

Agenda
Planning Commission
Committee of the Whole
CITY AND BOROUGH OF JUNEAU
Ben Haight, Chairman
June 13, 2017

I. ROLL CALL

Ben Haight, Chairman, called the Committee of the Whole (COW) meeting of the City and Borough of Juneau (CBJ) Planning Commission (PC), held in the Assembly Chambers of the Municipal Building, to order at 5:11 p.m.

Commissioners present: Ben Haight, Chairman; Paul Voelckers, Vice Chairman; Michael LeVine, Nathaniel Dye, Dan Miller, Percy Frisby, Dan Hickok, Kirsten Shelton-Walker, Carl Greene

Commissioners absent:

Staff present: Rob Steedle, CDD Director; Beth McKibben, Planning Manager; Laura Boyce, Senior Planner; Teri Camery, Senior Planner; Jill Maclean, Senior Planner; Robert Palmer, Assistant Municipal Attorney

Assembly members:

II. REGULAR AGENDA

- a. AME2016 0002:** Variances - Commissioner training and discussion about proposed amendments.

Providing background on this item, Mr. Steedle said that they have been working on variances for quite a while. Most of the work involves clarifying the language and ascertaining that the criteria are very clear. Since there has been a change in the Title 49 Committee, the staff wants to make sure that the entire Commission is aware and involved in the process, said Mr. Steedle. They want to ensure that they have code that is well understood, he said. The behavior of past commissioners has deviated somewhat from the intent of the variance, said Mr. Steedle. The other two items on the agenda for this meeting reflect the other two areas in which they are building flexibility into the code, he said. They have to be careful to develop enough flexibility within the code so that Juneau residents can build on their property, said Mr. Steedle. The Alaska Planning Commission handbook of which all Commission members should have

been provided, said Ms. Boyce, depicts a variance as a “safety valve”. It is an exception from the strict terms of the zoning or platting code allowing a relaxation of the strict requirements of the code for extraordinary cases, said Ms. Boyce. The City and Borough of Juneau is a home rule municipality, said Ms. Boyce, enabling the community to make its own rules, she said. Most of the other communities in Alaska follow the state statutes, she added.

The CBJ code states that variances are required to vary dimensions or design standards of the Title, said Ms. Boyce, where hardship and practical difficulties result in an extraordinary situation or a physical feature affecting only a specific parcel of property, read Ms. Boyce. The Board of Adjustment may grant a variance in harmony with the general purpose and intent of the Title, she said. Dimensional standards such as setbacks, lot width and lot depth can be varied, as well as design standards, she said. Design standards are not really defined within the code, said Ms. Boyce. The code is clear about what cannot be varied, she said. The use of land or structures, anything that affects housing density, lot coverage or those establishing construction standards cannot be varied, said Ms. Boyce.

And if too many variances are approved, said Ms. Boyce, then potentially the Land Use Code may be weak. They have looked at the past 30 years of data regarding variances, said Ms. Boyce. They have categorized the variances by type such as setback variances, she noted. For example there have been a total of 42 cases regarding eagle tree buffers, said Ms. Boyce. All of those variance requests have been approved, she noted. Those variances all had conditions attached to them, and the staff decided that it would be wise to change the code to accommodate those conditions, she said.

Eighty-nine percent of the variance requests which have come before the Commission in the past 30 years have been approved, she said. There have been about 1,200 cases that have been created for the past 30 years, but a number of those did not complete the process before the Commission, she said. Over half of the cases have been set back variances, said Ms. Boyce. The area of setbacks needs to be explored so that more flexibility will be allowed within the code, she said. Downtown Douglas and downtown Juneau are both areas that are highly susceptible to setback variance requests, said Ms. Boyce. The current zoning for those areas does not fit the development pattern, she said. They will be utilizing the overlay districts for those areas for the next few years until the code can be finalized for those areas, she said.

They are proposing exterior insulation additions so the exterior of the building would be given an allowance of four inches to homes which could be within the setback, said Ms. Boyce. She also mentioned needed ADA improvements for homes.

Parking variances are the next most sought after variances, said Ms. Boyce. There have been code changes over the years to help with this situation, she noted. More proposed code changes for parking are coming up, she said. Last year new parking standards for senior housing were added to code, as well as a new parking waiver approved allowing for reduction

of spaces in certain cases, while leaving the door open for variances as well, said Ms. Boyce. There is a fee-in-lieu district for certain downtown areas, said Ms. Boyce, for which a fee can be paid in lieu of providing the actual parking space. There are also two parking districts for the downtown area; one providing a 30 percent reduction in spaces and the other a 60 percent reduction, said Ms. Boyce.

Water body buffers were the third most prevalent variance sought, said Ms. Boyce. All 42 variances sought for eagle nests have been approved over the years, said Ms. Boyce. The panhandle section of the code has been amended so that the width of one of the lots could be reduced so that it could accommodate panhandle development, she said. They are currently working on panhandle changes which could affect that area of the code, she added.

Access related types of variances as an amendment to the code in 2015 allows for a privately maintained access road option which is available outside of the urban service area boundary, said Ms. Boyce. This year the shared access road, where up to four lots can share a road, has been added to the code, she said. The access standards have been moved to the subdivision portion of the code, said Ms. Boyce. The panhandle section of the code in which two lots can share a driveway will be coming before the Commission for review, said Ms. Boyce. They are also looking into the possibility of making the shared access road option available within the urban service area as well, she noted.

Design standards are not clearly defined in code, said Ms. Boyce. One of the proposed changes the staff is reviewing is the expansion of the Conditional Use Permit approval process for major developments to incorporate design standards as part of that review, she said.

Commission Comments and Questions

Mr. Voelckers asked if proposed code changes would be applied to only the five categories or if all Conditional Use Permit requests would be allowed.

Ms. Boyce replied that she thought any major development going through a Conditional Use Permit review process could incorporate the design standard review as well.

They used to get lots of variance requests for vegetative cover, particularly in the Mixed-Use zone districts, said Ms. Boyce. For this district the fact that they could have 100 percent lot coverage but at the same time require a five percent vegetative cover resulted in a conflict, she said. In 2012 they removed the requirement for vegetative cover within a Mixed-Use district, she said. In the future the staff would like to amend the vegetative cover section of the code, because it is not clear what the purpose of vegetative cover is, she said. They would like to clarify what the purpose of vegetative cover is and review the requirements for the different zone districts, said Ms. Boyce.

There have also been flood zone related variances as well as sign related variances, said Ms. Boyce. Title 49 states that these types of variances can be requested before the Board of Adjustment, she said. They will be working on sign code changes in the future, she said.

There are currently six criteria which must be met in order to be granted a variance, with number five containing four sub criteria, one of which must be met, said Ms. Boyce. Over the past year the Title 49 committee has come up with five criteria that they feel provide more clarity, she said.

The Title 49 committee has not yet addressed the Olmo decision, said Ms. Boyce. One of the questions they have is if the five criteria developed by the Title 49 committee are relevant in light of the Olmo decision, she said. One of the questions the staff would like the Commission to answer is if the current five criteria developed by the Title 49 committee are still relevant in light of the Olmo decision, said Ms. Boyce.

In summary, said Ms. Boyce, the changes to the code they are recommending provide for the development of flexibility:

- ✓ Parking waiver
- ✓ Additional setback exceptions
- ✓ Zone changes
- ✓ Revise the Conditional Use Permit to allow for design modification consideration
- ✓ Code changes to provide greater flexibility for those variances requested most often
- ✓ Streamside water body buffers
- ✓ Shared access
- ✓ Eagle nests

Commission Comments and Questions

Mr. Voelckers commented that the new variance review created by the Olmo decision is already currently in place. It is stopping the approval of variances that would otherwise probably be approved by the traditional variance criteria, he said. Mr. Voelckers said he would like to get the new language in place as soon as possible, currently with the relaxations and improvements discussed by Ms. Boyce. The overlay districts will help with the downtown Juneau and Douglas areas, he added.

Mr. Miller said he agreed that it would be beneficial to leave the current variances in place until the other code changes are set in place. Once code changes are in place it makes sense to tighten up the variances, said Mr. Miller. The Olmo decision tightens up the process to the extent that flexibility is severely limited, he said. Mr. Miller said he has had a hard time understanding how the Olmo decision was made. He said he is appreciative that the Olmo decision was actually included in the staff report.

He read through this decision several times, said Mr. Miller, trying to identify the specific content that clearly stated what portion of the interpretation has been brought before the Commission as law. He could not come up with clear direction from the decision, said Mr. Miller. The very next section in the Title under variances is Article Three “Interpretations”, said Mr. Miller. He said it is not actually the Law department that interprets the code. It is the Board of Adjustment, said Mr. Miller, which is authorized to interpret the text of this title. He said he felt that the threshold determination for variances established by the Olmo decision should be interpreted by the Board of Adjustment.

Mr. Miller said he agreed with Mr. Voelckers that the variance criteria should remain as they are, with the six criteria. Before the variance criteria are changed, the other code changes should be implemented, he said.

Concurring with the comments already made by Mr. Voelckers and Mr. Miller, Mr. LeVine said that he saw the value in simplifying the variance process. The decisions made on variances have been inconsistent in the past, said Mr. LeVine. He said he felt they do run the risk of changing the criteria and then in three years finding themselves back in the same situation, where the new criteria are difficult to interpret and implement, unless great care is taken starting with a “clean slate”.

Mr. Voelckers said in reviewing the proposed new five criteria for a variance that the first condition; (*Special conditions and circumstances exist that are peculiar to the land or structures or use involved and are not applicable to other lands and structures in the same district*) reminds him of the language introduced through the Olmo decision which stipulates that hardship and practical difficulties result from an extraordinary situation or unique physical feature affecting only a specific parcel of property.... Mr. Voelckers said he would like to get rid of the language in 49.20.250(b) and go with something less restrictive. Almost no variance request will be able to meet that standard, he said. A variance is to allow the Commission to utilize subjective common sense, said Mr. Voelckers, not to place standards that are next to impossible for most applicants to meet. He said he liked the softer language in the new draft, making it less of an impossible standard to meet for a variance.

Mr. Miller said he felt the proposed second criterion was too difficult to meet; “That compliance with the existing standards would unreasonably limit the owner from using the property for a permissible principal use.” According to this criterion, an applicant could always build something, therefore not allowing them to build what it was they wanted to build, he said.

Mr. LeVine said this criterion also caught his attention. They discussed that criterion and its connection to takings, said Mr. LeVine. Mr. LeVine also asked why the third criterion was relevant: “The deviation from the requirement of this title is no more than is necessary to permit a reasonable use of the property”. It doesn’t matter that the variance is as little as

possible, said Mr. LeVine. He said what matters is that a variance is granted which makes the most sense.

Mr. Palmer said the variance provision in code is necessary to avoid takings. The safety relief valve of a variance is to avoid the constitutional takings. This is so the City does not have to pay somebody for unreasonably regulating their property, explained Mr. Palmer. He said he felt this ties into number three.

Mr. Voelckers asked Mr. Palmer for the definition of a “taking”.

The basic “takings” concept is that the government cannot take your land without providing fair compensation, said Mr. Palmer. The Supreme Courts have narrowed this a little bit to say that reasonable regulations are fine, but that unreasonable regulations are “takings”, he explained. In the context of Title 49, the basic concept is that the government cannot unreasonably regulate your land. The core to variances is that land cannot be unreasonably regulated, he said.

Mr. LeVine agreed with the explanation of Mr. Palmer, but asked why proposed criterion number two was necessary at all.

Mr. Palmer said he felt that number two and number three functionally related to each other. These nuances come into play when the municipality is adding some variation to the code proposed by the state. He said he could not articulate the distinction between the proposed criteria number two and number three. In response to a question from Mr. Voelckers, Mr. Palmer clarified that he could not identify the distinction between number two and number three, or the fundamental need for either of the two criteria.

Ms. Boyce said that number three outlines what already exists within the code. She said the staff felt it was important to have a variance request for what was actually needed and not in excess of what was needed by the applicant.

Ms. Shelton-Walker noted that everyone’s definition of what is “reasonable” could differ. She asked what standard was used to define that term.

Mr. Palmer said that is where past decisions are helpful. For example, he said, when the Assembly makes a decision such as the Olmo decision, it can be followed and the decision can be affirmed. To deviate from that decision a really good distinction must be provided, he explained.

Mr. LeVine asked if there is a reason why the Planning Commission could not suggest to the Assembly that a code provision be formulated that has the effect of temporarily removing the

Olmo decision while the code is being updated and modified. He asked if there could be changes made in the code to obviate the Olmo decision.

Mr. Palmer said there may be a way, but that he was not quite sure at this time how that could be accomplished. If they create new standards and start from a new slate, then the Olmo decision would be irrelevant, said Mr. Palmer. Or, he said, another case could be put forward challenging that decision. Then the Assembly would have to decide, he said.

Mr. LeVine asked if the determination of the Olmo decision is interpreted largely to mean that variances are appropriate only when a taking would otherwise be the result.

Mr. Palmer answered that he did not think it was quite that narrow in scope.

Mr. Miller said the Assembly has ruled that the threshold that exists is as a result of the CBJ vs. Thibodeau in 1979.

Mr. Palmer responded that is one of the cases they relied upon.

Mr. Miller said they were told in 1979 that is how they should be complying with variances. He said the Commission has not been complying with that decision since 1979. The code was tightened up in 1995 with regard to that 1979 decision, said Mr. Miller. Mr. Miller said he did not think that they needed to meet Olmo threshold determination.

Mr. Voelckers asked if the proposed criteria could supplant the Olmo threshold currently applied.

Mr. Palmer confirmed that through the legislative process in writing new code the Commission could retain or reject the Olmo decision.

Mr. LeVine said it is better to fix the code than to make the granting of variances standard operating procedure.

Mr. Dye asked if Juneau has a variance problem or if it is just assuming that it has a problem. He asked how this community compares with other communities within Alaska regarding the number of variances issued.

A lot of the feedback they garnered from other planners at the State Planners Conference last year, said Ms. Boyce, was that variances were often used in other communities and that they were used as a tool for flexibility.

Ms. McKibben said she has worked in three other communities within Alaska and that Juneau issues a higher number of variances than any of the other communities in which she worked.

Mr. Voelckers said a variance was granted for the construction of the Marine Exchange building currently being constructed by the bridge. He said that construction would not have been approved under the current standards, and yet it is a very beneficial project for the community. They have to be careful to keep everything in context, he said.

The Walter Soboleff building was a great project for Juneau, said Mr. Miller, and it would never have met the threshold criteria by today's standards. There is no way the Assembly would have wanted the Planning Commission to deny the variance for that project, said Mr. Miller. That is another great example for a reason to say "yes" to a variance, he added.

Mr. LeVine said the problem he has with the way variances have been executed in the past is that they were inconsistent. If there are standards, he said, then those standards need to be abided by. Witnessing the variances approved he has seen on his past three years on the Planning Commission has made him wonder whether any variance denials would stand up were they to be challenged. That creates an inconsistency in the way that standards are applied, he said. They need to find a way to streamline the process and make it work in a consistent way, said Mr. LeVine.

Mr. Dye asked why the municipality cannot simply use the state standards for variances.

Mr. Steedle clarified that the state standards do not apply to Juneau, since it is a home rule community.

Chairman Haight said he cannot grasp the meaning of the new criteria for variances as well as the old criteria, since they were backed up by explanatory language. He said he would like to see explanatory language for the new criteria so that he could place it in context. He said he also liked Mr. Dye's idea of building off of the state's variance language.

Mr. Steedle suggested the Commission take a look at the third state criterion in light of its recent Tyler Rental decision. He said that variance could never have been granted had they been using the state criteria, because that reason for a variance was entirely monetary. He said he did not think the state criteria were a panacea for what the Planning Commission was trying to accomplish.

It would be useful for the Planning Commission to be given another vehicle to facilitate the granting of variances for projects of community worth such as the Soboleff building or the Marine Exchange, said Mr. Voelckers.

Mr. LeVine said it would be interesting to go through the past variances and identify which variances would have been accommodated by the recently developed overlay districts, and which variances would not have been addressed by the overlay district. Then they would have a better idea of where to place their focus.

Mr. Miller said he felt that was a great way to begin the process. He also recommended that any applications which come before the Commission as a Conditional Use Permit which needed variances could also be identified. He said he felt that the Conditional Use Permit process was a great way to deal with all of the issues at one time. Whether it is called a variance or a Conditional Use Permit, the important aspect was that there be a public hearing, said Mr. Miller.

Ms. McKibben clarified Mr. Miller's statement to mean that the Conditional Use Permit process be an opportunity to provide flexibility. She said what Ms. Boyce has stated is that the Conditional Use Permit process gives projects the opportunity to have that flexibility.

Mr. Miller said the applications already requiring a Conditional Use Permit and a variance be accomplished at once during the Conditional Use Permit review.

Mr. Steedle asked if the direction from the Commission was to do the analysis that Mr. LeVine requested, as well as develop alternative language modeled after the Alaska statute.

Ms. Shelton-Walker asked if creating language off of the Alaska statute would deal with the Olmo decision as well.

Mr. Voelckers said he was not sure that the Alaska statute language could be used to supplant the proposed criteria for the code. He said he felt they should keep working with the existing proposed criteria, with serious consideration as to whether criteria two and three are helpful.

Mr. LeVine said he agreed that the Alaska statute language was not what was needed as a basis for the new criteria. He asked if they were trying to develop standards that were flexible creating the opportunity for the granting of a lot of variances or with trying to create strict standards and only allow a few variances. He said he felt the best situation would be a flexible code and limited variances.

Chairman Haight said he felt they needed to address the variance criteria and also to address the code that affects the variances.

Mr. Miller said he liked the idea of identifying those variances which could be dealt with through the overlay district and then see what was left to help them identify what was needed in the process. It may be clear after that, said Mr. Miller, or it may remain just as obscure as it is now.

Mr. Frisby said he liked the approach mentioned by Mr. Miller. He asked when they could expect to be deciding on variances by the new code.

Mr. Steedle said two of those code changes are next on the agenda. He said they would return to the Commission with new proposed code language and further analysis.

Mr. Voelckers asked if the work the staff will be doing on the proposed code changes would come back before the Committee of the Whole or if it would first go to the Title 49 committee.

Mr. LeVine said this seems like an important topic and that it would be good to bring it back before the Committee of the Whole.

Chairman Haight clarified that the staff will bring the new information back before the Committee of the Whole at a future scheduled meeting.

b. AME2016 0019: Proposed amendments to buffers around eagle nests.

Ms. Camery said they are before the Commission for specific direction on how to deal with eagle nests. The current ordinance prohibits development within 330 feet of an eagle nest on public land, and within 50 feet of an eagle nest on private land. That buffer increases to 330 feet during the nesting season if the nest has actively nesting eagles, said Ms. Camery.

The eagle ordinance is tied to the code definition of development which includes a lot of irrelevant activities which has caused a lot of unnecessary restrictions and variances in the past, said Ms. Camery. The United States Fish and Wildlife Service (USFWS) has an optional federal permit, entitled an eagle take permit, which allows applicants to disturb an eagle and avoid violating the federal bald Eagle protection act, often with mitigation conditions attached to minimize harm, explained Ms. Camery.

Virtually all past variances requested for eagle nests have been approved, said Ms. Camery. They have had great difficulty with implementation of the eagle ordinance, said Ms. Camery, with identification of the eagle nests and especially with the identification of active eagle nests. They can no longer rely on active staff with the Fish and Wildlife Service for those identification purposes, she said. Their staff has been cut and they can no longer offer those services, she added.

CDD needs a scientific, defensible, rational basis for regulations, said Ms. Camery. CDD has looked at regulating non-urban eagles versus urban eagles, since urban eagles are not as sensitive to development as non-urban eagles, she said. CDD could not come up with any definable regulation monitors for eagles, such as noise, heavy equipment, or activity, said Ms. Camery. Also, CDD cannot even identify where current eagle nests exist and whether they are active or not, said Ms. Camery.

There is also the potential option of deleting the ordinance, she said. The eagle take permit of the Fish and Wildlife Service has often been cited as a reason for a variance, said Ms. Camery.

The local population of eagles is increasing, said Ms. Camery. They are not endangered, she added. Either deletion or revision of the ordinance could potentially be justified by the Comprehensive Plan, said Ms. Camery.

CDD would like direction from the Planning Commission on whether or not they should continue evaluating revision options or whether the direction would be to delete the ordinance, said Ms. Camery.

Mr. Frisby asked how it was determined whether a nest was active or inactive.

That is exactly the problem, said Ms. Camery. They have relied on the Fish and Wildlife Service for this information in the past, and that agency can no longer provide that information, she said.

Ms. McKibben said another issue raised by the Fish and Wildlife Service is that eagles do not necessarily use the same nest year after year. An active nest one year does not mean that it will be an active nest the following year, she explained.

Commission Comments and Questions

Mr. Voelckers asked if the question has come up as to whether The Fish and Wildlife Service has perceived that the CBJ should have any role in protecting eagles. He said perhaps this is simply a redundancy from which the municipality can remove itself.

The Fish and Wildlife Service is supportive of the City's ordinance, said Ms. Camery. The federal eagle permit is not required, said Ms. Camery. It is a liability shield for major developments, she said. The City's ordinance is a requirement and it does offer protection which the federal regulation does not, she explained.

Mr. LeVine said he sees the problem that the municipality has standards but there is no way to ascertain if those standards are being met. He said he is of the opinion that the lack of information makes it impossible to know if the standards are being met and there is no way to enforce those standards. It is difficult to have an eagle ordinance when it cannot be ascertained if it is needed and if needed, could not be reviewed and could not be enforced, he added.

Mr. Dye asked if Ms. McKibben knew the nesting range of eagles.

Ms. Camery said she thought it was a range of at least a half mile to a mile.

Mr. Dye said the urban service area boundary would not be beneficial, then.

Mr. Miller asked if the U.S. Fish and Wildlife Service with their take permit has supplemental information for the public such as brochures. He said it would be helpful if there is already a

pamphlet listing general standards which could be identified which could then be dispersed to the public.

Ms. McKibben said they have spent hours with Fish and Wildlife, and if there was some easily identifiable criteria which they could use they would have already presented that to the Commission.

Mr. Voelckers said if there is no perception of a vulnerability, and the City has no resources and no evidence or criteria, it is a fight in which the City should not engage in. Mr. Voelckers said he would be comfortable with the City getting out of the eagle regulation business.

Mr. LeVine said if they were going to regulate eagle nests it would be the best solution to put the onus on the property developer to identify the nest. If they found a nest, they would then need to come speak with a City representative, he said.

Mr. Dye asked how they would enforce the above scenario.

There is a prohibition on the taking of eagles under the Migratory Bird Treaty Act, said Mr. LeVine.

Chairman Haight asked if this is something that could be added to a building permit.

Mr. Voelckers said if there were not clear objective criteria and some way to implement those rules then they could easily develop into a scenario where conscientious people would identify eagle nests and those who were not so scrupulous would not.

Mr. Miller said perhaps they could have no code for those eagles already acclimated to the urban service area and some form of a checklist regarding eagles for those constructing outside of the urban service area.

Mr. Steedle said the urban service area boundary has been discussed by the staff, but that it is actually a poor proxy for where eagles are habituated. He said that Stabler's Quarry is outside of the urban service area boundaries and that the eagles are just fine in that location. He said with the resources that they have perhaps as far as they can take it is educating the public about the necessity of being aware and respectful of eagle nests. The City does not have the ability to enforce an eagle ordinance, he added.

Mr. Frisby said he felt that giving up on the eagle nest issue altogether was not a positive way to address the issue.

Mr. Hickok asked if they were to remove the ordinance if it would need to go before the Assembly. They will not even know where the eagle nests are if they do not have the capacity to inspect the property for those nests, said Mr. Hickok.

Mr. Miller said in the Community Development Department reception area there are a number of handouts. He said perhaps they could have the handout available for those seeking a building permit to educate on the subject.

Mr. Steedle asked the Commission if they would like the staff to bring forward the ordinance with the deletion of the eagle nest portion for their review, or if there is some further research the Commission would like the staff to conduct on this matter.

Mr. LeVine said he felt this may be the best recommendation. He said they cannot direct staff to go work harder on something that they have already worked very hard to resolve.

Mr. Steedle said they will be back at the next Committee of the Whole with streamside buffers and variances.

c. AME2017 0001: Update on proposed amendments to buffers for anadromous waterbodies.

III. **OTHER BUSINESS** - None

IV. **REPORT OF REGULAR AND SPECIAL COMMITTEES** - None

V. **ADJOURNMENT**

The meeting was adjourned at 6:59 p.m.