to be conforming. Mr. Dye said that if the argument is that density should remain in perpetuity, slap it right on here. Ms. Maclean said this has to do with property tax. Mr. Dye asked what this has to do with Title 49 or density. Mr. Miller said that in Mr. Levine's situation, he knew the potential for building a second structure which could be money in the bank to sell later. If a platted as a separate lot, he shouldn't have to prove that. Mr. Levine pointed out that he should not be able to build a nonconforming house on the second lot; he should meet legal setbacks even if it is a legally nonconforming lot. Ms. McKibben said that under current code, he could build a second house on that lot, but how would an appraiser give it second tax ID number? This language provides a process so an owner can have the choice to consolidate or keep as two separate lots and go through a process to establish the intent to keep as two separate. Mr. Levine said that this only comes up when the owner wants to sell and separate them. Mr. Miller said if I own 3 lots, who cares if there is one tax bill or 3? I can sell at any time I want, he said. These are platted lots, and I cannot be prevented from selling. Mr. Levine said if an addition to the house were to be built, the owner would have had to consolidate to conform.

Ms. McKibben asked if the committee wanted to go through the conceptual language again or see a draft ordinance. Mr. Dye said he needed to go through the remaining section and understand about percentages of the cost of rebuilding, so he wanted to see it again. Mr. Levine and Mr. Miller agreed.

B. Alternative Residential Subdivision (ARS)

Ms. Maclean reminded the commissioners that it was left to staff to work on the language in this ordinance, but a minimum was never set. It cannot be zero. She said she proposed 25% of the setback. Mr. Miller asked if the minimum should be 5 feet. Ms. Maclean said the base starting point is the underlying zoning but asked what should be the absolute minimum? Mr. Dye said he liked the idea of 25% of street side setback on all sides. Ms. Maclean said that might be more than the underlying zoning setback in some areas, but 25% across all works. Mr. Miller asked if all four sides could be different minimums. Yes, said Ms. Maclean. This might not be approved, but that would be the absolute minimum. Mr. Levine asked if 2 feet should be a minimum? Ms. Maclean said she did not think it should be zero. Mr. Dye said he did not care.

V. Next Meeting

- Monday, October 15, 2018, 12:00 – 1:30 pm, Urban Agriculture

VI) Adjournment

The meeting adjourned at 8:03 pm.



(907) 586-0715
CDD_Admin@juneau.org
www.juneau.org/CDD
155 S. Seward Street • Juneau, AK 99801

October 5, 2018

Memorandum

To: Title 49 Subcommittee

A handwritten signature in black ink, appearing to read 'BMc', is written over the 'To:' line.

From: Beth McKibben, AICP, Planning Manager

RE: AME2018 0009 Proposed amendments to 49.30 – Nonconforming Development

Attachments:

A – Proposed Language

B – Title 49 Minutes – 07/19/17, 08/16/17, 09/20/17, 10/11/17

C – June 21, 2017, Memorandum to Planning Commission and attachment - American Planning Association
Planning Advisory Service Quick Notes

Introduction

The Planning Commission referred the consideration of amendments to CBJ 49.30, Nonconforming Development, to the Title 49 Committee. The Title 49 Committee reviewed and considered a complete revision to CBJ 49.30. The Committee discussed the proposed amendments at four meetings in 2017 (see Attachment B).

Staff previously identified this section of code as needing revisions to provide clarity. More critically, prospective buyers have been encountering challenges in financing non-conforming developments that previously have been financed, which has raised the level of urgency to improve this chapter.

Discussion

The existing 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 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.

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

Zoning nonconformities are existing uses, structures, or lots that were legally established prior to a change in zoning provisions, 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 we answer these questions will affect 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. 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 while developing housing and promoting 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.

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 sorely in need of revision. The various non-conforming situations are blended into single paragraphs and the reconstruction section is poorly written, which makes it challenging to understand. Staff proposed a complete rewrite of the chapter rather than attempting to edit the existing code.

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.

Title 49 Committee
Case No.: AME2018 0009
October 5, 2018
Page 3 of 5

The American Planning Association Planning Advisory Service Quick Notes attached to the June 21, 2017, memorandum to the Planning Commission discusses the management of nonconformities (Attachment C). The article suggests, and staff agrees, that not all nonconformities are the same. Some nonconformities are benign while some have significant detrimental effects. In some instances, continuance or expansion of a benign nonconformity may not threaten public health or safety, may have little 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 benign nonconformities differently than those likely to have significant detrimental effects. Staff recommends an approach that mixes the phasing out of detrimental nonconformities and recommends maintaining the status quo or allowing limited modification and expansion to benign nonconformities. Additionally, over time and separate from this project, the Commission and staff will work to review and revise zoning standards and will continue to consider the impacts of those proposed changes on various nonconforming situations. The downtown zoning project mandated by the adoption of the ADOD is a step in this direction.

The proposed language provides a process for a property owner to establish that a given nonconforming situation was legal when it was created, which if true may allow for development. This places the burden on the property owner rather than the Community Development Department, which is fair and consistent with the burden for other permits. The Director would then make a nonconforming determination, and that decision could be appealable to the Commission. The process is spelled out in the proposed language (see p. 9, line 230 in Attachment A). By allowing the Director to approve proof of nonconforming status, time will be saved by applicants, the Commission, and staff. The proposed language also includes a process called “a nonconforming situation review”, which is undertaken by the Planning Commission and explained below.

The proposed language provides for this nonconforming situation review for the following:

- As an alternative to an appeal of a director’s decision on a “proof of nonconforming status”;
- An alternative to staff review of a “proof of non-conforming status” when non-standard proof is provided by the applicant. The code contains a list of standard proof.
- For changes of use within the same use category that do not comply with associated district-specific, dimensional, and development and design standards such as setbacks, parking, landscaping, etc., or the Director determines that an increase in off-site impacts can reasonably be anticipated;
- A change to a use in a different use category which is prohibited by the underlying zoning district;
- In RR, D1, D3, D5, D10, D15 and D18 zones, a change from a nonconforming, nonresidential use to an allowed residential use that exceeds the allowed density;
- Re-establishment of a nonconforming use that has been discontinued for 365 days.

The proposed amendment would repeal and replace all of 49.30.

The proposed language clarifies the following non-conforming situations:

- Nonconforming uses,
- Nonconforming residential densities,
- Nonconforming structure,

Title 49 Committee
Case No.: AME2018 0009
October 5, 2018
Page 4 of 5

- Nonconforming lot, and
- Nonconforming parking.

Nonconforming signs are addressed in 49.45. Staff proposes to address signs when that section of Title 49 is amended.

Key Policies for Discussion

Normal maintenance and repair of nonconforming situations is allowed. The Title 49 Committee discussed this concept and agreed that it should be allowed. Staff recommends defining what constitutes “normal maintenance and repair”.

Example language from Anchorage: ...ordinary repairs, or on repair or replacement of nonbearing walls, fixtures, wiring or plumbing, to an extent not exceeding ten percent of the current replacement cost of the nonconforming structure or nonconforming portion of the structure as the case may be. Nothing in this chapter shall be deemed to prevent the strengthening or restoring to a safe condition of any building or part thereof declared to be unsafe by any official charged with protecting the public safety, upon order of such official.

The proposed language requires nonconforming lots in common ownership to be treated as one lot and provides a process for the Director to allow the nonconforming lots to be used as separate lots. This concept provides the flexibility for property owners to use the lots as separate lots but in most cases requires the lots to be treated as one.

A concept proposed by the Title 49 Committee would allow a building that is violating a setback (i.e. a nonconforming structure) the ability to expand up to the existing nonconforming location. Staff recommends against the proposed language to preserve the legality of setbacks and to avoid fairness problems. While staff recognizes the desire to allow nonconforming structures the ability to expand, such an expansion should only be allowed where it complies with the setbacks. In this way, the legality of the setbacks is maintained and owners of *conforming* structures are not penalized because they would not be allowed to encroach into a setback. Additionally, older areas where there may be a higher percentage of nonconforming structures currently have the option to apply for relief under the Alternative Development Overlay Districts. The upcoming area plans may identify zoning revisions in areas where zoning is not seen to fit the character of the existing neighborhoods, and these revisions may also provide relief for property owners.

The existing code allows for residential uses in nonconforming structures to be reconstructed on the existing footprint (except for encroachments into public ROW and adjacent properties) when damaged (75%) by means beyond the control of the owner. This percent includes the cost of the replacement of the entire structure, exclusive of foundations, using new materials, and is determined by the Building Official. Staff recommends this remain available and that the Committee consider, for residential structures only, allowing for reconstruction when repair cost is up to 100 percent of the cost of the replacement of the entire structure, exclusive of foundations, using new materials.

The proposed language allows for a nonconforming use to be re-established within 365 days of being

destroyed or ceasing operation. The proposed language also allows for a nonconforming use to be re-established after 365 days through a nonconforming situation review. However, the re-establishment of a nonconforming use through the nonconforming situation review must take place within 3 years of the use no longer being in operation. This assures that a nonconforming use cannot retain the opportunity to re-establish the use in perpetuity, thus allowing for the integration of the current and future zoning, while still maintaining some flexibility within the code.

The proposed language provides that nonconforming densities will not be enlarged, altered, or reconstructed until proof of a nonconforming situation is established. Additionally, density cannot not be increased from the density established through the proof of the nonconforming situation, except in accordance with Title 49. Nonconforming residential densities can be reconstructed to the density determined through the proof of nonconforming review. This is intended to specifically retain the residential character of the residential zoning districts, while supporting the need for housing in Juneau.

1
2 **Purpose**

3 When a zoning ordinance or other land use regulation is adopted or amended, or when the
4 zoning district designation applicable to a lot changes, then as a result a previously lawful lot,
5 structure, density or use may no longer be allowed. Such previously lawful use, density,
6 structure or lot shall be considered a nonconforming use, density, structure or use. Such
7 nonconformities may continue, subject to the requirements of this chapter and any other
8 provisions of this Code that expressly apply to nonconforming lots, structures, density or uses.

9 This chapter provides methods to determine whether situations have legal nonconforming
10 status. This is based on whether they were allowed when established, and if they have been
11 maintained over time. This chapter also provides a method to review and limit nonconforming
12 situations when changes to those situations are proposed. The intent is to protect the character
13 of the area by reducing the negative or undesired impacts from nonconforming situations. The
14 regulations ensure that the uses and development may continue and that the zoning
15 regulations will not cause unnecessary burdens to property impacted by the zoning change.

16 Nonconforming situations that have a lesser impact on the immediate area have fewer
17 restrictions than those with greater impacts. Nonconforming nonresidential uses in residential
18 zones are treated more strictly than those in commercial or industrial zones to protect the
19 livability and character of residential neighborhoods. In contrast, nonconforming residential
20 developments in residential zones are treated less strictly because they do not represent a
21 major disruption to the neighborhood and they provide needed housing opportunities.

22 **Nonconforming Situations**

23 A specific site may be nonconforming because it contains a nonconforming use, a, an allowed
24 residential use that exceeds the allowed density, nonconforming structure, nonconforming lot,
25 or a combination of these. Nonconforming uses, nonconforming residential densities,
26 nonconforming structures and nonconforming lots are defined in Chapter 49.80, Definitions.

27 **Applicability**

The nonconforming situation regulations apply only to those nonconforming situations which were allowed when the situation was established or which were approved through a land use review. Additionally, they must have been maintained over time. These situations have legal nonconforming status. Nonconforming situations which were not allowed when established or have not been maintained over time have no legal right to continue and must be removed.

Ownership. The status of a nonconforming situation is not affected by changes in ownership.

Change to a conforming situation. A nonconforming situation may be changed to a conforming situation by right. Once a conforming situation occupies the site, the nonconforming rights are lost and a nonconforming situation may not be re-established.

Change to conditional use. A nonconforming use may change to a conditional use if approved through a conditional use review. Once an approved conditional use occupies the site, the nonconforming rights are lost and a nonconforming use may not be re-established.

Maintenance. Normal maintenance and repair of nonconforming situations is allowed.

Nonconforming Uses

Continued operation. Nonconforming uses may continue to operate. Changes in operations, such as changes in ownership, hours of operation and the addition or subtraction of permissible accessory uses, are allowed. Nonconforming uses in residential zones may not extend their hours of operation into the period between 11pm to 6am.

Change of use in the same use category. A change to a different use in the same use category, such as a change from one type of Sales and Rental Goods, Merchandise or Equipment use to another type of Sales and Rental Goods, Merchandise or Equipment use, is allowed by right, provided that the use complies with associated district-specific, dimensional, and development and design standards such as setbacks, parking, landscaping, etc.

Page 2 of 12

57
 58 For changes of use within the same use category, which do not comply with associated district-
 59 specific, dimensional, and development and design standards such as setbacks, parking,
 60 landscaping, etc. or the director determines that an increase in off-site impacts can reasonably
 61 be anticipated, the change may be allowed through a nonconforming situation review.

62
 63 **Change of use in a different category.** A change to a use in a different use category which is
 64 prohibited by the base zone may be allowed through a nonconforming situation review. In RR,
 65 D1, D3, D5, D10, D15 and D18 zones, a change from a nonconforming nonresidential use to an
 66 allowed residential use that exceeds the allowed density may be allowed through a
 67 nonconforming situation review.

Comment [BM1]: An example of this is a conversion of a store in a D5 zone to an office in D5 –both nonconforming.

Comment [BM2]: An example of this is conversion of a storefront in a D5 zone (nonconforming use) to a triplex (allowed use, nonconforming residential density).

68
 69 **Expansions.** A use made nonconforming due to a change in the zone or zoning regulations may
 70 be expanded throughout any portion of the existing building manifestly designed or arranged to
 71 accommodate such use. A nonconforming use may not be expanded to other buildings or to
 72 land outside the original building.

73
 74 **Loss of nonconforming use status.**

75
 76 **Discontinuance.** If a nonconforming use ceases operations for 365 consecutive days, even if
 77 the structure or materials related to the use remain, the use has been discontinued. A
 78 nonconforming use that has been discontinued for more than 365 continuous days may request
 79 re-establishment through a nonconforming situation review. The non-conforming situation
 80 review must take place within 3 years of the discontinuation of the non-conforming use.

81
 82 **Accidental destruction.** When a nonconforming use is damaged by fire or other causes beyond
 83 the control of the owner, the re-establishment of the nonconforming use is prohibited if the
 84 repair cost of the structure is more than 75 percent of the cost of the replacement of the entire

85 building, exclusive of foundations, using new materials. The extent of building damage shall be
86 determined by the building official.

87

88 **Intentional destruction.** When a structure containing a nonconforming use is intentionally
89 damaged by fire or other causes within the control of the owner, the reestablishment of the
90 nonconforming use is prohibited.

91

92 **Nonconforming Residential Densities**

93

94 **Changes to dwellings.**

95 Generally. Existing dwelling units may continue, may be removed or enlarged, and amenities
96 may be added to the site provided that existing dimensional requirements such as setbacks and
97 lot coverage are met.

98

99 **Sites that exceed the maximum residential density standard.** On sites that exceed the
100 maximum residential density standards, reconstruction of the non-conforming dwelling units
101 may be approved through a nonconforming situation review.

102

103 Nonconforming densities may not be increased, altered or reconstructed until proof of a
104 nonconforming situation is established.

105 No increase in the number of units from that established through the nonconforming situation
106 review is allowed.

107 **Discontinuance and damage.**

108 **Building unoccupied but standing.** Nonconforming residential density rights continue even
109 when a building has been unoccupied for any length of time.

110 **Accidental damage or destruction.**

111 **More than one dwelling unit.** When there is more than one dwelling unit on a site, and when
 112 the site is nonconforming for residential density, the following applies if a structure containing
 113 dwelling units is damaged or destroyed by fire or other causes beyond the control of the owner:

114 If the structure is substantially complete within 3 years, nonconforming residential
 115 density rights are maintained;

116 If the structure is not substantially complete within 3 years, the nonconforming
 117 residential density rights are lost, and the site is considered vacant;

118 **One dwelling unit.** When there is only one dwelling unit on a site, and when the site is
 119 nonconforming for residential density, the following applies if the structure containing the
 120 dwelling unit is damaged or destroyed by fire or other causes beyond the control of the owner:

121 If the repair cost is more than 75, percent of the cost of the replacement of the entire
 122 structure, exclusive of foundations, using new materials, nonconforming residential density
 123 rights are maintained and the structure may be rebuilt within 3 years if it complies with the
 124 existing associated district-specific, dimensional, and development and design standards such
 125 as setbacks, parking, landscaping, etc. (except for density) that would apply to new
 126 development on the site. The extent of building damage shall be determined by the building
 127 official. If the structure is not rebuilt within 3 years, the nonconforming residential density
 128 rights are lost, and the site is considered vacant.

129 Nonconforming densities may not be enlarged, altered or reconstructed until proof of
 130 nonconforming situation is established. Density shall not be increased from that established
 131 through the proof of a nonconforming situation, except in accordance with this title.

132 **Intentional damage, destruction or demolition.** When a structure that is nonconforming for
 133 residential density is intentionally damaged, destroyed or demolished by fire or other causes
 134 within the control of the owner, the nonconforming residential density rights are lost, and the
 135 new development must meet all development standards for the site.

136 **Nonconforming structures**

137

138 **Nonconforming structures.** A nonconforming structure may be continued so long as it remains
139 otherwise lawful, subject to the following provisions:

140 A nonconforming structure may be enlarged or altered, but only if it does not increase
141 its nonconformity.

142 A nonconforming structure may add additional stories in accordance with
143 49.25.430(4)(M).

144 If a nonconforming structure is moved for any reason for any distance whatsoever it
145 shall thereafter conform to the code provisions applicable in the zone in which it is located after
146 it is moved;

147 If a nonconforming structure or nonconforming portion of a structure is damaged by any
148 means to an extent of more than 75 percent of its replacement cost at time of the damage, it
149 shall not be reconstructed except in conformity with the provisions of this code. The extent of
150 building damage shall be determined by the building official. This does not preclude the
151 reestablishment of nonconforming residential density as allowed by 49.XX.XXX.

152 If at any time a nonconforming structure is abandoned or brought into conformity with
153 this title, the structure shall thereafter conform to all the regulations of the zone in which it is
154 located.

155 Tenant improvements or renovations within an existing structure shall not be
156 considered an enlargement or an alteration as described in subsection XX above.

157 This subsection shall not be construed to allow the expansion of a nonconforming
158 density or use of structure, which is governed by sections XXXX.

159 A nonconforming structure may not be enlarged, altered or reconstructed until proof of
160 nonconforming situation is established.

161

162 **Nonconforming Lots and Lot Fragments**

163 A lot rendered substandard in size by the adoption of this title may nonetheless be used
164 provided if all of the following can be met:

165 The use does not have a minimum lot size greater than the minimum lot size required
166 by the underlying zoning district;

167 Any associated district-specific, dimensional, and development and design standards
168 such as setbacks, parking, landscaping, etc. are met; and

169 The lot is accepted as legally nonconforming.

170

171 When a nonconforming lot or lot fragment contains a dwelling unit that is damaged or
172 destroyed for any reason other than fire or other catastrophe beyond the owner's control the
173 structure may be rebuilt to the same footprint on the original location with the exception of
174 encroachments into public rights-of-way or adjacent property.

175

176 Undeveloped nonconforming lots that adjoin and have continuous frontage with one or more
177 undeveloped lots under the same ownership shall be treated as a single lot for zoning purposes
178 in order to minimize nonconformities with the dimensional requirements. Nonconforming,
179 adjacent lots in common ownership may be treated as separate lots for zoning purposes if the
180 Director finds that the owner of said lots has demonstrated the intent to maintain the lots as
181 separate. The Director shall rely on the following factors:

182 a. The existence and maintenance of walls or fences along the original lot lines;

183 b. The lots are separately assessed for tax purposes;

184 c. The placement of structures on the various lots.

185

186 The manner in which the lots were acquired or the fact that the lots were separately described
187 on a deed shall not be considered.

188

189 **Nonconforming parking.** A building may be replaced or reconstructed under this subsection
190 with the same number of off-street parking spaces as were provided for the original building.
191 Any use that had non-conforming parking and later became more conforming may not revert to
192 the original, lesser, non-conforming parking. Such uses may apply for a parking waiver in
193 accordance with 49.40.210(d) Exceptions (6) Parking Waivers.

194

195 **Nonconforming signs.** 49.45.400

196

197 **Proof of nonconforming situation**

198

199 **Purpose.** This review will determine if a use or site has legal nonconforming situation rights. In
200 addition, it will determine what the current legal use is, based on the use categories in Chapter
201 49.XX.XXX. It is the responsibility of the owner to produce evidence proving the nonconforming
202 situation was allowed when established and has been continuously maintained or used over
203 time.

204

205 Upon presentation of such proof the Director may formally approve each nonconforming
206 situation. If approved, the Director shall issue a written decision that includes a complete
207 description of each approved nonconforming situation.

208 No permit may be issued under 49.15 for any activity on a lot prior to Director approval of each
209 nonconforming situation existing on the lot.

210 Standard evidence that the situation was allowed when established includes:

- 211 1. Building, land use, or development permits;
- 212 2. Zoning codes or maps;
- 213 3. Recorded plats;
- 214 4. Sanborn Maps.

215

216 **Situation maintained over time.** Standard evidence that the use has been maintained over
217 time includes but is not limited to:

- 218 1. Utility bills;
- 219 2. Income tax records;
- 220 3. Business licenses;
- 221 4. Listings in telephone (record? books?), business;

Page 8 of 12

- 222 5. Advertisements in dated publications;
- 223 6. Building, land use, or development permits;
- 224 7. Insurance policies;
- 225 8. Leases;
- 226 9. Dated aerial photos;
- 227 10. Insurance maps that identify use or development, such as the Sanborn Maps; or
- 228 11. Land use and development inventories prepared by a government agency.

229

230 **Nonconforming Situation Review**

231 **Purpose.** A nonconforming situation review provides an opportunity for the Board of
 232 Adjustment to consider nonconforming uses changes of use within the same use category,
 233 which do not comply with associated district-specific, dimensional, and development and
 234 design standards such as setbacks, parking, landscaping, etc. or the director determines that an
 235 increase in off-site impacts can reasonably be anticipated, the change may be allowed through
 236 a nonconforming situation review.

237

238 **Applicability.** A change to a use in a different use category which is prohibited by the base
 239 zone may be allowed through a nonconforming situation review. In RR, D1, D3, D5, D10, D15
 240 and D18 zones, a change from a nonconforming nonresidential use to an allowed residential
 241 use that exceeds the allowed density may be allowed through a nonconforming situation
 242 review. On sites that exceed the maximum residential density standards, reconstruction of the
 243 non-conforming dwelling units may be approved through a nonconforming situation review
 244 when an applicant does not provide standard evidence for a Proof of Nonconforming Situation
 245 or when the Director does not find the evidence to be satisfactory.

246

247 **Procedure.** A nonconforming situation review is processed..... Refer to public notice section –
 248 red sign, newspaper, mailing to property owners...

Comment [BM3]: An example of this is conversion of a storefront in a D5 zone (nonconforming use) to a triplex (allowed use, nonconforming residential density).

249 **Approval criteria.** The request will be approved if the Planning Commission finds that the
 250 applicant has shown that all of the following approval criteria are met:

251 With mitigation measures, there will be no net increase in overall detrimental impacts (over the
 252 impacts of the last legal use or development) on the surrounding area taking into account
 253 factors such as:

- 254 a. The hours of operation;
- 255 b. Vehicle trips to the site and impact on surrounding on-street parking;
- 256 c. Noise, vibration, dust, odor, fumes, glare, and smoke;
- 257 d. Screening, public safety, neighborhood harmony;
- 258 e. The amount, location, and nature of any outside displays, storage, or
- 259 activities.

260 If the nonconforming use is in a D1, D3, D5, D10, D15 or D18 zone, and if any changes are
 261 proposed to the site, the appearance of the new use or development will not lessen the
 262 residential character of the area. This is based on taking into account factors such as:

- 263 a. Building scale, placement, and facade;
- 264 b. Parking area placement;
- 265 c. Buffering (screening?) and the potential loss of privacy to abutting residential
- 266 uses; and
- 267 d. Lighting and signs.

268 Nonconforming residential density will have no net increase in overall detrimental impacts on
 269 the surrounding area taking into consideration factors such as:

- 270 a. Vehicle trips and impact on surrounding on street parking
- 271 b. Lot coverage, vegetative cover, anything else? Conformity with future land
- 272 use maps maybe?

273 **49. 80 Definitions**

274 Nonconforming building or structure. A building or structure that does not meet one or more
275 height, setback, building coverage, , or other dimensional requirements for the land use district
276 in which it is located.

277 Nonconforming lot. A lot which legally existed prior to the adoption, revision, or amendment of
278 this Code does not comply with current minimum lot size, lot depth, lot width requirements or
279 other lot requirements of the district in which the lot is located.

280 Nonconforming Residential Density. A residential use that is an allowed use in the zone and
281 that was constructed at a lawful density, but which subsequently, due to a change in the zone
282 or zoning regulations, now has greater density than is allowed in the zone.

283 Nonconforming Situation means a nonconforming lot, use or structure, density, or any
284 combination thereof.

285 Nonconforming Use. A use that was allowed by right when established or a use that obtained a
286 required land use approval when established, but that subsequently, due to a change in the
287 zone or zoning regulations, the use or the amount of area devoted to the use is now not
288 permitted under the current zone designation.

289 Abandon means (a) with respect to a use, the cessation of such use for any length of time,
290 combined with intent to indefinitely cease such use, or (b) with respect to a structure, the
291 cessation of occupancy of such structure for any length of time, combined with intent to
292 indefinitely cease occupancy of such structure.

293 Change means, with respect to a nonconforming use, that the nonconforming use has been
294 converted to a different use for any period of time, regardless of intent.

295 Discontinued means that a nonconforming use has ceased, and has not substantially resumed,
296 for a period of 365 consecutive days regardless of intent.

297 Occupy or occupancy means actual physical occupancy of a structure or lot, regardless of
298 intent.

299 Primary use means the primary activity actually conducted in a serious, substantial, and
 300 ongoing manner on a lot or in a structure, and for which the lot or structure is actually and
 301 primarily occupied and maintained, regardless of intent.

302 Substantially resumed means substantial and continuous resumption of the use as the primary
 303 use for a period of at least 60 consecutive days. Activity that does not meet this standard is not
 304 sufficient to interrupt a period of discontinuance.

305 Use means activity actually conducted on a lot or in a structure, and for which the lot or
 306 structure is actually occupied and maintained, regardless of intent.

307 **49.85 Fees**

308 Proof of Nonconforming Situation – staff review \$200 (similar to letter of zoning compliance)

309 Nonconforming Situation Review – to PC \$400 (similar to variance and ADOD) plus public notice
 310 fees...NOTE NSR should refer to public notice section.

311

312

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

Wednesday, July 19, 2017
Community Development Department, Large Conference Room
3:15 p.m. to 4:30 p.m.

Members Present:

Dan Miller, Paul Voelckers, Kirsten Shelton, Dan Hickok (Alternate)

Members Absent:

Carl Greene

Staff Present:

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

Public Present: Scott Rinkenberger (Airport Superintendent)

Mr. Rinkenberger stated that it seems the airport is under different types of scrutiny regarding tree limbing on anadromous streams. Mr. Rinkenberger wanted to be sure the airport is involved and keeps an ear to the ground regarding this topic. He hopes to be present at Title 49 meetings that address the topic of streamside setbacks. Ms. Boyce assured Mr. Rinkenberger that she would keep him in the loop for when the Committee addresses the topic.

I) Call to Order

Meeting called to order at 3:18 pm.

II) Approval of Minutes

June 28, 2017 Draft Minutes

MOTION: *by Mr. Miller to approve the June 28, 2017 minutes.*

The motion passed with no objection.

III) Old business:

a) Panhandles

Ms. McKibben remembered that she had work to do on panhandles as previously requested by the committee.

Mr. Voelckers reminded her that she was going to share graphics and other adjustments for panhandles with the committee. Then the issue is expected to move on to Committee of the Whole. Ms. McKibben suggested putting this as a discussion item on the August 8th agenda, not for public hearing.

IV) New Business

a) Review of Title 49's Nonconforming Development Policies

Ms. McKibben started by reviewing the memo on nonconforming development policies that she had prepared for the committee. When analyzing non conformities, she stated, it is essential to clarify if the lot, the structure and/or the use is

non-conforming. While it is possible to have all three areas meet the definition of non-conforming, it is better for staff, commissioners and the public to understand these three dimensions as separate entities.

Mr. Voelckers said it is helpful to know if one type or another of non-conformance is of particular concern to lending institutions. Ms. McKibben said she believes that banks are mostly concerned with use. An example is Aurora Arms where the zoning doesn't support the use, at present, she said.

Mr. Voelckers said that another item that got on the community's radar was a parcel with a triplex where zoning only supports a duplex. Ms. McKibben said there are numerous examples of this type of situation in the borough.

For discussion today, Ms. McKibben said she intended to review with the committee the existing code and focus on the simpler things – lot and structure. She suggested leaving the more complicated piece – use – for a second discussion. It will take some time to parse out the question of benign and non- benign uses, she said. Perhaps the non-benign uses are on a case by case basis. Ms. McKibben asked if this was a good approach to the topic.

Mr. Voelckers asked if the whole process of determining benign use was an active or passive decision. Do we want to bring attention when there is a complaint or a problem presented, he asked? Ms. McKibben offered as an example a gas station located in a residential area. If it has been there since 1964, the business gets to continue its operations. Complaints about it would receive the response that it is legally non-conforming and gets to continue. However, she said, the gas station couldn't expand its business under current code. The issue of non-conforming comes up most often when there is a change of ownership. Another question is, can it be rebuilt if it is destroyed? Can it be expanded or moved? Zoning codes historically try to amortize out non-conforming uses to make them go away over time, said Ms. McKibben. That is the concept.

Mr. Voelckers said regarding the gas station example, if a person wants to sell the business but can't get financing from a bank, does this come to the Planning Commission? Ms. McKibben suggested deferring discussion on this question to the committee's next meeting, as it is the more difficult facet of the topic. She said she will collect a variety of tools for the committee to use while considering.

The discussion refocused regarding non-conforming properties. Ms. McKibben noted that in her June 27 memo, the final section is a discussion of work to do as follow up to the recently approved overlay districts to get the work done regarding zoning in historic districts.

Ms. McKibben suggested that the ordinance be repealed and replaced, not amended. But, she said, the committee still needs to review the policies to see what to keep, rework, etc.

Ms. McKibben said that non-conforming lots are the most simple to address. In the case of a non-conforming lot due to width or depth, current code says you can have a single family home on a non-conforming lot, meeting current setback requirements. It is pretty clear and simple except for in the industrial zone where single family homes are not allowed, she said. Ms. McKibben said she was not suggesting this be changed. Mr. Voelckers asked committee members if they agree with this suggestion.

Ms. McKibben stated that for accessory apartments there now is a process to apply with a non-conforming lot and bring the case to the Planning Commission. Mr. Miller asked if in the industrial zone, can someone build a structure with a caretaker apartment. Yes, said Ms. McKibben, if you can comply with setbacks then any use that is allowed in a district can be built provided it can meet current setbacks, parking, lot coverage, vegetative coverage, etc.

There will be challenges in older, historic districts, said Ms. McKibben. Juneau currently has some lots in these districts where the ownership has been fractured. In such situations, in the event one building is destroyed, under current code it can be replaced. Can it be subdivided further, asked a commissioner? No, said Ms. McKibben. She used as an example a lot on Sixth Street which was broken up into 3 lots, sometime in the past.

Mr. Miller wondered if a person might not want to lock themselves into a property if it is a non-conforming lot with a non-conforming use. In order to fix the mortgage problem, it is not the duplex or triplex that is non-conforming, it is the zoning, he said. Ms. McKibben said it was not quite that simple. For a 1500 square foot lot downtown, we don't want to take away usage by holding to current setbacks, etc., she said. This could make the lot unusable to build a home whereas we said "any use in the district". The zoning in that area requires a larger lot size for a duplex, so an application for this type of development would be denied. But the owner can apply for an accessory apartment in that case, said Ms. McKibben. Mr. Miller said that if he bought a duplex downtown and then discovered that more than 75% of the building needs rehabilitation when he attempts to remodel. If he went to the bank, they would not loan him money to upgrade the duplex because it is non-conforming.

Allowed use and dimensional criteria is the most important policy, said Mr. Voelckers. Ms. Shelton said she understands that for a rebuild but wonders about an initial purchase. The bank says it won't loan to purchase an already existing duplex because that type of structure would not be allowed as a new build, she said. As an example, Ms. Shelton could not get a loan on her house on Sixth Street because of the size of the lot, which has two single-family structures on it. Ms. McKibben said it was not the lot size but the use that prevented the loan.

Ms. McKibben said that non-conforming structures are ones not meeting setbacks, height requirements or parking. She said she would talk about parking later. The variance that was denied recently by the Planning Commission is a great example (VAR2017 0002 on 12th street) because the proposed structure did not have the required setbacks. If a catastrophe happened to destroy the original building, it could be rebuilt on the footprint, but since the applicants wanted to tear down the old structure and replace it, they were required to meet the setbacks. Mr. Miller noted that the house was less expensive to rebuild than to restore/remodel, since it was in such poor shape.

Mr. Voelckers said a slow-roll calamity versus a single event have two different attitudes i.e. slow rot versus an earthquake. Ms. McKibben said the 75% recovery line is for a catastrophic event and lack of maintenance is not such an event. Theoretically termites or something could have been prevented or mitigated with maintenance, she said. This is the way most non-conforming codes are written. Do you like the term in code "involuntary change", asked Mr. Voelckers? Ms. McKibben shrugged.

Ms. McKibben read from code concerning change to a building such as the one on 12th street which continued with a description of catastrophic change. What is the magic with the 75% number, asked Ms. Shelton? Ms. McKibben said it was a policy call and was hard to talk about. There is no magic number; some prior somebody came up with this, she said. Mr. Miller said he thinks the advantage is for people who are trying to rebuild their homes. He would agree with Mr. Voelckers that the intent is to not let people let their building deteriorate and then claim calamity. Mr. Miller agrees with that intent as it offers the possibility to rebuild if there truly is a calamity. Mr. Voelckers suggested the language could include some unknowable calamity that is not a one-time event like a fire. Ms. McKibben read some other examples of code with ideas of changes such as for health and safety. Mr. Voelckers suggested that staff mess around with this language. Ms. Shelton said another wording could be "involuntary change". Ms. McKibben said the code defines that as catastrophic, but staff can work on some draft language.

Mr. Miller said that on the 12th street property, there was a feeling that the bad shape of the foundation was just cause for a variance, but it turned out not to be.

Ms. Shelton said she was still confused about the purpose of having 75% as the number. Mr. Voelckers and Mr. Miller both felt the 75% number was justifiable. Here in Juneau, the cost of doing business requires being closer to the high end, they said.

Going back to the topic of non-conforming structures, you can put additions on the building if they meet setbacks, said Ms. McKibben. Now we have the Alternative Development Overlay District (ADOD) for this purpose, she noted. Also we have the process of up-fill conditional use; for example if an applicant wants to add height to a building, the conditional use process can be used. This is for a property owner who has a building already encroaching into setback but wants to add another story, for example, she said. Ms. Shelton asked, if you have a non-conforming structure with a non-conforming use, can you add to it? Mr. Voelckers drew a case on the whiteboard showing a situation where a portion of a house stuck out

into a setback and the owner wants to fill in the notch. The narrow interpretation, he said, is that this is not allowed, however other interpretation could be that it just fills in along the line that already exists. In such a case, he said, the structure does not get any closer to the property line than the portion that is already there – it is just an extension of that line. Mr. Voelckers said his own house has a similar situation that was denied by one planning commission and allowed by another.

Mr. Voelckers asked about Ms. McKibben statement on page 3 of her July 27 memo suggesting that additions to non-conforming situations should not aggravate. This was followed by a discussion about aggravated use. Ms. McKibben said that currently if the gas station from the earlier example wanted to add another bay to their business, this would be denied. What about widening the bay they already have, asked Mr. Miller?

Ms. McKibben said that the question before the group is regarding the extension of the front encroachment of the house, creating a greater encroachment. Mr. Voelckers said the code is unclear what “greater” means in this case. Mr. Miller said at some point that house was built legally. So the old setback ought to be considered legal, if it currently is considered legally non-conforming, and therefore that would be a valid reason to extend the house to fill in the notch. Mr. Hickok said he would like to be able to approve something like that. Mr. Voelckers said it is tricky when the design is fine and seems benign yet other times the proposed development seems less desirable because we don’t “like” it. “Additions to non-conforming structures that don’t add density or don’t expand non-allowed uses” could be new language here, suggested Ms. McKibben. Commissioners liked the notch infill as not further increasing the encroachment and felt this sort of infill should not be dismissed outright.

Ms. McKibben said that staff has been working for the last few years to reduce the number of applications coming to the Planning Commission because it takes longer for the applicant and is more of a gamble. For example, applications for accessory apartments used to come to before the Planning Commission. Mr. Voelckers and Ms. Shelton said they felt there needs to be some oversight. Ms. McKibben suggested that the director have some discretion to approve some of applications involving non-conforming situations while others would need to come before the Planning Commission.

Would you want this sort of non-conforming structure in any district, asked Ms. McKibben? We’ve focused on residential district so far, she said. A good example is the new bank by the Bill Ray Center which required 3 variances for that building, said Ms. McKibben - variances for parking and for the drive-through window. Today this would not have met the unique threshold. That is an example of a building built that is legally non-conforming. Mr. Voelckers asked if the variance lives with the land. Yes, said Ms. McKibben. Why would the triplex not follow, asked Mr. Hickok? Because of the use, said Ms. McKibben.

Committee members felt that a similar event in another district – filling in a notch for example – was the same difference as the residential example. Ms. McKibben said some things come to the Planning Commission, versus the director, because it then becomes a public process with 9 decision makers, and the public can participate.

What is the process to repeal the ordinance, asked Mr. Hickok? Ms. McKibben said it is a repeal and replace action and is fairly easy.

V) Next Meeting

Wednesday, August 16, 3:15 pm

At this meeting, we will dive into discussion about non-conforming uses, said Ms. McKibben, and she will suggest some language. The committee needs to discuss the issue of benign – what is and what is not. Ms. Shelton asked for some examples. Ms. McKibben said she would bring examples from the finance world.

Mr. Voelckers said he felt that we are dancing around the big issue, which is the sudden, instantaneous change of ownership. This is when the bank suddenly refuses to loan and owners did not even know they had an issue. When the appraiser pulls up info on a property which says it is non-conforming, said Mr. Miller, there needs to be a way to say that it is legally non-conforming or have some sort of a process to make it legal and satisfy the lender.

Ms. McKibben used the example of Homer where the burden of proof is on the owner to show that the non-conforming use is rooted in history. Mr. Voelckers said it is more than just the owner proving it was legal back in the day; they also have to prove it continues to be in the public interest to remain so. Mr. Miller said once the designation is set, he thinks it should be done. The bank loans for 30 years. Mr. Voelckers said that there are tons of properties in Juneau that are non-conforming but that get loans all the time. The bank asks can this building be rebuilt, said Ms. McKibben. Yes, we say, a single family can be rebuilt, but not the triplex as it stands today.

Ms. McKibben said that conversation needs to be had concerning Aurora Arms. Is it OK to have such a building here for 50 years but now is not conforming to zoning, remain in place as such, asked Ms. McKibben?

VII. Adjournment

The meeting adjourned at 4: 35pm.

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

Wednesday, August 16, 2017
Community Development Department, Large Conference Room
3:15 p.m. to 4:30 p.m.

Members Present:

Dan Miller, Paul Voelckers, Kirsten Shelton, Dan Hickok (Alternate)

Members Absent:

Carl Greene

Staff Present:

Laura Boyce (CDD), Beth McKibben (CDD), Marjorie Hamburger (CDD), Tim Felstead (CDD)

Public Present:

I) Call to Order

Meeting called to order at 3:19 pm.

II) Approval of Minutes

July 19, 2017 Draft Minutes

Mr. Voelckers commented that on page 4, 3rd paragraph add "Commissioners liked the notch infill as not further increasing the encroachment. This sort of infill should not be dismissed outright."

MOTION: *by Mr. Miller to approve as amended the July 19, 2017 minutes.*

The motion passed with no objection.

III) Old business:

a) Review of Title 49's Nonconforming Development Policies

Ms. McKibben is not totally prepared to dive deep into the use discussion. She has an example of nonconforming code from Portland, OR that she thinks represents the direction our code want to go. It has very clear parameters, although it might be more complicated than we want. She said this will help with challenges in this section of code for example to separate use from density. She pointed out other concepts that she finds useful in this example and will share this document with the committee members at a later meeting.

She also recently learned that different lending institutions will take on different amounts of risk. Most strict, for example, is the HUD 180 loaning program. Ms. McKibben talked about Aurora Arms as an example, and she found evidence of a loan that was processed in 2011 and flew through with no problem. If we say the building can be rebuilt to the existing footprint, the loan goes through. Mr. Miller noted that yes, it could be a single-family rebuild.

Mr. Miller said there have been many changes from 2011 to today with housing loans. Now there is much more paperwork and scrutiny and this has been gaining steam since 2008.

Ms. McKibben said the American Planning Association (APA) service told her they had not seen many communities revising their sections of nonconforming code since the Great Recession. Ms. McKibben said we need to focus on the issues to make a code that works for the community and not just focus on the lending institutions. If this is clear, likely it will improve things for the lenders.

Mr. Voelckers asked if committee members want a copy of the Portland model. Ms. McKibben said for her, reading through it gave her a framework for thinking through concepts. She handed paper copies to the attending members. She suggested they read this for homework. The way the language is framed, what is ok to continue and what is not will help to group things into various kinds of uses, she said.

Mr. Voelckers suggested the committee have two weeks to read the document and then give their comments to Ms. McKibben so that the topic can come back at the September committee meeting.

IV) New Business

a) Review of Planned Unit Development Code (PUD)

Mr. Felstead came in to talk about a developer who wants to build in the West Montana Creek PUD. Each plat says 1 dwelling unit per lot. He explained that we don't include accessory apartments counting towards density. There is nothing in the staff reports that says allowed or not allowed, he said, and it was not talked about in the minutes for permits for the PUD.

Ms. McKibben said whether an accessory apartment is allowed or not is one question. Another question is do they need a permit or not. The density of the entire property is a D3 density.

Mr. Voelckers asked what these apartments trigger for parking. One additional space, replied staff. As part of a review we would insure 3 parking spaces for each property with an apartment, said Ms. Boyce. Montana Creek lots are designed like a D5 neighborhood in a D3 zoning area, said Mr. Felstead. Ms. McKibben said housing is clustered in these lots.

Ms. Boyce has no qualms about saying it is an over the counter permit because overall this meets density requirements. But planners are all over the place with this, she said. Mr. Felstead has done forensic planning on this topic, said Ms. McKibben. What we can't discern is whether one dwelling per lot included accessory apartments or not. We don't know the intention from the past, said Ms. McKibben. They count as dwelling units but not density, said Ms. Boyce.

Mr. Miller said the reason is we took full acreage and figured out how many lots could fit in there. We were not using zoning as the framework. Then we were blindsided by the flood plain trigger for rezoning and so it was determined that the wetlands there could not be built upon, he said. We were forced into the PUD situation; trying to make the best of it. The question never came up when Mr. Miller built the first houses in that area. No clients wanted an accessory apartment at that time, although he said he thought it would have been allowable, said Mr. Miller.

There is a plat note that says zoning allowances allowed for the entire PUD parcel can be transferred over to the smaller sub lots, said Mr. Felstead. This means each small PUD lot is effectively bigger in terms of zoning allowance since it can 'borrow' lot area from the large conservation lot. Each lot is effectively 12,000sq ft. in size in terms of zoning rights. This was my interpretation as well, said Ms. Boyce. This was the first PUD I took from start to finish, said Mr. Miller, so not every eventuality was thought through.

When we changed the code so that accessory apartments could be permitted over the counter if conventionally conforming, I noticed Low Pete offering these options to clients, said Ms. McKibben.

About PUD, is the only issue regarding setbacks is that they only have to stay within 10 feet from another building, asked Mr. Voelckers? Montana Creek subdivision is a little different, said Ms. McKibben. So, I think we can do it as a single blob with 8 units. A subdivision within a PUD is not the same, said Ms. McKibben. Mr. Voelckers argued that setbacks are still minimal.

I threw my hat into the ring to be a commissioner after this experience and seeing how tough it was, said Mr. Miller. Forty percent is a big huge number and stops a lot of PUDs, said Mr. Miller. Land is priceless in Juneau. He said it only can work if there are so many wetlands that already can't be built on, for example.

What if a PUD was four 8-plexes, asked Mr. Voelckers? Montana Creek West has something like that, said Mr. Miller. But then, said Mr. Voelckers, this may color our perception of accessory apartments. Multi-family can't have them, said Ms. Boyce, only a single-family dwelling. A 12-unit PUD on North Douglas collectively owns the land; dwellings are not sitting on their own lots, so they can't have accessory apartments.

Mr. Miller stated that common wall dwellings are single-family and duplexes are not. This has to do with the situation of the structure on the lot and where the lot line runs. Mr. Miller asked, if there is a single owner and the lot is big enough, why not allow an accessory for a duplex?

Changes made for these apartments has been great these past years, said Ms. McKibben

Mr. Voelckers asked committee members if they have enough info about PUDs and accessory apartments to make some suggestions.

Plat notes added to Montana Creek were required by the Planning Commission, said Mr. Felstead. Ms. Boyce pointed out that 49.15.12 talks about number of dwellings in a PUD. Mr. Voelckers asked if it was the thought to amend PUDs with some language that would help clarify something like Montana Creek. We probably want to deal fast with this particular question, said Mr. Voelckers. Ms. McKibben said that staff at CDD hopes to find an answer but planners are not all of one mind. The hope is that someone would have history in order to help clarify the intent.

Mr. Miller hopes to fix PUD code to make it friendlier. Mr. Voelckers said he thinks we should allow accessory apartments because this quacks like D5 zoning in terms of lot size. Who knows where the note came from as this was started some years ago, he said. Ms. Shelton said her gut tells her it makes sense to allow accessory apartments. Allowed outright or with a Conditional Use Permit (CUP), asked Ms. McKibben. It would be so for anyone else with the minimum lot size to receive a permit over the counter, said Ms. McKibben. Mr. Voelckers clarified that this is a single case we are approving now, but not setting precedent. Yes, however this means the next time someone in Montana Creek West asks, we would say yes to that as well said Ms. McKibben.

Mr. Felstead said planners would look at lot size in combination with the common space of the entire development - this is still at D3 density. Mr. Miller examined the comparison of D3 and D5 and overall density. Ms. Boyce is concerned that people who bought into the development might have thought that it would only be a single-family community, not understanding the situation that accessory apartments would not be considered adding density.

If we brought this to the Planning Commission, we could notice everyone in the PUD about this, said Ms. Boyce. PUDs are the beginning of a subdivision, is this correct asked Mr. Hickok? A clustered subdivision, said Ms. Boyce. Give some flexibility suggested Mr. Miller. Ms. McKibben gave examples of how the zoning flexes under a PUD such as putting 4-plexes in a D3 zone. Mr. Voelckers said it is a progressive way to work with difficult lots or afford residents more green space.

So, this should go before the Planning Commission, asked Ms. Boyce? Mr. Miller said it will probably be the residents immediately outside of the Montana Creek PUD who will be most concerned; that was the biggest meeting I've ever seen. But he thinks this is the best way to go nevertheless. Maybe beginning with a public hearing would have an eye towards moving to an over the counter permit process, but for this first time let the public have their say, said Mr. Voelckers. This would then say this new rule would apply to existing PUDs, said Mr. Miller. One option is to go through a CUP for this one and have the Commission say that the CUP is not necessary, said Mr. Felstead. Have a public hearing and have the Commission make an interpretation, he suggested. Commissioners in attendance nodded their heads, and Ms. Boyce stated she liked this idea. We should err on the side of over-noticing and explaining at this point. Who pays for the CUP, asked Mr. Felstead? We will need to talk to Mr. Steedle (Department Director), said Ms. McKibben. We will vet that option, she said. So it appears we are of a mind to get to a process that involves the Planning Commission, stated Mr. Voelckers. Staff can game it out, he said.

Ms. Boyce brought up another situation related to PUDs. Rich Harris has a condo project with units owned individually but the land is owned collectively, she said, sort of a cottage housing concept. The project is under construction already, but the developer wants to make it a PUD. However he can't make the 25-foot greenbelt requirement and a few others requirements, yet Ms. Boyce wants help reviewing the project to see if the developer can make this work somehow. There is some "shall" language in the code that makes it hard to modify, she said.

Mr. Voelckers said that the Planning Commission should figure out what is right for PUDs first and then see if Mr. Harris' project can be accommodated.

Mr. Miller stated that he has a laundry list of modifications concerning PUDs. There should be discussion about prioritizing things to be fixed in code from the builders' perspective, he said.

- 40% common open space is fine if underlying D1 zoning but 30% for D3 – Mr. Miller feels the code ought to start lessening the percentage sooner than it does at present. Once the developer gets into planning a multi-family project, it gets easier to set aside more land again. There ought to be some scale to make PUDs a more useful option for development.
- 25 foot buffer – ought to be more flexibility with this requirement.

Mr. Voelckers asked if the PUD is in a D3 or D5 zone, can it be developed as though it were D18. Yes, said Ms. Boyce. It is the underlying district that sets the tone, said Mr. Miller. If D1 and 10 acres, a developer would need a 25 foot buffer all around and 40% greenspace, leaving 6 acres to build the 10 dwellings. A developer buys land, pays for road, sewer, etc. and then gives this to the city to maintain, said Mr. Miller. It becomes unfriendly for the developer to lose all that land to recoup expenses. Ms. Boyce thinks the sliding scale is an interesting idea.

Mr. Miller said when he did Montana Creek West, the selling point was having less road to build and he could save development costs with the same amount of lots and houses because it was more dense. The level of difficulty for the construction went up, however. Also the design was more difficult.

What about the requirement for building separation of 10 or 6 feet, asked Mr. Voelckers, side setback for D10-SF is 3 feet in code, why not here?

We are hoping there is enough existing language to make a process flexible but now with the “shalls” this makes it less so, said Ms. Boyce. There is a need for language to be clearer between PUD and subdivisions, she said. PUD talks about a density bonus up to 15 %, but another section of code offers a 50% bonus. On the to-do list is work on the bonus section, said Ms. McKibben.

Maybe there is opportunity for mitigated judgements like a fence. Probably we will have to address the utility hook ups, said Ms. McKibben. The high school house-build is an example of a lot with multiple units owned by a Land Trust and with only a master water meter for all the properties. Housing Trust doesn’t want to function that way and allow for individual meters. There needs to be an avenue to have a discussion with utilities to see what flexibility there can be in such a situation. When not subdividing, what are options for utilities, asked Ms. McKibben?

V) Next Meeting

Wednesday, September 20, 3:15 pm

VI) Adjournment

The meeting adjourned at 4:34 pm.

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

Wednesday, September 20, 2017
Community Development Department, Large Conference Room
3:15 p.m. to 4:30 p.m.

Members Present:

Dan Miller, Paul Voelckers, Dan Hickok (Alternate)

Members Absent:

Carl Greene, Kirsten Shelton

Staff Present:

Laura Boyce (CDD), Beth McKibben (CDD), Rob Steedle (CDD), Marjorie Hamburger (CDD)

Public Present:

I) Call to Order

Meeting called to order at 3:21 pm.

II) Approval of Minutes

August 16, 2017 Draft Minutes

MOTION: *by Mr. Hickok to approve the August 16, 2017 minutes.*

The motion passed with no objection.

III) Agenda Topics

a) Language for Nonconformities

Ms. McKibben explained that document before the committee was a patchwork of concepts - some from existing code, some from Homer and Anchorage and Portland, OR. There are a number of categories and processes for nonconforming situations. A nonconforming situation could be any one or a combination of these things.

Is it the intent of these meetings to convert this document into Title 49 language, asked Mr. Voelckers? We will plan to repeal and replace from 49.30.500, said Ms. McKibben, rather than try to amend what we have. The idea is to put in new language. We also want to provide a process to determine legally nonconforming status and we need to discuss which decisions can be done administratively or need to happen through the Planning Commission process.

Discussion of Proof of Nonconforming Situation (Lines 33-80)

Mr. Steedle said this puts the burden on the applicant or the property owner to demonstrate nonconforming status and there is not a definition of this at present.

What about the purchase of the triplex on Sixth Street recently, does this situation apply, asked Mr. Hickok? Did the bank not get confirmation on the legally nonconforming status? So we don't know if the buyer made the

purchase of the building considered as nonconforming, asked Mr. Hickok. I don't know, said Ms. McKibben. He may have found a workaround with owner financing, said Mr. Voelckers. But this language we are drafting could provide a process for an owner to show us, in the future, said Ms. McKibben.

Lines 37, Option A and Option B present an option for whose decision it should be. Mr. Hickok asked what the director wants. Mr. Steedle said he did not have an opinion but thinks this determination could be handled administratively. Mr. Voelckers said he liked having it be a director decision with the option for an appeal to the Planning Commission or if the determination gets too complicated. Mr. Steedle says he would rather keep the noise away from the Planning Commission and direct things to them that are necessary only. It is also cleaner if things happen at the director level, said Mr. Voelckers. But something can be said for making decisions in the public eye, said Mr. Steedle. This could be where the appeal comes in if the neighbors are unhappy, for example.

We have tried to make it a trend for more applications to be approved at the director level, said Ms. McKibben. We are trying to be more responsive.

Ms. McKibben said the language concerning evidence of nonconformity is borrowed from other code, and she thinks it is pretty good. There is in this document a lot of clarifying language that is not currently in our code, such as on Line 63 (Ownership). Other language here is not addressed in our code but she thinks is useful such as Line 69 (Change to conditional use). We have the opportunity to talk about maintenance (Line 73). Do we need to define it, asked Ms. McKibben? I put in some language borrowed from Anchorage, she said. She has not talked to building official yet but thinks it would be good to run this language by him.

Mr. Miller said there can be a situation, for example rebuilding a staircase where the stairs could be built to the new standards even though the building as a whole is nonconforming. Do you think we should have language here about such a situation, asked Ms. McKibben? I think most people would want or need to do this when replacing their staircase but doing so might affect the nonconforming status of their building, replied Mr. Miller. You are correct, said Ms. McKibben, if a building owner was going to reconstruct stairs, this should be done to code, and so should we say here that repair or maintenance should be done to code? I think it is implicit, said Mr. Steedle, and a building official would determine this requirement so it is not needed to be spelled out here. Mr. Voelckers said he likes the last section (Lines 75-80) where it says fixing a rotten stair, for example, does not interfere with nonconforming status. However, while it mentions a percentage, it is not specific about the 10 percent. What if someone breaks a project into smaller chunks and has ten 10% projects? This is of concern, said Mr. Voelckers.

Discussion of Nonconforming Lots and Lot Fragments in ??? Zones (Lines 82-113)

I think nonconforming status should not be specific to a particular zone but borough wide, said Ms. McKibben. Mr. Voelckers said the first sentence in this section (line 84-85) should be broader. Mr. Miller asked about Line 86. Wouldn't a lot already have gone through the land use review process to establish use and so it wouldn't have to meet a minimum lot size if it is determined to be nonconforming? Ms. Boyce could not recall a specific use that requires a specific land size (minimum lot size requirement). Ms. McKibben said that in Homer there was a minimum lot size for use, but Juneau doesn't have one so this could be eliminated in that sentence. Mr. Voelckers agreed.

Regarding district standards, Juneau does not have any so this can be taken out said Ms. McKibben. Basically we can keep the same policy we have now - if you can meet all the requirements. And the lot needs to go through the process of determining that it is legally nonconforming, said Ms. McKibben. It might be that for different categories of nonconforming, some are determined administratively while others are brought before the Planning Commission.

Ms. McKibben said that Line 92 contains a concept staff suggests - that lots sharing ownership must be combined into one lot. Should the language say one conforming lot, asked Mr. Voelckers? What if there are five lots? Does the committee want to consider when nonconforming lots have common ownership that the lots should be required to be combined, asked Ms. McKibben? North Douglas Highway and 9 Mile Road is an example, said Ms. Boyce. Is there anything external to this section that says a legally nonconforming lot can have a house on it, asked Mr. Voelckers? Yes, said Ms. McKibben, and if you want to make this come forward there is merit. She suggested committee members think about it.

In the Casey Shattuck area, an owner could have two nonconforming lots and today could build two houses, one on each lot, said Mr. Steedle. But the rub is that we want to encourage the development of more housing, he said, and so if code requires the owner to combine the two lots and then only be able to build one house, that is in conflict. Mr. Voelckers said that if someone can meet setbacks, we have had the attitude to allow for a build and sometimes give a variance regarding the setbacks. Ms. McKibben said all this is fine, but it is a discussion we need to have. Ms. McKibben recalled a property owner of 4 legal lots on Douglas Island, with one single family home w/accessory apartment. But with a density change, the 4 lots only have one tax id number and one parcel number which is of concern to the CBJ assessors.

Ms. McKibben suggested removing "must be" in Line 94- keep the language simple. She next suggested taking out everything after the "OR". Commissioners agreed saying that less is more.

Ms. McKibben said that Line 96 is a concept from existing code. Mr. Miller questioned the 75% replacement cost concept. He said what if something happens and the house is destroyed to 76%, why shouldn't the owner be allowed to rebuild if they are willing and have the money? He said he does not see the reason. If an unintentional event happened and they want to rebuild, even if it might cost 120% of the replacement cost, why not allow them to do that if it was a legally nonconforming use? Mr. Miller was also concerned with the definition of catastrophic damage. He said he has been in situations where an owner sets out to replace a window and then discovers a ton of rot. This is a catastrophic event although initially was simply considered "maintenance", said Mr. Miller. Stepping away from the discussion of percentage, said Ms. McKibben, we want nonconformities to go away over time and be replaced with things that conform. This code provides more opportunities to extend nonconforming situations. But that is the concept behind percentages. Committee members might want to think about this as we go though, said Ms. McKibben.

Mr. Miller said that in the neighborhoods downtown, for example, with nonconforming use, these lots and buildings are completely a part of the fabric of the neighborhood. Mr. Voelckers agreed but reminded members that with the Planning Commission's reworking of the zoning in these historic neighborhoods, whole swaths of nonconforming situations might disappear. If we get the underlying zoning right, then there will be less need for nonconforming determinations, he said.

Ms. McKibben said a home that unintentionally burns to the ground could be rebuilt, according to this language. But poor maintenance would not be supported.

Do we need to say explicitly (Line 97) that something can be rebuilt, asked Mr. Voelckers? The language implies this for a catastrophic situation but maybe it is not explicit. Mr. Voelckers said his point regarding Lines 96-97 is that it talks about structures destroyed due to a reason other than a catastrophic one. But the language does not address what is allowed if it is. Mr. Miller suggested it should say if it IS a fire. The word "other" is what is wrong, said Mr. Voelckers. Take out the word "other" and add "such as". If there is a shed or garage, could they

rebuild that, asked Mr. Hickok? Yes, that is current code, said Ms. McKibben, but the committee may want to think about that.

Mr. Steedle said we need to get back to the point about percentage brought up by Mr. Miller. The Alternative Development Overlay District (ADOD) is only temporary, but it would not have helped Trinity Church. Lines 96-97 do not cite a percentage, is this correct asked Mr. Miller? Lines 103-104 discuss intentional damage and I am ok with the percentage there, said Mr. Miller.

Line 103 concerns intentionally damaged dwellings; everyone is fine with this said Ms. McKibben. What about negligence, when things just rot asked Mr. Voelckers? This is a can of worms, said Mr. Miller. Many people just don't know about rot until it is discovered, said Mr. Hickok. I think the phrase "exclusive of the foundation" has to go, said Mr. Miller.

Discussion of Nonconforming Structures (Lines 115-141)

It says here that nonconforming structures can continue and I've added the concept discussed in the July meeting about additions to buildings not encroaching into setbacks, said Ms. McKibben. This is about it being okay to fill in a little cut, as discussed previously, said Mr. Hickok. Yes, when infill doesn't aggravate the nonconformance, is not further into setback, etc. said Mr. Voelckers. Ms. McKibben said this language is trying to articulate this concept but would be improved with an explanatory drawing. I am advocating for more illustrations in our code book, she said. Line 123 is better than Line 121, said Mr. Voelckers. I can get Lisa to help me with a drawing, said Ms. McKibben.

Ms. McKibben pointed out Line 124 which allows for additional stories on a building, which is in code. An applicant would apply for an upfill CUP. We are not suggesting a change, but this should be referred to in the language, said Ms. McKibben. There should be language about this being permissible as long as it doesn't negatively impact the neighbors; also language for the footprint infill. Mr. Voelckers suggested that this could be a CUP process so that neighbors could have the opportunity to comment. But this would come up in a building permit review, said Mr. Miller. Maybe this should rise to the Planning Commission level, suggested Mr. Voelckers.

Ms. McKibben moved onto Line 127 which discusses structures damaged by any means. The language here says it is not to be reconstructed except for the provisions of this code. What does this talk about, asked Mr. Steedle? This breaks down into lots, structures and uses, and I think that is good, said Mr. Voelckers. Mr. Miller said he received a call from a woman who came to town to move her father into a home. The father had been living on 4th street for 40 years, there was lots of trash, and the woman needed help to move things. When Mr. Miller arrived, he pointed out things that had gone unnoticed; the house was basically falling down the hill. Now it is up for sale, and someone is going to buy it, said Mr. Miller. But to fix it right it will be considered more than a 75% rebuild. This is an example of someone who wants to live in a particular building and location and wants to put the money in to fix it up, but they might get shot down. Ms. McKibben said that the current policy is we would allow for a rebuild in the existing footprint except for encroachments into the right-of-way. Do you want to keep that, she asked? But the 75% thing is still there, said Mr. Miller.

Mr. Voelckers asked for a nonconforming structure example. Ms. McKibben said the variance requested recently on Twelfth Street is one where the setbacks did not conform for a complete rebuild on the property.

Mr. Voelckers asked Mr. Miller his thoughts. Mr. Miller said maybe it doesn't really matter and the structures in our town are important enough that if they are legally nonconforming then it is ok. The potential is that a legally nonconforming structure, damaged by any mean (not just catastrophic), any new building except one built on

encroachments is ok; this is what I am hearing, said Ms. McKibben. Mr. Voelckers said the thing he is concerned about is the neighbors. Maybe we are bending over backwards to accommodate a homeowner but the structure has been problematic for years for the neighbors, he said. Also there is a concern about health and well-being. Mr. Hickok said he doesn't like the idea of property owner losing out. Ms. McKibben said to get back to Mr. Voelckers' reminder, we have the ADOD process and active plans to work towards a new zoning district which will more accurately reflecting the historic nature of the neighborhoods. These are things to think about, she said, and a decision is not needed today. We will flag this topic to come back to later.

Ms. Boyce asked if height is a factor for a nonconforming structure. Mr. Miller said for a building that is already in place, neighbors can't be purchasing property with the intention that this tall building will someday come down.

Just have a situation with the recent fire on Sixth Street where the house will need to be totally rebuilt, said Mr. Steedle.

Line 134 – no disagreement here. Density or use is governed somewhere else in the code.

Discussion on Nonconforming Uses (Lines 143-215)

Nonconforming use is a big, tough area, said Ms. McKibben. Beginning with Line 150 is a whole new concept, the change of use in the same category, borrowed from Portland. Portland has code for off-site impacts while we do not, said Ms. McKibben. I like the language, she said, so staff has the ability to document in some way showing we have done an evaluation of this in our review.

For Line 147, I would suggest that they don't operate between 11 and 6, said Mr. Voelckers. What about the conex containers we just approved with noise happening beyond the operating hours, asked Mr. Hickok. Ms. McKibben said, if this was a nonconforming use, then it would go before the Planning Commission. And then it would no longer be nonconforming, with a CUP, said Mr. Miller.

Mr. Voelckers suggested matching the operating hours to the noise ordinance.

For changes of use (Line 165) the example is the conversion of a storefront in a D5 zone, and my suggestion here is that these are reviewed on a case-by-case basis, said Ms. McKibben. An example is AmeriGas which is situated in a residential district, said Ms. McKibben in response to a query from Mr. Hickok.

Ms. McKibben explained that at Line 172, expansions, there is current code here with Portland language in italics, below. This could be simplified, she said. I thought we already decided not to allow expansion for nonconforming uses, said Mr. Hickok. Mr. Voelckers said what if AmeriGas wants to add more tanks on their property? We would want to decide that on a case by case basis, he suggested. How does that compare to Rainbow Foods expanding their grocery to more parts of the building (interior)? Ms. McKibben postulated about a small, nonconforming grocery in a residential district. This fits with CBJ policies about walkability for the neighborhood. Maybe more eyeballs will be on it if it goes through the Planning Commission process, said Mr. Steedle. I think Juneau is lucky because other communities have things like a strip club that are more emotional and controversial, so this is a great time to get this language into place, said Mr. Voelckers.

The intent for language beginning with Line 195 is to reinstate use. Ms. McKibben said it is interesting because the language is used in other communities but the intention is not explained. What if AmeriGas closes for a time to repair the building? I don't know what would be permissible, said Ms. McKibben. It is tricky and worth thought, said Mr. Voelckers. Maybe pull the director into the question to determine if there is legitimate reason

versus gaming the system, said Mr. Voelckers. Maybe proof goes back to the owner, suggested Mr. Miller. There are other concepts in Lines 199 and 200), is the committee okay with them, said Ms. McKibben? Mr. Voelckers said in Line 196 it says used discontinued for 365 days, does this apply here as well? How many people in Juneau know about filing a change of use application, asked Mr. Steedle? I think idea is legitimate, said Mr. Miller, but the reality is what if owners have a little grocery store which is accepted by the neighborhood and no one has ever said it is nonconforming. But then another large, cheaper grocery store opens nearby and the small store owners replace groceries with bicycles. Should they lose their ability to make a living when competition opens nearby driving them to sell bicycles instead of groceries, asked Mr. Miller? It seems difficult to determine what “different” use is; we might need more definition of changed use, said Mr. Voelckers.

Less than 365 days is considered unfriendly to property owners, said Ms. McKibben. But changing to a different thing is instantaneous, said Mr. Voelckers. I like the part about asking permission to reestablish, said Mr. Voelckers. This might clarify the variety of things that cause a stoppage – selling, moving, whatever – he said.

In Line 206 it was suggested to add an example.

Discussion on Nonconforming Residential Densities (Beginning Line 217)

It was decided that the committee will pick up here next time they meet.

IV) Next Meeting

Wednesday, October 11, 3:15 pm

VI) Adjournment

The meeting adjourned at 4:41 pm.

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

Wednesday, October 11, 2017
Community Development Department, Large Conference Room
3:15 p.m. to 4:30 p.m.

Members Present:

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

Members Absent:

Kirsten Shelton

Staff Present:

Laura Boyce (CDD), Beth McKibben (CDD), Rob Steedle (CDD), Amy Liu (CDD), Marjorie Hamburger (CDD)

I) Call to Order

Meeting called to order at 3:20 pm.

II) Approval of Minutes

September 20, 2017 Draft Minutes

Ms. McKibben pointed out that on Page 2, second to last paragraph, it was she who talked about the minimum lot size in Homer, not Ms. Boyce.

MOTION: *by Mr. Miller to approve the September 20, 2017 minutes as amended.*

The motion passed with no objection.

III) Agenda Topics

a) Update on Committee Topics and Actions

Mr. Voelckers reminded staff that the committee would like to start each Title 49 meeting with an update on legislative topics and actions. Ms. Boyce reviewed:

- Privately Maintained Access Roads Amendment is scheduled for the Assembly's Lands Committee meeting agenda on October 23. If the committee wants to move it forward, they will then schedule a hearing with the Planning Commission.
- Variances (AME2016 0002) is scheduled to be heard at the November 14 Planning Commission meeting.
- Eagles (AME2016 0019), Panhandles (AME2017 0003) and Essential Public Facilities (AME2017 0006) are scheduled to be introduced at Assembly meetings in October and November.
- Urban Agriculture (AME2017 0011) is in internal review with plans to come before the Committee of the Whole (COW) soon.
- Staff is working on a clean up to Junk and Salvage Yards (AME2016 0014) and will bring this to a COW, not back to the Title 49 Committee.

Mr. Miller asked how sure staff was about November 14th for variances. This date coincides with the American Planning Association (APA) training in Anchorage, but he doesn't want to miss that hearing. Mr. Steedle

concurred and said staff will push back the hearing date. Mr. Voelckers suggested the commission may even want to consider not having a meeting at all that night, since three commissioners will miss it.

b) Language for Nonconformities - Continued

Discussion on Nonconforming Residential Densities (Beginning Line 217)

Ms. McKibben said this is a whole new concept borrowed from Portland as they have similar challenges for housing, therefore it may be useful to use these concepts. The language creates new nonconforming situations. When use is residential, a triplex in a D5 zone for example, the dwelling is legally nonconforming. While the use conforms, the density does not, she said. In this case we are separating density from use. Is Aurora Arms an example, asked Mr. Voelckers? Yes, said Ms. McKibben. This building is a challenge in the world of finance; if Aurora Arms burnt to the ground, they would not be able to rebuild all 18 units – only 5 of them according to the zoning. Property owners of these condominiums would suffer a loss – 13 of them. The language in this section creates a new way of looking at that type of nonconforming, said Ms. McKibben.

Ms. McKibben said that Line 219, “Existing dwelling units may continue” needs more definition and description about what is meant by “amenities” so planners can understand the intent. There is a new process suggested in this section which is a nonconforming review. Would this be done by the department or the Planning Commission? She suggested maybe a departmental review with the option to kick it up higher. Mr. Voelckers asked about the overlay zone as now we have the Alternative Development Overlay District (ADOD) in place.

Does Aurora Arms meet the height requirement for the zoning, asked Mr. Miller? It is close, said staff. What is the point, then, he asked? If it has to meet underlying requirements maybe that could also be reviewed. Ms. McKibben suggested that maybe in such a case Aurora Arms could be rebuilt to meet height restrictions but still include the same number of units.

Mr. Voelckers said that on Line 219 the word “enlarged” seems tricky if the dwelling is already above density. Ms. McKibben said she reads it to mean that if the owner wants to take out one unit, such as to combine two units into one larger one, s/he can do that. So for a triplex in a D5 zone the owner can add another room but not add another unit.

People are nodding with intent, said Mr. Voelckers. This is about existing dwelling units, not the creation of new units, said Mr. Steedle. Ms. McKibben said for legislative history, new units added is a no, modifications to existing units is a maybe. If at Aurora Arms an owner combines two units into one, is the density now 17 units for the building into the future or can this be undone and returned to the original 18, she asked? In Portland if a unit is removed, the building can’t get it back. Staff and the commissioners need to think about this.

Discontinuance and Damage (Line 228)

This is interesting, and we have some of these buildings in Juneau, said Ms. McKibben. A building that is unoccupied but standing is a big policy question. Juneau has policies about housing and so having density rights continue despite being unoccupied is something we might want to support. Mr. Voelckers stated that the committee already talked about timelines for removing nonconforming structures in other categories and so why not be consistent? Mr. Miller said he thinks differently. If an owner discontinues a nonconforming use, then they lose that status in a year but in this situation, for example with a triplex that is nonconforming that suffers a fire which makes all units uninhabitable it might take more than a year to sort out insurance and contractors and so forth. Mr. Voelckers asked how fundamentally different density is to other nonconforming categories. Ms. McKibben said there is another section in this draft that talks about damage. However this section talks about

buildings that are vacant and deteriorating because of neglect, she said. The language here says you can redo the building; it is not about damage.

Mr. Voelckers said he thinks the situation should be treated the same as other types.

Accidental Damage or Destruction (Line 231)

Ms. McKibben said the language here is similar but there questions to be answered. She said she heard Mr. Voelckers liking the timeline of one year to rebuild. Mr. Miller said that if he gets a building permit but doesn't act on it, it expires in 18 months unless he renews it. Maybe there should be language here about in order to keep the status the owner has to have an active permit? Mr. Hickok asked doesn't the owner have to get an inspection within certain time? You can't renew a permit without getting an inspection, said Mr. Hickok. Mr. Voelckers said the 365 day marker was about the cessation of activity, but he agrees that if a process is underway and legitimate there could be some other timeline. But if nothing is happening, then the owner loses the nonconforming status. Ms. McKibben said we would have to create two different categories of passive and active regarding density. Portland has 5 years as the magic number. Mr. Hickok asked if the apartment building on Gastineau Avenue is an example of this. Why is it not being rebuilt? Ms. McKibben said it encroaches on a right-of-way; the issues for this building have to do with setbacks and parking, not density.

(Line 237 - If the structure is not rebuilt)

Ms. McKibben explained that this sentence is about if a structure is not rebuilt the density reverts to whatever zoning exists today. She said she likes having the two separate sentences. It is up to the commission to set the policy, the amount of time after which it reverts and if there is an opportunity for an extension. She thinks that 5 years is generous. If at 4.5 years the owner just poured a foundation, the status won't be taken away if work has begun. But if nothing has happened in 5 years, it will. Mr. Voelckers clarified that this is the first pass on language in this document, and the committee will finalize the draft later. Mr. Hickok said he thinks 5 years is generous. Mr. Greene said if within that time something has begun to be rebuilt, then the window should be extended. Mr. Miller said he wants to think about it a while. He said he likes the idea that every 18 months someone checks in about what is going on. What if an owner is elderly and doesn't have the energy to rebuild and leaves it to the grandkids, he postulated? There is value to having a triplex said Mr. Miller. Who will tell the owner they have to fill out the paperwork every 18 months? How do we make sure the person knows of the situation, he asked? Mr. Greene said that in this case it is damaged property. Ms. Boyce said 3 years could be reasonable for replacing housing units but if in 5 years the city doesn't get housing back this is a concern. Mr. Voelckers said he likes having 3 years to get something going, to initiate the rebuild. Mr. Miller asked again how a person will know they have to do this and that they will lose the value of the dwelling if they don't act. Mr. Steedle asked if thought the department should notify owners. Ms. McKibben recalled a burn on Basin Road and the house coming down immediately afterwards. Property owners have some responsibility, she said.

Ms. Boyce said she has trouble with the definition of abandoned buildings. If a person owns multiple homes around the country, for example, and spends only a little time in each, is the home considered vacant? Mr. Hickok said he wouldn't call it vacant if the house is maintained. Ms. McKibben said the concern is backwards, nonconforming status remains if a building is unoccupied. Mr. Steedle talked about squatters. There was a situation in Juneau where squatters were maintaining a building with water and electric being paid, but they were not the owners nor did they have permission to be there.

(Line 239 – If the repair cost is more than . . .)

Ms. McKibben said that this section takes us back to repair costs and the 75% figure, but the committee does not have to talk about that at this meeting. Mr. Voelckers said it seems we are saying the same thing a couple times. Why not state it once and then reference the statement for each of the nonconforming instances, he

wondered? Ms. McKibben said this is Law's job and the language should be consistent. There are pros and cons either way about restating it depending on use.

One Dwelling Unit (Line 242)

The language here is from Portland, said Ms. McKibben. Does this apply to us, asked Mr. Voelckers? Ms. McKibben said yes, in our industrial zoning with only caretaker units allowed as residences. There are some parcels where there is no industry but there is a caretaker unit. It may not apply to Juneau but we need to talk about it. How do we think about caretaker units in these zones, asked Ms. McKibben? Mr. Voelckers asked what we are thinking about here. Ms. McKibben explained that in industrial (I) and waterfront industrial (WI) zones, residences are not permitted but a caretaker unit as an accessory to industrial use is permissible. However Juneau has some residential use in these zones on lots with no active industrial use taking place on the parcel. She said there are lots of policies in the Comprehensive Plan that talk about the need for industrial areas in the borough and talk about not allowing residential uses in these zones. Ms. Boyce said that recently a Conditional Use Permit for a marijuana facility was protested due to residential use in the industrial zone where the facility was proposed to operate.

Mr. Voelckers suggested the committee should give this concept the benefit of half-engaged thought. He said it seems this raises a philosophical question about what might be considered a "bad actor", a house in a WI or I zone that is damaged, do we want to give the owner the ability to rebuild or have it go away because it doesn't belong? Yes, that is the question, said Ms. McKibben. Mr. Miller said he thinks this fits for industrial land that is very active and has a caretaker unit on it, storage for boat condos or a plumbing contractor or tour company as examples. But what about a caretaker unit on an industrial parcel owned by a contractor who just parks dump trucks and wants someone to keep eye on things? Ms. McKibben said a caretaker unit is still conforming for a parking yard; this is ok. But, she said, we also have situations where an industrial use took place and a caretaker unit was built in conformance but then that industrial building was made into condominiums and the caretaker unit was no longer associated with the industrial use. Anyone could buy the former caretaker unit but not do any care taking of the industrial use, said Ms. McKibben. This has happened. Mr. Voelckers asked if there are cases where people are just gaming the system. There are a few from a while back, said Ms. McKibben. Mr. Steedle pointed out Sherwood Lane and Crazy Horse Drive during a discussion about installing an asphalt plant. There were residences in this industrial zone, and people were against the asphalt. We can run some data on this, said Ms. Boyce.

Mr. Voelckers said this seems like a fringe situation. He would err on the side of if someone is gaming the system, then we should not have to accommodate. Mr. Hickok said what about the Fairweather barn, is that in an industrial zone? If the zone is commercial, you can have more residential use, said Ms. Boyce. Mr. Voelckers suggested maybe staff look at whether this situation is worth giving language in the document when it is not likely to have much use in our community. Ms. McKibben brought up the point of a parcel where the zoning changed after the house was built, or a duplex built before zoning changed to industrial, then should the owner be able to keep that use. Mr. Voelckers said these situations are already covered elsewhere.

(Line 260 – Nonconforming densities may not be enlarged . . .)

Mr. Voelckers pointed out that this is literally the same statement as on Line 226.

Intentional Damage, Destruction or Demolition (Line 262)

We don't want to encourage people to set fire to their homes, said Ms. McKibben. The fire department will determine if something has been intentionally set and this should not be rewarded.

Nonconforming Parking (Line 266)

The concept here is already in current code, said Ms. McKibben. She brought the committee's attention to the words "may be replaced or reconstructed". The new requirement is less, she said, now just 1 parking space is required, and she thinks this works. Mr. Voelckers asked if this is specific. Only to nonconforming situations, said Ms. McKibben.

Nonconforming Signs (Line 268)

This topic is addressed in the code that deals with signs (49.45.400).

Nonconforming Situation Review (Line 269)

Ms. McKibben said this is a new concept, and she has been thinking about what the process might look like. What does this mean, asked Mr. Steedle? Ms. McKibben said to change the use or to get density approved owners would need to go through a review regarding nonconformance. Are we talking about an administrative review and the Board of Adjustment, asked Mr. Steedle? There would need to be some sort of process for establishing this status, said Ms. McKibben. The language here asks that the owner provide evidence of a nonconforming status. Mr. Hickok asked if someone purchases a property that is in some way nonconforming, will they have to go through this review. Ms. McKibben said that right now people call the department and staff does the research, but she thinks this needs some thought. The department would have records on a property and share them with an appraiser if this review had already been done. But if not done, we haven't thought about how to handle that.

Mr. Voelckers said the process of determining a property to be nonconforming might want to be at the front end of the document because it leads to a series of active requirements.

(Line 271 - Approval criteria.)

Ms. McKibben reviewed the list of proposed criteria. She suggested thinking about Rainbow Foods, which is a nonconforming use grocery in a residential area. "With mitigation measures, there will be no net increase in overall detrimental impacts . . ." This list is borrowed language, she said. We would want to also look at on-site parking requirements for the parcel; what else for this list? Mr. Voelckers suggested public safety; he said he was thinking about AmeriGas in the Valley. Does the committee want to think about language regarding neighborhood harmony asked Ms. McKibben? Mr. Voelckers said he would, for example what about a strip club? He would like to include the opportunity to raise the question. Mr. Greene said he likes this phrase as a catch-all to for something that doesn't fit in a neighborhood.

The line about outdoor displays, etc. (Line 280) pertains to residential uses, said Ms. McKibben. This language refers to maintaining neighborhood character. To be contrary, said Mr. Voelckers, why are not all items on Lines 276-280 also relevant elsewhere? Mr. Steedle suggested that the sentence beginning on Line 282 could say "in addition". Ms. McKibben said that this section is an additional layer of review for a residential district and might not be applicable elsewhere. She suggested leaving the language for Mr. Palmer to work on, as there is structure for writing an ordinance that would make it clearer.

Definitions (Line 291)

Ms. McKibben pointed out that the draft includes a boatload of definitions. In particular, a definition for nonconforming density is important because this is a new concept. Does it seem clear to others, she asked? Mr. Voelckers asked if these were pulled from the Portland model. Some are already in our existing code, replied Ms. McKibben, some come from other communities and from the dictionary of planning concepts.

Mr. Voelckers pointed out the phrase on Line 309 about intent and said that this is hard to establish. He felt this might need some thought, and he suggested making the language more about action than intent which is hard to suss out. I don't know if there is a better way to do it, said Ms. McKibben. Mr. Voelckers asked how can one prove intent or lack thereof. Ms. McKibben said that when something is not defined, we go with a common definition.

(Line 315 -Discontinued)

Ms. McKibben said that the 365 consecutive days is used in our code. The committee liked that number.

Ms. McKibben said she is not sure if all these definitions are needed in this document. Are these definitions broader than just this piece of Title 49, asked Mr. Voelckers? Yes, nodded Mr. Steedle and Ms. Boyce.

Mr. Voelckers asked about the expectations of time on this document. Will it come back from law with baby wheels on it? Ms. McKibben said she wants to go through it and make notes on what needs more input. Ms. Boyce asked if staff should bring back the draft ordinance before it moves on to the next step. Mr. Voelckers said he would like to see it again. Once it is all written down, he would like staff and committee members to think about their own experiences and see how this would apply. Ms. McKibben said she is not sure of Mr. Palmer's schedule and when he can get together with CDD staff to discuss updating this draft.

IV) Next Meeting

Wednesday, November 15, 3:15 pm.

VI) Adjournment

The meeting adjourned at 4:25 pm.



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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.

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*This PAS QuickNotes was prepared by
David Morley, AICP, senior research associate
at APA and APA's PAS coordinator.*

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

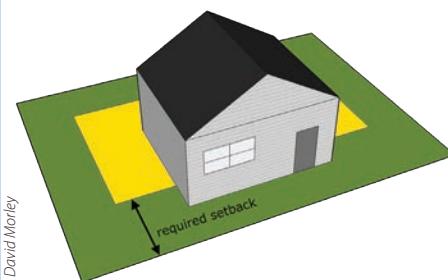
Communities have typically applied zoning standards prospectively. In other words, new standards only apply to new development. Existing nonconforming lots, structures, and uses are grandfathered under new zoning standards. The early framers of zoning law did this on purpose to take the sting out of 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)

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.

(Serial No. 87-49, § 2, 1987)

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.

(Serial No. 87-49, § 2, 1987)

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.

(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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Abandonment, Discontinuance and Amortization of Nonconforming Uses: Lessons for Drafters of Zoning Regulations

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Zoning and Land Use Planning

*Patricia E. Salkin**

Abandonment, Discontinuance and Amortization of Nonconforming Uses: Lessons for Drafters of Zoning Regulations

I. Introduction

Observing that a disproportionate number of reported cases highlighted on the Law of the Land blog (www.lawoftheland.wordpress.com) are opinions addressing the subject of nonconforming uses, this column attempts to unravel some of the legal issues that stem from poor drafting of these provisions in zoning regulations, and demonstrates options for practitioners and drafters to better regulate for the eventual disappearance of nonconformities.

Early drafters of zoning legislation believed that some uses of land were incompatible with others and that more efficient employment of land resources would be achieved if such incompatible uses were cleanly separated. The drafters respected the “natural” patterns of development evidenced by existing uses, and use districts established by law unavoidably included land devoted to uses proscribed by the new zoning regulations.¹ However, for legal and political reasons, the drafters avoided direct attacks on these incompatible or nonconforming uses and instead permitted existing uses to continue, albeit taking steps to gradually eliminate them over time.² The early drafters took steps to reduce the life expectancy of these nonconforming uses by limiting their right to change, expand, alter, repair, restore, or recommence after the use stopped for a specified period of time.³ With such restrictions, the theory was that market forces would eventually force operators and owners to eliminate these nonconforming uses.⁴ This expectation, however,

*Patricia Salkin is the Raymond & Ella Smith Distinguished Professor of Law and Director of the Government Law Center of Albany Law School. This column is based on presentations by the author at the August 2009 ALI-ABA Land Use Institute in San Diego, CA, and the November 2009 Planning, Zoning and Eminent Domain Institute of the Center for American and International Law in Dallas, TX.

ZONING AND LAND USE PLANNING

has not been realized, and today the problems associated with the regulation and desire to eliminate nonconforming uses make up a significant portion of land use related litigation. The American Planning Association's Legislative Guidebook on Smart Growth explains that in deciding how to treat nonconforming uses, local governments must address two competing principles: achieving ultimate conformity balanced with fairness in requiring termination of a use or demolition of a structure that was constructed or commenced in compliance with the law when the owner, relying on the legality of the land use or structure at the time, incurred time and money in maintaining the structure or continuing the use.⁵ More recently, attention has been focused on the legal nonconformities of development standards.⁶

The authority of a municipality to deal with nonconforming uses may be broadened or narrowed by the enabling acts which are the source of its zoning power.⁷ However, most states do not address the subject of nonconforming uses in these statutes.⁸ Therefore, the regulation of nonconforming uses is left largely to municipalities and the unique approaches and language they may individually choose to employ with respect to these uses. While there are many aspects of a full discussion of the regulation of nonconforming uses, this column is focused on the narrow issue of how local governments seek to use their authority to eventually eliminate nonconforming uses through regulatory determinations of passive abandonment and/or discontinuance of the use, and well as through the more active method of amortization.

II. Abandonment or Discontinuance

Municipal legislatures have included in their zoning ordinances specific provisions for the termination of nonconforming uses based on the theory of discontinuance of use or abandonment. Some ordinances terminate nonconforming uses after a specified period of "abandonment" while other regulations are drafted in terms of "discontinuance" of use, or allowing a nonconforming structure to remain vacant.⁹ The periods of vacancy, discontinuance, or abandonment that may trigger a permanent cessation of use can range from 30 days to two years.¹⁰

Many jurisdictions have established a two-pronged subjective test to determine if a property owner has abandoned a nonconforming use.¹¹ This test typically requires "(1) an intention to abandon, and (2) some overt act or failure to act

which carries a sufficient implication that the owner neither claims nor retains any interest in the subject matter of the abandonment.”¹² The owner has the burden of proof by a preponderance of evidence to show “the use is a continuing and definite intention.”¹³ Other municipalities instead choose to remove the element of intent. In these situations, discontinuance provisions specifically state that they operate to prevent and prohibit resumption of a nonconforming use after a specified period of time has lapsed, regardless of intent.¹⁴ This type of provision has been construed as establishing a rule of evidence and operates even where there is no intent to abandon or even where there was an intent *not* to abandon.¹⁵ While the courts have agreed that municipalities have power to impose such a restriction, they are not in agreement as to whether it is alone sufficient to prevent resuming the nonconforming use.¹⁶ A number of courts still construe discontinuance as abandonment and require proof of discontinuance for the specified period of time to be supplemented by some proof of an overt act, or failure to act, which would justify a finding that there had been an intent to abandon the rights inherent in the nonconforming use.¹⁷

III. Drafting and Interpreting Ordinance Language for Abandonment and Discontinuance

Absent statutory guidance, exactly what constitutes abandonment or discontinuance of a nonconforming use is up to the municipality in the first instance. Much of the litigation can be avoided if municipal drafters were more careful in wording. What follows are examples of the common approaches to drafting that demonstrate the variety of choices municipalities must make. It is critically important for municipal attorneys to review the applicable zoning ordinance/law when it comes to the subject of nonconforming uses to guide the municipality in a discussion for purposes of ensuring that the ordinance, as written, will accomplish the desired outcome. Furthermore, a preemptive examination of the nonconforming use section of the zoning regulation can help municipal attorneys and planners to identify vague provisions and standards that can be clarified prior to applicants, property owners and neighbors invoking a poorly drafted regulation that is then left to the courts to interpret.

For example, consider the following issues:

ZONING AND LAND USE PLANNING

1. What is the desired length of time for a nonconforming use to have ceased for the municipality to consider it abandoned and no longer legally recognized?

There is no “right” length of time for a municipality to allow a nonconforming property owner to cease or suspend operation of the use before future use must conform to the zoning regulation. This is a decision that each municipality must make for itself. The common drafting problem is the ordinances can be poorly written with vague and ambiguous terms. Below are examples of both clear and unclear ordinance provisions, as well as provisions that show a range of time from 30 days to two years before abandoned or discontinued nonconforming uses lose their preferred status as such. These illustrative examples are then followed by examples of recent litigation where the issue before the court centered on the language of the zoning ordinance with respect to time.

Examples from zoning ordinances:

- a. **“If such nonconforming use of land ceases for any reason for a period of more than 30 days**, any subsequent use of such land shall conform to the regulations specified by this chapter for the district in which such land is located.” City of Grand Ledge, MI, Charter, Part II, General Legislation, Chapter 220 Zoning, Article XX: Nonconforming Lots, Structures and Uses, § 220-93 Nonconforming uses of land (C).
- b. **“If any such nonconforming use of land ceases for any reason for a period of more than 30 days**, any subsequent use of such land shall conform to the regulations specified by this chapter for the district in which such land is located.” City of El Reno, OK, Charter, The Code, Part II, General Legislation, Chapter 361 Zoning, Article V: Nonconformities, § 361-30 Nonconforming Uses of Land (C).
- c. “Except as herein provided, no nonconforming use may be reestablished after it has been ***discontinued or vacated for a period of 180 days or more.***” City of Albany, NY, Chapter 375 Zoning, Article XIII, Sec. 375-90(A).
- d. “When a nonconforming use of land, structure and premises in combination **is discontinued or abandoned for six consecutive months or for 18 months during any three-year period (except when government action impedes access to the**

REAL ESTATE LAW JOURNAL [VOL. 38:4 2010]

premises) the land, structure or structure and premises in combination shall not thereafter be used except in conformity with the regulations of the district in which it is located.” Borough of Gibbsboro, NJ, Part II, General Legislation, Chapter, 400 Zoning, Article X: Nonconforming Uses, § 400-77 Abandonment. [Amended 2-15-1983 by Ord. No. 83-1].

- e. **“If any nonconforming use of land ceases for any reason for a period of one hundred eighty consecutive days or more**, any subsequent use of said land shall conform to the regulations for the zoning district in which the land is located.” Code of the City of Evanston, WY, Chapter 24 Zoning, Article X Nonconforming Uses, Structures And Lots, § 24-98 Nonconforming use of land (C).
- f. “If a nonconforming use of a building, structure or lot is ***abandoned for a continuous period of one year***, subsequent use of such building, structure or lot shall conform with provisions of this chapter. For purposes of this chapter, abandonment shall commence when the nonconforming use ceases.” Township of Doylestown, PA, Article XXI Zoning, sec. 175-112 (D).
- g. “Shall not be reestablished if such use has for any reason been discontinued for ***a period of over one year*** . . .” Village of Bronxville, NY, Chapter 310 Zoning, Article V, sec. 310-25(A)(3).
- h. **“Whenever a nonconforming use has been discontinued or in a non-operative status for a period of one year or more**, such use shall not thereafter be reestablished, regardless of change of ownership, and any future use shall be in conformity with the provisions of this Code. The casual, intermittent temporary or illegal use of land or buildings shall not be sufficient to establish the existence of a nonconforming use, and the existence of a nonconforming use on a part of a lot or tract shall not be construed to establish a nonconforming use on the entire lot or tract. Town of Bethany Beach, DE, Chapter 245: ZONING, ARTICLE V Nonconforming Uses and Structures, § 245-32. Abandonment. [Amended 12-16-1983 by Ord. No. 123].
- i. **“When a nonconforming use of land ceases for any reason for a period of more than one year, its legal, nonconforming status is terminated.”** Town of Bridgeville, DE, Charter, The Code, Part II: General Legislation, Chapter 234: Land Use and

ZONING AND LAND USE PLANNING

Development, Article V: Nonconforming Situations, § 234-28: Nonconforming Uses (C) Termination of nonconforming status.

- j. “Without just cause, no building or portion thereof used in whole or in part for a nonconforming use in a Residential or Commercial District **which remains idle or unused for a continuous period of 12 months, whether or not the equipment or fixtures are removed**, shall again be used except in conformity with the regulations of the district in which such building or land is located.” Town of Fenwick Island, DE, Charter, Part II, General Legislation; Chapter 160 Zoning, § 160-6: General regulations; exceptions. (D) Nonconforming uses. (2) Discontinuance of nonconforming uses.
- k. “**If any nonconforming use of land or of a structure housing a nonconforming use ceases or is discontinued for any reason for a period of 12 or more consecutive months**, any subsequent use of such land or structure shall conform to the requirements of this chapter in all respects.” Town of Bar Harbor, ME, Charter, The Code, Chapter 125 Land Use, Article IV Nonconformity, § 125-54 Nonconforming uses of land or structures. (E) [Amended 11-4-2003].
- l. “(A) **If a nonconforming use of a building or land is discontinued, razed, removed or abandoned for 365 consecutive days**, subsequent use of such building or land shall conform with the regulations of the district in which it is located. (B) **Abandonment shall commence on the date when customary efforts to continue the use cease.**” Code of the Borough of Quakertown, PA (Bucks County), Chapter 27 Zoning, Part 4 General Regulations, § 406. Nonconformities. (Ord. 983, 3/4/1992; § 4.6; as amended by Ord. 1053, 9/1/1999, § II) 5. Abandonment.
- m. “Abandonment: If any nonconforming use of land or a building is ***discontinued for a period of two years or more*** such land or building shall thereafter be used or developed only in accordance with the terms of the Abington Zoning Bylaw for the zoning district(s) in which such property is located.” Abington, MA—Art. XI Nonconforming Uses, Structures and Lots, sec. 175-70 (A).
- n. “If a nonconforming use is ***discontinued for a period***

of 24 consecutive months, further use of the property *shall conform to this chapter or be subject to review by the Zoning Board of Appeals.*" Town of Lake George, NY, Chapter 175 Zoning, Article VII, sec. 175-65.

2. Does it make a difference whether the property owner intended to abandon the use?

Typically zoning ordinances remove the element of intent from an abandonment analysis, making it easier to prove that the use had ceased for the applicable period of time. Where intent is an element to be considered, evidentiary issues can become problematic. What follows are examples of provisions for zoning ordinances that illustrate various approaches to addressing the issue of intent, and then some recent cases where intent was an issue.

Examples from zoning ordinances:

- a. "A nonconforming use, if is discontinued for a continuous period of six months, shall be deemed terminated *unless the property owner can demonstrate to the reasonable satisfaction of the Planning and Zoning Commission his or her intent to maintain and continue such use.*" Bethel, CT (Fairfield County), sec. 118-40(D).
- b. "Abandonment of a nonconforming use shall consist of some act, or failure to act, which *evidences the owner's lack of intent to continue* the nonconforming use *and is not refuted by any demonstration on the part of the owner of an intent not to abandon the use*; provided however, that any involuntary interruption caused by catastrophe, if any nonconforming use ceases for a period of one year, the owner will be presumed to have abandoned the nonconforming use unless such *presumption is rebutted by substantial evidence of intent not to abandon* the use. Town of Westerly, RI, Chapter 260 Zoning, Article VII, sec. 260-32(B)(3).
- c. "*Intent to resume a nonconforming use shall not confer the right to do so.*" Village of Bronxville, NY, Chapter 310 Zoning, Article V, sec. 310-25(A)(3).
- d. "**If such nonconforming use of land ceases for any reason** for a period of more than 30 days, any subsequent use of such land shall conform to the regulations specified by this chapter for the district in which such land is located." City of Grand Ledge, MI, Charter, Part

ZONING AND LAND USE PLANNING

II, General Legislation, Chapter 220 Zoning, Article XX: Nonconforming Lots, Structures and Uses, § 220-93 Nonconforming uses of land (C).

- e. **“If a nonconforming use of a building or land is voluntarily abandoned and ceases for a continuous period of one year or more,** subsequent use of such building or land shall be in conformity with the provisions of this chapter.” Borough of Shippensburg, PA, Part II General Legislation, Chapter 150 Zoning, Article X Supplementary Regulations, § 150-48 Nonconforming structures and uses, (E) Abandonment.
- f. **“(C) Continuity of nonconforming uses. No nonconforming use may be reestablished after it has been discontinued for 12 consecutive months. The vacating of premises or structures or the non-operative status of such premises or structures shall be conclusive evidence of discontinued use . . .”** Township of Brecknock, PA, Part II: General Legislation Chapter 110 Zoning, Article III Nonconforming Lots, Uses and Structures, § 110-10 Nonconforming uses and structures.
- g. **“(D) A nonconforming building or a building in which a nonconforming use is conducted that is damaged or destroyed by any casualty to any extent may be restored within two years after such destruction or damage** but shall not be enlarged except as provided in § 170-73 above. (E) **If any nonconforming use ceases for any reason for a continuous period of two years or more, other than for reasons beyond the control of the owner of the property,** except as provided in Subsection D above, or is changed to or replaced by a conforming use, the land and building thereupon shall be subject to all the regulations as to the use for the zoning district in which such land and building are located as if such nonconforming use had never existed.” Rappahannock County, VA, Part II, General Legislation Chapter 170 Zoning, Article VIII Nonconforming Uses § 170-74 General Regulations.

Recent Litigation:

In two recent cases involving the nonconforming use of a single family home as a rental property, the courts in New Jersey and Utah came to different determinations on whether abandonment had occurred based on two very similar fact patterns.¹⁸

Some courts have not looked past the presumption of abandonment created by a nonconforming use's statutorily proscribed time period of inactivity. In those courts a showing of intent to abandon a nonconforming use is not required when the statutory time period of abandonment is reasonable and specifically stated in the ordinance.¹⁹ Other courts have ruled that intent is only important where some force outside the control of the property owner prevents the continuous use of the land in a particular manner. When there is nothing involuntary about the cessation of the nonconforming use, the showing of a landowner's intent to abandon is not required.²⁰

Courts which follow this two-pronged approach requiring a showing of intent and an overt act or failure to act, have ruled that mere non-use is not sufficient to establish the fact of abandonment absent other evidence tending to prove the intent to abandon.²¹ According to such reasoning, although the passage of time can create an inference of abandonment there must be the additional showing of an intent to abandon the nonconforming use before the nonconforming use is deemed abandoned.²² The longer the time of cessation the greater the weight is attributable to that factor, but it can be overcome with evidence of the owner's intent to resume operation and factors which have prevented him/her from continuing operation.²³

A zoning ordinance requiring a proof that a nonconforming use was "voluntarily discontinued" for abandonment to occur required proof of a manifest intention to abandon the use coupled with acts or omissions implementing that intent.²⁴ Proof of a previous landowner's decision to dissolve a corporation considered a pre-existing nonconforming use and his choice to cease doing business sufficiently met this burden, and when coupled with nonuse for a statutorily sufficient time period equated to abandonment of the nonconforming use.²⁵ Attempts to sell a property for uses other than nonconforming uses, statements of the owner not to return to the site in question, and removal of equipment integral to the nonconforming use are all acts that have been found equating to the abandonment of a nonconforming use.²⁶

Some courts have ruled that the actions and intent of the current or prior landowner are crucial in determining abandonment of a nonconforming use, while the actions and intent of a lessee or future owner are irrelevant.²⁷

3. Can the Period of Abandonment/Discontinuance be Extended?

Remembering that the goal of zoning is to ultimately bring

ZONING AND LAND USE PLANNING

all parcels into compliance with the allowable uses in the zoning district, it might seem peculiar to discuss whether a municipality can extend the time of abandonment or discontinuance of a nonconforming use beyond the time initially set in the local regulation. However, some municipalities, perhaps as a result of negotiation and compromise in the drafting of new zoning regulations, do allow for this possibility. These ordinance provisions should set forth the specific circumstances that must exist for this to occur, as well as describe the process that must be followed for the requesting and granting of this extension. What follows are examples.

Example from a zoning ordinance:

- a. ***“The Zoning Board of Adjustment may, for good cause shown, extend the period of permitted discontinuance up to three additional years,*** provided that application in writing is made to the Board at least 60 days before the commencement date of such three-year additional period.” City of Nashua, NH, Chapter 190, Article XII, sec. 190-122.

Recent Litigation:

Where the zoning ordinance is very strict regarding the extension of the abandonment period, large scale operations will be affected much more than small ones. Where an injunction prevented the operation of a nonconforming use landfill, after the injunction was lifted the landfill was not able to become operational quickly enough not to be deemed abandoned under the applicable ordinance. The controlling statute contained no exception for a complex business such as a landfill, which required considerable startup and development time for it to be functioning after the injunction was lifted.²⁸

4. Can an abandoned nonconforming use be re-established?

Although municipalities are typically strict in their quest to eliminate nonconforming uses, some jurisdictions provide a mechanism for the re-establishment of the nonconforming uses. The first example below seems to indicate that the nonconforming uses shall be allowed to continue by special permit. Where there are no conditions on the length of time a special use permit is granted, and since such permit runs with the land, this may in essence convert the nonconforming use closer to a more permanent use. Further, should municipalities desire to allow the nonconformity to continue,

it might be better to either consider granting a use variance if the subject property can meet the statutory test for such, or consider rezoning to allow the use if it is no longer considered offensive.

Examples from zoning ordinances:

- a. "Any nonconforming structure use which has been abandoned or not sued for a period of two years, or more shall not be re-established, ***except by the granting of a special permit from the Zoning Board of Appeals*** in accordance with provisions of this ordinance." Town of Pittsfield, MA, Town Code Article 23-8 Non-conformities, Sec. 8.4 Abandonment and Non-Use.
- b. "**In the event that a nonconforming use of any building or place is discontinued for a period of six months**, the use of the same shall thereafter conform to the use permitted in the district in which it is located; **provided, however, that the Board of Commissioners may permit a continuation of such nonconforming building or premises.**" Town of Redington Shores, FL, Charter, Part II, General Legislation Chapter 90 Land Development Regulations Part 5 Zoning, Article XXV District Use Regulations, § 90-114 Nonconforming Uses. (C) Discontinuance of a nonconforming use.

Recent Litigation:

Where a zoning ordinance stated that once a nonconforming use is abandoned, it cannot be reestablished, the operation of a nonconforming use on property pursuant to a special exception was deemed by a court to be abandonment of the nonconforming use.²⁹ Once the special use permit is granted, it becomes the operative document regarding the permitted uses of the property, and the use of the property is no longer considered a nonconforming use or the time period required for abandonment begins.³⁰ However, the intent to discontinue a nonconforming use cannot be proven where a municipality forces a property owner to apply for a special use permit for an activity substantially similar to the nonconforming use and where the property owner has no intent to end the nonconforming use.³¹

5. Does use of the entire building need to be abandoned to eliminate the nonconformity?

Another area that has been the subject of litigation surrounds the question of exactly what constitutes a discontinuance of use. For example, is it use of the building/structure

ZONING AND LAND USE PLANNING

for any reason in whole, or just in part? Sometimes municipalities choose to use the phrase “substantial discontinuance” or discontinuance of “substantially all” of the use. The immediate problem is that the ordinances fail to define the term “substantial,” providing a field day for negotiation between landowners and the municipality, and ultimately often requiring court intervention due to poor drafting.

Examples:

- a. “Any nonconforming use ***or portion thereof*** which becomes unoccupied, unused or discontinued and remains unoccupied, unused or discontinued during any continuous period of twelve (12) months shall be deemed an abandonment of the nonconforming use . . .” City of Harrisburg, PA, Zoning Code 7-302.2 Reversion of Nonconforming Structures, Buildings and Uses.
- b. “The ***substantial discontinuance*** of any nonconforming use for a period of one year or more terminates such nonconforming use of a structure or premises, and thereafter said structure shall not be used, except in conformity with provisions of this ordinance.” Town of Islip, NY, Chapter 68 Zoning, Article III, sec. 68-15(B).

Recent litigation:

In interpreting the Zoning Resolution of the City of New York to determine the appropriate legal standard to determine whether a nonconforming use has been discontinued, the New York Court of Appeals overturned both the trial court and Appellate Division, concluding that substantial—rather than complete—discontinuation of the active, nonconforming activity forfeits the nonconforming use, and that the good faith of the owner is irrelevant to that determination.³² Here, Section 52-61 of the Zoning Resolution prohibited continuation of a nonconforming use if, during a two-year period, “***the active operation of substantially all*** the nonconforming uses * * * is discontinued” (emphasis added). The Board of Standards and Appeals found minimal warehouse activity following the complete stoppage of operations for 20 months, and held that this cessation failed to preserve the nonconforming use status. As a result, the Board revoked the building permit that had allowed the petitioner to maintain a nonconforming use on the premises. The Court upheld the Board’s determination finding that it was supported by substantial evidence.

6. Are there exceptions to the period of abandonment?

Most zoning ordinance provisions desire to eliminate

nonconformities, and therefore leave no opportunity for discontinuance after the use is abandoned, unintentionally or even involuntarily (e.g., due to an act of god). Occasionally, however, a municipality chooses to overlook, or not count, the period of time that a use was discontinued as a result of certain intervening actions that are not within the control of the property owner.

Example from a zoning ordinance:

- a. ***"If any portion of the twelve month period of discontinuance is due solely to fire, other casualty, act of God, or action by a governmental jurisdiction,*** including, inter alia, a proposal submitted to City officials for consideration of either a reuse of or a continuation of the same use of the structure, then ***such portion of time shall not be counted in the afore-said twelve month period*** following which nonconforming use shall be deemed abandoned." City of Harrisburg, PA, Planning and Zoning Code, 7-703.2(c)(2).

Recent litigation:

Where a zoning ordinance contained a provision allowing a nonconforming use fraternity to continue so long as the fraternity's privileges were not revoked by the university for more than a year, the revocation of privileges for more than a year immediately expired the nonconforming use. The subsequent lease of the property for use by another fraternity within one year did not function to preserve the nonconforming use.³³

7. What constitutes evidence of abandonment?

Some zoning regulations provide examples of what evidence will be considered to assess whether the use has been abandoned.

Examples from zoning ordinances:

- a. "A nonconforming use shall be presumed abandoned and its right as a nonconforming use extinguished when any of the following has occurred:
"(A) If a nonconforming use of a building or land is discontinued, razed, removed or abandoned for 365 consecutive days, subsequent use of such building or land shall conform with the regulations of the district in which it is located. **(B) Abandonment shall commence on the date when customary efforts to continue the use cease."** Code of the Borough of Quakertown, PA (Bucks County), Chapter 27 Zoning,

ZONING AND LAND USE PLANNING

Part 4 General Regulations, § 406. Nonconformities. (Ord. 983, 3/4/1992; § 4.6; as amended by Ord. 1053, 9/1/1999, § II) 5. Abandonment.

- b. “(C) Continuity of nonconforming uses. No nonconforming use may be reestablished after it has been discontinued for 12 consecutive months. **The vacating of premises or structures or the non-operative status of such premises or structures shall be conclusive evidence of discontinued use.**(F) Restoration and repair. (1) Restoration (c) **The reconstruction shall start within one year from the time of damage to the structure.**” Township of Brecknock, PA, Part II: General Legislation Chapter 110 Zoning, Article III Nonconforming Lots, Uses and Structures, § 110-10 Nonconforming uses and structures.

Recent Litigation:

As abandonment of a nonconforming use is often a question of fact, many cases involve landowners arguing the zoning board had incorrectly ruled that their nonconforming use was abandoned. Landowners have been able to rebut the presumption of the abandonment of a nonconforming use through the use of affidavits and by casting doubt on contrary evidence.³⁴ Half-hearted efforts of complying with chronological requirements have not been sufficient to rebut the presumption of abandonment.³⁵

In *Zall v. Zoning Board of Appeals of Salisbury*,³⁶ the owner of property adjacent to a nonconforming use brought an action seeking to annul a special permit granted to the nonconforming use property owner (defendant) by the zoning board (co-defendant). The special permit authorized the defendant to change a prior nonconforming use of its beachfront property from a nightclub to a restaurant. The trial court vacated the board’s decision to grant the special permit concluding the defendant had abandoned the nonconforming use. The defendant appealed. The applicable zoning ordinance stated that nonconforming uses cease to exist after two years of non-use. Aware that the two-year period set forth in the by-law was about to expire, the defendant made what the judge viewed as a weak effort to open for business in August, 2001. The defendant obtained a temporary ten-day permit to serve “prepackaged food with milk.” However, he did not purchase new goods for sale, and the only food available was several years old. The defendant was on the premises several hours each day during the ten-day period, with the lights on and the door unlocked, but did not make

any sales. The defendant did not advertise the business or do anything that would put the public on notice that a food establishment had opened. A month later, the defendant threw the items out. The Court did not find the defendant's actions to be a sufficient showing of operation of his business to reverse the trial court's determination that the nonconforming use was abandoned. As a result, the lower court's decision to vacate the zoning board's decision to grant a special permit to NEBC was affirmed.³⁷

8. Can an abandoned use be converted to a less intensive nonconforming use?

Typically zoning ordinances provide that abandoned uses may resume or be converted to a less intensive nonconforming use. Courts prohibit the conversion back to the more intensive use.³⁸ Likewise, courts have not allowed the reversion to a previously abandoned more expansive nonconforming use once it has been abandoned.³⁹ Where the owner of a prior nonconforming use billboard improperly added lights to the sign, he did not abandon the original nonconforming use. The court ruled that an improper expansion of a nonconforming use does not equate to an overt act of abandonment as the original use was not abandoned.⁴⁰ On the other hand, where a nonconforming use deli was converted into a take-out Chinese restaurant which operated beyond the authorization the zoning board granted to the deli, the original nonconforming use was deemed abandoned.⁴¹ The subsequent reversion of the property to a deli use was not possible as the court ruled the nonconforming use was abandoned by the prolonged improper use as a Chinese restaurant.⁴² The sale of alcohol by a restaurant has been considered an accessory use and not an expansion nor a separate and distinct use to a nonconforming restaurant.⁴³ As such the decision of a previous owner of a nonconforming use to stop serving alcohol for several years did not affect the restaurant's ability to serve alcohol in a restaurant setting.⁴⁴

IV. Amortization

A more active or aggressive method of eliminating nonconforming uses is amortization. This concept has its roots in the early 1915 case of *Hadacheck v Sebastian*, 239 U.S. 395 where the Court confirmed that the City could eliminate the brickyard use on the property in question without such action necessitating compensation. Amortization has always been a controversial tool, gaining most notoriety perhaps in

ZONING AND LAND USE PLANNING

the 1960s and 1970s as advocates attempted to use this method to force the removal of billboards along highways. By 1978, governments were prohibited from using amortization to remove these signs on federally funded highways absent compensation. While few states have specific statutory guidance on amortization, the general rule from common law is that the property owner/user must be given enough time to realize a reasonable return on their investment. Although courts approach amortization issues on a case-by-case basis, a balancing test is typically employed to weigh the value to the public in eliminating the use and the harm or private loss suffered as a result of the amortization.

What follows are examples from local zoning laws and ordinances demonstrating various approaches to implementing amortization efforts. Readers must keep in mind, however, the need for appropriate balancing.

1. Time for the Nonconforming Use to Conform

- a. "Any adult arcade, adult bookstore, adult cabaret, adult entertainment establishment, adult motel, or adult motion picture theater, as defined in this Ordinance, in existence at the time of adoption of this Ordinance which violates or does not conform to the provisions hereof (hereafter, a "pre-existing, non-conforming business") **shall conform to the provisions of this Ordinance within a period of three (3) years from said adoption of this Ordinance.**" City of Jackson, MS, Article XIII, § 1303.03-A. Amortization of Non-conforming Use.
- b. "Any nonconforming open use of land or any nonconforming billboard or advertising structure not attached to a building, but which lawfully existed at the time that this Ordinance became effective, **shall be discontinued within five (5) years from the date of its passage.**" Howard County, IN, Ch. 6, § 6.1. Amortization of Nonconforming Uses or Buildings.
- c. "The lawful use of buildings or land existing at the effective date of this Ordinance which does not conform to the provisions of this Ordinance shall be discontinued within a reasonable period of amortization of the building; uses of buildings and land which become nonconforming by reasons of a change in this Ordinance shall also be discontinued within a reasonable period of amortization of the building. A reasonable period of amortization shall be construed to being **after the date of adoption of this Ordinance and shall be consid-**

ered to be thirty (30) years for buildings of ordinary wood construction, forty (40) years for buildings of wood and masonry construction, and fifty (50) years for buildings of fireproof construction."

County of Redwood, MN, § 21(1). Non-conforming Uses.

- d. "The Board, under authorization of State statute, may provide for the timely modification or removal of a nonconforming structure or use of land. **A maximum of a five (5) year period may be granted in which the nonconforming use shall be modified or removed** in order to comply with the General Plan and Zoning Ordinance. The Board may provide for a shorter time period by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of any investment in the nonconforming use or structure, if any." Layton City, UT, Ch. 19.15.080. Amortization of nonconforming uses.
- e. "If, after holding public hearings, the Planning Commission determines that the continuance of a nonconforming use is detrimental to the health, safety or welfare of a neighborhood, the nonconforming use shall be completely removed or converted to a conforming use within an amortization period prescribed by the City Council. The Planning Commission shall establish conditions for the operation of the nonconforming use during the amortization period **(not less than 5 years nor more than 40 years, depending upon the impact the nonconforming use has on the surrounding neighborhood).**" City of Florence, OR, Title 10, § 10-8-8. Removal of Nonconforming Uses.
- f. "The board may require the removal or discontinuance of a nonconforming use in any residential district which does not meet the allowable use standards for the zone in which it is contained. The removal of nonconforming uses may be accomplished only in the following 2 ways:
 - A. Nonconforming signs, temporary structures, open air storage facilities, or parking facilities shall be required to be removed **5 years from the date of this ordinance**, when, after a hearing as provided in section 150.023, the commission finds the uses to be inconsistent or incompatible with surrounding land uses.
 - B. Nonconforming use in a permanent structure, except as described in section 150.144(D), may only be required to be removed when, after a hearing as provided in section 150.023, the commission finds that the nonconforming use is inconsistent or incompatible with

ZONING AND LAND USE PLANNING

surrounding land uses, and the nonconforming use is not necessary to the surrounding residential areas in that location. If the commission recommends the use be discontinued, the board is required to give the owner notice and serve notice to subsequent owners that the use of the land or structure is to be amortized. The amortization period shall relate to the market value of the property. **Any structure having a market value less than \$5,000.00 shall be given an amortization period of 2 to 5 years. Any structure with a market value over \$5,000.00 shall be given an amortization period of not less than 5 years or more than 25 years from the date of the hearing. If the nonconforming structure or use is not removed or discontinued within 6 months of the end of the amortization period, the owner shall be subject to a fine of not more than \$500.00 per day or other court action which the village deems necessary.**⁴⁵

2. Extension of the Nonconforming Use to Conform

- a. **“The City Planning Board may grant an extension of time for continued operation after the conclusion of this grace period if the owner of the pre-existing, non-conforming business proves that he is unable to recoup his investment in such enterprise by that date. In order to secure an extension of time, the owner must submit to the City Planning Board a written request for such extension at least sixty (60) days prior to the expiration of the three (3) year grace period. No application for extension received by the City Planning Board after such time shall be considered. This information shall be supported by relevant documentary evidence such as financial statements and tax records. Copies of such documentary evidence must be attached to the request for extension, and refusal or failure to provide this information as required shall constitute a waiver of the right to seek an extension of time in which to operate. Such written request shall set forth the following information:**

- a. The amount of the owner’s investment in the pre-existing, non-conforming business through the effective date of this Ordinance;

- b. The amount of such investment that has been or will have been realized at the conclusion of the three-year grace period;

REAL ESTATE LAW JOURNAL [VOL. 38:4 2010]

- c. The life expectancy of the existing enterprise;
- d. The existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such lease.

The City Planning Board shall notify an applicant for an extension of time of the time and place of a hearing to be held on such request before the City Planning Board. After such hearing, the City Planning Board shall issue a written order on the request for extension. If the owner desires to appeal the City Planning Board's order, said appeal may be taken by following the procedures for appeal to the City Council pursuant to the provisions of the Zoning Ordinance of Jackson, Mississippi, as amended. Extensions that are granted shall specify a date certain for closure, and shall not be valid for operation at any other location." City of Jackson, MS, Article XIII, § 1303.03-A. Amortization of Nonconforming Use.

- b. **"The owner or operator of a nonconforming use may apply to the City Council for an extension of time within which to terminate the nonconforming use. An extension shall be for a reasonable period of time commensurate with the investment involved and shall be approved if the City Council makes all of the following findings or such other findings as are required by law:**

(1) The applicant has made a substantial investment (including but not limited to lease obligations) in the property or structure on or in which the nonconforming use is conducted; such property or structure cannot be readily converted to another use; and such investment was made prior to September 27, 2005.

(2) The applicant will be unable to recoup said investment as of November 24, 2006.

(3) The applicant has made good faith efforts to recoup the investment and to relocate the use to a location to meet the requirements of this Chapter." Santa Monica, CA, Ch. 9.44.040. Amortization of nonconforming uses.

- c. **"A nonconforming use due to be terminated pursuant to this section may be extended upon application for a special approval for such extension from the Board of Appeals.** Such approval shall not be granted unless the applicant establishes and the Board of Appeals finds that, notwithstanding the fifteen year period for amortizing a nonconforming use created by the 1991 amendment referred to above, termination

ZONING AND LAND USE PLANNING

of the nonconforming use would cause serious financial harm to the property owner not balanced or justified by the advantage to the public in terms of more complete and effective zoning accruing from the cessation of such use. In making this determination the Board shall consider, among other factors (including the factors set forth elsewhere in this chapter relating to the issuance of special permits or approvals), i) the nature of the nonconforming use; ii) the cost of converting to a conforming use; iii) the amount of investment that existed in the property on March 1, 1991, or if the zoning change creating the nonconformity was adopted after March 1, 1991, the amount of such investment on the date of such later zoning change; iv) the detriment caused by the nonconforming use; v) the character of the neighborhood; vi) the ability of the landowner to have amortized the cost of the landowner's investment over the period between March 1, 1991 (or such later zoning change date) and the required termination of such use; and vii) whether an additional reasonable amount of time is needed by the owner to amortize the owner's investment. In making its determination the Board shall disregard, as irrelevant, any costs for purchase of a nonconforming building or property or costs to repair, maintain, improve or enlarge a nonconforming property, incurred after March 1, 1991, or, if the nonconformity was created by a subsequent zoning change, any such costs incurred after such change. If the extension is granted, the Board of Appeals shall set a fixed additional period for the extension of time before the nonconforming use must be terminated." Town of Ithaca, NY, § 270-214. Amortization of certain nonconforming uses related to pre-1991 residential occupancies.

3. Rebuilding of Damaged Nonconforming Use

- a. "No structure damaged by fire or other causes to the extent of more than triple its assessed value shall be repaired or rebuilt except in conformity with the provisions of this Ordinance, provided, however, that this requirement shall not apply with respect to any structure used exclusively for residential purposes." Howard County, IN, Ch. 6, § 6.1. Amortization of Nonconforming Uses or Buildings.
- b. "No buildings damaged by fire or other causes excluding residences and farm buildings, to the extent that their restoration will cost more than sixty (60) percent of

REAL ESTATE LAW JOURNAL [VOL. 38:4 2010]

their fair cash value shall be repaired or rebuilt except to conform to the provisions of this ordinance.” Logan County, IL, § 9.4. Amortization of Nonconforming Uses or Buildings.

- c. “Structures incurring damage of less than 50 percent (50%) of fair market value above the foundation may be restored, reconstructed and used as before, provided that such restoration is commenced within six (6) calendar months from the date damages were incurred. If reconstruction is not commenced within six (6) months, the use of said land or structure shall thereafter conform with the provisions of this Ordinance. Fair market value shall be determined by reference to current statutory provisions pertaining to real estate assessment and the records of the county assessor.” City of Snellville, GA, Article V, § 5.7. Amortization and Discontinuance.

V. Conclusion

A substantial portion of the litigation surrounding nonconforming uses could be avoided with better drafting of zoning ordinance provisions. Areas that have attracted a significant amount of nonconforming use litigation involve abandonment or discontinuance of use and amortization. Property owners are typically not anxious to give up the property interest that accrues from nonconforming use status. Sometimes property owners are not aware of the specific regulations governing their nonconforming use, other times, the use may have inadvertently ceased for the requisite period of time. Still, often disagreements result from ambiguities in the regulations themselves. Attorneys who find themselves in a position to assist municipalities with the drafting of nonconforming use provisions should be mindful of the pitfalls in failing to specify exact desires of the municipal client in dealing with such uses. Practitioners whose clients desire to challenge vague and ambiguously worded provisions may be pleasantly surprised at the body of caselaw that has developed that may support these positions, as well as the wealth of examples available from other jurisdictions that could be used to demonstrate more specific and clearer language for addressing municipal desires.

NOTES:

¹Patricia E. Salkin, *American Law of Zoning*, vol. 2, sec. 12-7

ZONING AND LAND USE PLANNING

(Thomson Reuters/West 5th ed. 2009).

²Patricia E. Salkin, *American Law of Zoning*, vol. 2, sec. 12-7 (Thomson Reuters/West 5th ed. 2009).

³Patricia E. Salkin, *American Law of Zoning*, vol. 2, sec. 12-7 (Thomson Reuters/West 5th ed. 2009).

⁴Patricia E. Salkin, *American Law of Zoning*, vol. 2, sec. 12-7 (Thomson Reuters/West 5th ed. 2009).

⁵Stuart Meck, *Growing Smart Legislative Guidebook* vol. 2, sec. 8-111 (American Planning Association 2002 ed. Jan. 2002).

⁶See, V. Gail Easley and David A. Theriaque, “Distinguishing Between Detrimental and Benign Nonconformities,” *Zoning Practice* (American Planning Association, November 2009).

⁷Patricia E. Salkin, *American Law of Zoning*, vol. 2, sec. 12-10 (Thomson Reuters/West 5th ed. 2009).

⁸Patricia E. Salkin, *American Law of Zoning*, vol. 2, sec. 12-10 (Thomson Reuters/West 5th ed. 2009).

⁹Patricia E. Salkin, *American Law of Zoning*, vol. 2, 12-233 to 12-235 (Thomson Reuters/West 5th ed. 2009).

¹⁰Patricia E. Salkin, *American Law of Zoning*, vol. 2, 12-233 to 12-235 (Thomson Reuters/West 5th ed. 2009).

¹¹*Karas v. Foss*, 2008 WL 859504 (N.J. Super. A.D., 2008) (citing *S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford*, 373 *N.J. Super.* 603, 613 (App. Div. 2004)) citing *Borough of Saddle River v. Bobinski*, 108 *N.J. Super.* 6, 16–17 (Ch. Div. 1969).

¹²*Karas v. Foss*, 2008 WL 859504 (N.J. Super. A.D., 2008) (citing *S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford*, 373 *N.J. Super.* 603, 613 (App. Div. 2004) citing *Borough of Saddle River v. Bobinski*, 108 *N.J. Super.* 6, 16–17 (Ch. Div. 1969).

¹³*Karas v. Foss*, 2008 WL 859504 (N.J. Super. A.D., 2008) (citing *S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford*, 373 *N.J. Super.* 603, 613 (App. Div. 2004) (citing *Villari v. Zoning Bd. of Adj. of Deptford*, 277 *N.J. Super.* 130, 137 (App. Div. 1994)).

¹⁴Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning*, 4 *RLZPN* § 74:3 (2009).

¹⁵Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning*, 4 *RLZPN* § 74:3 (2009).

¹⁶Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning*, 4 *RLZPN* § 74:3 (2009).

¹⁷Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning*, 4 *RLZPN* § 74:3 (2009).

¹⁸*Euneva v. Keansburg Planning Board of Adjustment*, (PDF COPY of opinion), Superior Court of New Jersey, Monmouth County, (Decided: November 5, 2008 & Approved for Publication: May 26, 2009), and *Vial v. Provo City*, 2009 UT App 122 (Utah Ct. App. 2009).

¹⁹*McKenzie v. Town of Eaton Zoning Board of Adjustment*, 154 N.H. 773 (N.H. 2007), and *Village of Waterford v. Amna Enterprises, Inc.*, 27 A.D. 3d 1044 (N.Y. App. Div. 2006), and *Sun Oil Co. of PA v. Board of*

REAL ESTATE LAW JOURNAL [VOL. 38:4 2010]

Zoning Appeals of the Town of Harrison, 57 A.D.2d 627 (N.Y. App. Div. 1977).

²⁰City of Red Bank v. Phillips, 2007 WL 4460223 (Tenn. Ct. App. 2007).

²¹Ghindia v. Buckeye Land Development, LLC., 2007 Ohio App. LEXIS 694, **12 (Ohio Ct. App., 2007).

²²Karas v. Foss, 2008 WL 859504 (N.J. Super. A.D., April 2, 2008).

²³S&S Auto Sales, Inc. v. Zoning Board of Adjustment for the Borough of Stratford, 373 N.J. Super. 603, 624. (N.J. Super. Ct. App. Div. 2004).

²⁴Ghindia v. Buckeye Land Development, LLC., 2007 Ohio App. LEXIS 694, **12 (Ohio Ct. App., 2007).

²⁵Ghindia v. Buckeye Land Development, LLC., 2007 Ohio App. LEXIS 694, **12 (Ohio Ct. App., 2007).

²⁶Pezzullo v. Ure, 2008 R.I. Super. LEXIS 167, *18 (R.I. 2008).

²⁷Face Value, LLC v. Zoning Board of Appeals of Town of East Hartford, 2008 Conn. Super. LEXIS 2931 (Conn. Super. Ct. 2008), Karas v. Foss, 2008 WL 859504 (N.J. Super. A.D., April 2, 2008), Gem City Metal Spinning Co. v. City of Dayton Board of Zoning Appeals, 2008 WL 185535 (Ohio Ct. App. 2008), Palmieri Cove Associates v. City of New Haven Board of Zoning Appeals, 2006 Conn. Super. LEXIS 848 (Conn. Super. Ct. 2006).

²⁸Custom Land Development, Inc. v. Coopertown Board of Zoning Appeals, 168 S.W.3d 764, 775 (Tenn. Ct. App. 2004).

²⁹Purich v. Draper Properties, Inc., 395 Md. 694 (2006).

³⁰Smith Bros. Woodland Management, LLC v. Zoning Board of Appeal of Town of Brookfield, 108 Conn. App. 621 (Conn. App. Ct. 2008), Purich v. Draper Properties, Inc., 395 Md. 694 (2006).

³¹Greer v. Washougal Motorcross, LLC., 2007 Wash. App. LEXIS 497, *11 (Wash. Ct. App. 2007).

³²Toys R Us v. Silva, 89 N.Y.2d 411, 676 N.E.2d 862, 654 N.Y.S.2d 100 (1996).

³³Schweizer v. Board of Adjustment of City of Newark, 2009 WL 597630 (Del. 2009).

³⁴Bialik v. Stambaugh Township, 2008 WL 1885772 (Mich. Ct. App. 2008), and Finn v. Zoning Hearing Board of Beaver Borough, 869 A.2d 1124 (Pa. Commw. Ct. 2005).

³⁵Zall v. Zoning Board of Appeals of Salisbury, 73 Mass. App. Ct. 1103 (Mass. App. Ct. 2008).

³⁶Zall v. Zoning Board of Appeals of Salisbury, 73 Mass. App. Ct. 1103 (Mass. App. Ct. 2008).

³⁷Zall v. Zoning Board of Appeals of Salisbury, 73 Mass. App. Ct. 1103 (Mass. App. Ct. 2008).

³⁸Taylor v. Zoning Board of Appeals of City of Evanston, 375 Ill. App. 3d 585 (Ill. App. Ct. 2007).

³⁹Town of Orange v. Shay, 68 Mass. App. Ct. 358 (Mass. App. Ct. 2007).

ZONING AND LAND USE PLANNING

⁴⁰Pallco Enterprises, Inc. v. Denton Beam, 132 Cal. App. 4th 1482, 1498 (Cal. App. Dep't Super. Ct. 2005).

⁴¹Gorgone v. District of Columbia Board of Zoning Adjustment, 2009 D.C. App. Lexis 179 (2009).

⁴²Gorgone v. District of Columbia Board of Zoning Adjustment, 2009 D.C. App. Lexis 179 (2009).

⁴³City of Okoboji v. Okoboji Barz, Inc., 746 N.W.2d 56 (Iowa 2008).

⁴⁴City of Okoboji v. Okoboji Barz, Inc., 746 N.W.2d 56 (Iowa 2008).

⁴⁵Mt. Zion Code sec. 150.146 (1999).