

# Agenda

## Planning Commission - Special Meeting City and Borough of Juneau

September 17, 2019  
Assembly Chambers  
7:00 PM

**I. ROLL CALL**

**II. APPROVAL OF MINUTES**

- A. August 13, 2019 Draft Minutes, Regular Planning Commission Meeting
- B. August 30, 2019 Draft Minutes, Ad Hoc Nonconforming Committee Meeting
- C. September 3, 2019 Draft Minutes, Ad Hoc Nonconforming Committee Meeting
- D. September 10, 2019 Draft Minutes, Ad Hoc Nonconforming Committee Meeting

**III. PUBLIC PARTICIPATION ON NON-AGENDA ITEMS**

**IV. PLANNING COMMISSION LIAISON REPORT**

**V. RECONSIDERATION OF THE FOLLOWING ITEMS**

**VI. CONSENT AGENDA**

**VII. CONSIDERATION OF ORDINANCES AND RESOLUTIONS**

**VIII. UNFINISHED BUSINESS**

**IX. REGULAR AGENDA**

- A. AME2018 0009: A text amendment to revise Title 49 to repeal and replace 49.30-Nonconforming Development - Continued from August 27, 2019

**X. BOARD OF ADJUSTMENT**

**XI. OTHER BUSINESS**

**XII. DIRECTOR'S REPORT**

**XIII. REPORT OF REGULAR AND SPECIAL COMMITTEES**

**XIV. PLANNING COMMISSION COMMENTS AND QUESTIONS**

**XV. ADJOURNMENT**

Agenda  
**Planning Commission**  
***Regular Meeting***  
CITY AND BOROUGH OF JUNEAU  
*Ben Haight, Chairman*  
August 13, 2019

**I. ROLL CALL**

Ben Haight, Chairman, called the Regular Meeting of the City and Borough of Juneau (CBJ) Planning Commission (PC), held in the Assembly Chambers of the Municipal Building, to order at 7:02 p.m.

**Commissioners present:** Ben Haight, Chairman; Michael LeVine, Nathaniel Dye, Ken Alper, Shannon Crossley, Dan Hickok, Travis Arndt

**Commissioners absent:** Paul Voelckers, Vice Chairman

**Staff present:** Jill Maclean, CDD Director; Jane Mores, Law Department; Amy Liu, CDD Staff

**Assembly members:** Wade Bryson

**II. REQUEST FOR AGENDA CHANGES AND APPROVAL OF AGENDA -none**

**III. APPROVAL OF MINUTES**

A. July 9, 2019 DRAFT Minutes – Planning Commission Regular Meeting

**MOTION:** by Mr. LeVine to approve the July 9, 2019, Planning Commission Regular Meeting minutes noting any staff corrections or commissioner comments.

***The motion passed with no objection.***

**IV. PUBLIC PARTICIPATION ON NON-AGENDA ITEMS - none**

**V. ITEMS FOR RECONSIDERATION –**

**Motion:** by Mr. Dye to move USE2019 0018 to the regular agenda for discussion

The motion passed without objection

VI. **CONSENT AGENDA** moved to Regular Agenda as Item B at the request of Mr. Dye for a discussion on conditions

**USE2019 0018:** ~~\_\_\_\_\_~~ A Conditional Use Permit

**Applicant:** ~~\_\_\_\_\_~~ Nugz LLC

**Location:** ~~\_\_\_\_\_~~ 9331 Glacier Highway

**Staff Recommendation**

It is recommended that the Planning Commission adopt the Director's analysis and findings and grant the requested Conditional Use Permit. The permit would allow the development of a marijuana cultivation facility.

The approval is subject to the following conditions:

1. ~~Security cameras must capture a 360 degree view of the outside and inside premises. Staff recommends as a condition of approval that prior to temporary certificate of occupancy, the applicant must submit a security plan, showing camera and alarm placement that meets this requirement.~~
2. ~~CBJ approved signage shall be posted for the van accessible parking space prior to final certificate of occupancy.~~
3. ~~Striping for all required parking spaces be provided prior to final certificate of occupancy.~~
4. ~~Debris must be removed from vegetative cover areas prior to final certificate of occupancy.~~

**MOTION:** ~~by M to accept staff's findings, analysis and recommendations and approve the consent agenda.~~

**The motion passed with no objection.**

VII. **UNFINISHED BUSINESS**

**WCF2019 0007:** A Wireless Communications Facility Permit with potential lighting required by FAA

**Applicant:** City & Borough of Juneau

**Location:** Engineers Cutoff

**Staff Recommendation**

Staff recommends that the Planning Commission adopt the Director's analysis and findings and grant the requested Special Use Permit. The permit would allow replacement of an existing communication tower with a 40-foot tall, self-supporting tower.

The approval is subject to the following conditions:

1. Prior to final certificate of occupancy, signage shall be installed to meet the requirements of CBJ 49.65.930(c).
2. Prior to issuance of a building permit, the applicant shall provide a signed and stamped letter indicating the proposed WCF complies with industry practices of the National Association of Tower Erectors and local building code requirements for loads.

**Motion:** *by Mr. Dye to reopen public testimony to receive new information from staff and the public regarding the application.*

Mr. Dye declared that he has read the Draft minutes and is familiar with the subject and the conversation from the last meeting. Based on the motions made then, he believed we are in the deliberative state and need to reopen public testimony. Mr. LeVine spoke in favor of the motion and Ms. Maclean added the hearing has been publicly noticed allowing for public testimony.

***The motion passed with no objection.***

Prior to the staff presentation, Ms. Maclean pointed out CBJ personnel in attendance: Alan Steffert, CBJ Engineering; Erann Kalwara, JPD; Erik Gazdig, JPD; Deputy Chief David Campbell, JPD, are able to speak to the application.

Ms. Liu presented updates on the Wireless Tower project. Prior to the July 23 Planning Commission hearing, the applicant had requested review of a 40-foot tower with up to a 20-foot antenna. Per Commission direction, the applicant is requesting review of a 40-foot tower with no additional antenna height.

Follow up included three topics.

1. Lighting – to determine whether a request for a lower obstruction would result in a lesser lighting requirement.
2. Review of design and location – to examine whether the proposed design and location are essential for meeting JPD and CCFR needs.
3. Timeline as it relates to grant funding.

Public notice included notification within 1,500-foot radius of the site, three public notice signs, and ads published twice in the newspaper. One public comment was received which included questions regarding the design, purpose and cost of the project. Staff has responded with pertinent information.

FAA indicated that no lighting or marking is required for a 40-foot obstruction.



Staff gleaned more information about how the design increases capacity and stability over the current tower. The current tower does not have room for additional antenna. To expand services and improve performance more structures are required. The proposed stand-alone tower provides more stability over the current guyed tower. The location is optimal because it provides direct line of sight and is already an established tower site and is therefore accessible for immediate repairs and ongoing maintenance.

The proposed tower is receiving a \$150,000 grant from the Department of Homeland Security. The initial deadline was September 30, 2019. The deadline has been extended to May 30, 2020. Any additional extensions are not guaranteed. To meet this deadline and receive the funding, the tower must be operational and expenditures must be complete by the stated deadline.

Questions for staff:

Mr. Dye asked about Item 11 on page 109. He asked if the applicant was someone other than CBJ, would they have to have the signed drawings stamped prior to the hearing. Is it standard practice to allow these to be submitted after construction? If not, why is CBJ exempt? Ms. Maclean answered that this is included as a condition of approval prior to and not after construction. Mr. Dye pointed out that the applicant statement noted it would be supplied after construction. Ms. Maclean said that it may have been the applicant's statement but she believes it should be a condition of approval as required of others. Ms. Liu added that it is a condition of approval as it is written. Mr. Dye questioned whether this is a complete application considering the applicant's statement as written.

Ms. Maclean added additional comments were received after the Staff Report and Ms. Kalwara from JPD can speak to these. The comments were received from Snowcloud.

Mr. LeVine asked for clarification from Ms. Mores regarding the memo describing whether this tower is a new tower or a modification of the old tower. His understanding is that, according to the memo, it is most likely a new tower but because it is being constructed in the vicinity of other towers a balloon test or other visual site study is not necessary. Jane Mores answered that she did not address the balloon test directly but because of the safety concerns due to the other nearby tower and because the tower will not be lighted, there is a reasonable reason to determine the safety issue is enough to excuse the requirement for a visual test. She added that the Code is not completely clear. If there were no safety issues and if this is a new site, then there is no exception in the Code. Her recommendation was if there are safety concerns, they should be explained so that can be shown on the record. The purpose of the balloon test is to show something that has not been there before and to see what it would look like. Mr. LeVine is concerned that if there is no exception in Code for the balloon test, then he was unsure an exception could be made this time.

Mr. Dye asked for information regarding security and fencing of the area in accordance with 49.65.930(b). Ms. Maclean responded that because they were originally considering this a replacement, they were going to leave the site as is. However, if we are considering it a new tower and there is a need for this tower to be secured then we would be willing to meet that requirement. It is in a relatively remote location but it is open to the public and there are hiking trails in the area.

Ms. Kalwara spoke to the email and supplied answers to the questions contained therein.

1. CBJ MIS and CDD staff with access to the vicinity are required to have security clearance in order to have unescorted access to the Data.
2. The City of Hoonah has a similar grant but their grant does not allow this type of work. Our grant specifically does allow it.
3. Regarding colocation, JPD is concerned about having private entities accessing the tower. The site will contain equipment and data requiring anybody accessing it to either have security clearance or be escorted by JPD. Right now, it is a city-owned site with city-owned equipment and it should remain that way.
4. This would be a better question for either Mr. Steffert or Mr. Gazdig to answer.
5. No, we do not need a new tower just to have a generator on site. We need it to support JPD radio communication.
6. This might also be a question for Mr. Steffert or Mr. Gazdig as well. She is unsure about the pad but if it needs to come out, then it will be done.

Mr. Dye asked if there is a plan for fencing or securing the area to keep people from climbing the tower or accessing the site. Ms. Kalwara is unaware of any issues with people climbing the current tower. The data itself will be contained in the shed. The shed will be secured with a security system and locked with a key kept in JPD possession.

Mr. Dye asked about the logistics of allowing non-CBJ entities to collocate on the tower. Ms. Kalwara stated that the proposed tower will not have the room for non-CBJ to collocate. It will contain all of the equipment already on the current tower and allow for some expansion for CBJ needs going forward.

Mr. Haight pointed out that there are already other towers in that space and asked if this is already considered colocation. Mr. Dye added to the question asking if 4 towers located together counts as a single WCF. Mr. Haight asked Ms. Mores what it would require for CBJ to lease space on a CBJ tower to a local company. Mr. Mores said that would most likely be accomplished via a competitive solicitation process. Ms. Mores addressed the colocation question explaining that by definition the term colocation really means the mounting or installation of transmission equipment on an eligible support structure. Therefore, using the term 'colocation' to describe tower located nearby each other is not the correct industry usage of the term.

Mr. Haight asked Mr. Steffert to address the questions Ms. Kalwara had not answered.

4. Regarding, whether the site can be improved for less money by cutting trees in the view shed, currently the telecommunications site is managed by KTOO and they are the ones who make decisions regarding when and who to call for tree cutting in that area.
6. Regarding the sling pad, it is his understanding that was installed by JPD some years ago. The pad is mounted on concrete piles with not much underneath it. However, below that is rock which would make suitable foundation for an unguyed tower. Right next door to the site is a large helipad so the pad in question is not the only option.

Mr. LeVine asked Mr. Steffert for information regarding any safety concerns or other reasons why there ought to be an exception to the requirement for balloon test visual impact study. Mr. Steffert explained that it is on a ridge subject to strong winds and there are several guyed towers in the area. He referred to the photos (blue folder additional material provided by Snowcloud) showing the other towers in the area and said that if we were to fly a balloon there, it would be likely to tangle in one of the other towers. That tangling, or the maneuvers required to untangle it, could cause damage to the other tower. Mr. LeVine asked if we would learn anything by conducting a balloon test here. Mr. Steffert said we would not learn anything by conducting the test in this area. We already know what it will look like as there are already other towers there.

Ms. Maclean spoke to the colocation explaining that the purpose of the Code section is to *encourage* colocation but it does not *require* it. It is her belief that based on the last hearing and the Commission request to go to a 40-foot tower that there is a tradeoff to be made. By lowering the height in order to avoid the lighting requirement CBJ has less space than if they had kept it at 60-feet. With that less space, it makes sense to keep it to CBJ use as they will need that for its own expansion requirements.

#### PUBLIC TESTIMONY:

Damien Horvath, representing Snowcloud said that they operate quite a bit of equipment in that area. He said that the current pad needs to be removed and a new one put in. In terms of security, there is always people up there trying to climb the towers. Because of this, they agree that the fencing/security issues are valid. As for colocation, Snowcloud has concerns if CBJ begins to put a lot of equipment in the area because they say CBJ is not known for frequency coordination and said that causes a lot of 'noise' for other wireless providers. They question why the current site could not be cleared and the new tower put in that same location or 10 feet added to the current structure.

Mr. Hickok asked who owns the site. Mr. Horvath explained it is his understanding that CBJ owns the site and KTOO manages it.

Mr. Hickok asked about the fencing. He asked if we are talking about fencing the proposed tower

or the entire area. Mr. LeVine asked what kind of protection or precautions Mr. Horvath would suggest. Mr. Horvath said that the safest thing would be to leave the tower where it is. He said that to fence the proposed area would be very tight.

**MOTION:** *by Mr. Hickok to accept staff's recommendations, and approve WCF2019 0007.*

**COMMISSION DISCUSSION –**

Mr. Dye referred to page 99 of the packet 49.65.930 where it states the tower will not be climbable and will have a locked trapdoor. He has concerns whether that will be sufficient and asked for staff clarification to the security of the area.

Mr. Steffert pointed out that it is not in CBJ interest that someone climb the tower and break something. Whatever security measures put in place beyond a security system will be their best efforts. Having a locked trap door is just a start.

Mr. Dye asked CDD staff if they feel they have met code according to 49.65.930. Ms. Liu explained that as for security of the data, locking the structure was a reasonable measure. As for making the structure non-climbable, that is an industry practice. There is a condition for required signage regarding 'no trespassing'. Staff was not made aware until this meeting that anecdotally there are frequently people in the area. In the light of this information, it is possible to condition the WCF application accordingly.

Ms. Crossley asked Mr. Steffert to explain how can you explain how it was decided to use new rather than existing site. Mr. Steffert explained that the existing site is sloped and requires a guyed tower. The new tower is required to not be guyed so we need a less sloped area. Also, we want to keep the radio equipment functional through the time of construction to allow for least amount of outage time.

Mr. Dye asked if this is the last buildable site to build a freestanding, unguyed tower. Mr. Steffert said that while he is not a radio engineer he can speak to foundations and the ridge is the place to be considering the bedrock in the area. Mr. Steffert said KTOO has said they will be moving their tower possibly freeing that space but he was not aware of their timeline for that move.

Public Testimony closed and Mr. LeVine requested the motion be restated. Mr. Hickok restated the motion.

**DISCUSSION:**

Mr. LeVine said that he is still concerned with the requirement for a balloon test. It is his interpretation of the Code that the test is required and he does not see an exception even for safety or other reasons.

Mr. Maclean suggested a recess to consult with Law on the matter.

8:00 Recess

8:08 Called back to Order

Ms. Mores quoted from the balloon test section stating the purpose of the test is to better inform the public in the case of a new freestanding WCF. Considering the purpose being to inform the public and considering the safety issues, if the commission makes findings clarifying the safety issues and include suggestion to Staff to consider a Code change, they would be in a defensible position to waive the balloon requirement.

Mr. Dye asked if the stamped drawings in condition 2 are required by the National Association of Tower Erectors in order to be considered a complete application. Ms. Maclean explained that the condition meets Code 49.65.960(s).

Mr. LeVine objected to the motion.

Mr. Dye spoke in support of the motion.

***The motion passed on Roll call vote with all present members but Mr. LeVine voting in favor.***

#### **VIII. REGULAR AGENDA**

A:

**AME2019 0008:** A rezone of 17 acres along Montana Creek Road from D3 to D5  
**Applicant:** Coogan Construction  
**Location:** Montana Creek Road

#### **Staff Recommendation**

Based upon the findings and conclusions stated above, staff recommends the Planning Commission concur with the Director's analysis and findings and **RECOMMEND APPROVAL** to the Assembly for a rezone of the subject parcel from D3 to D5.

Ms. Maclean explained in her presentation that this is a request to rezone 17 acres along Montana Creek Road near Skaters Cabin from D3 to D5. The presentation included slides illustrating the location in a vicinity map and an aerial photo as well as slides illustrating the current zoning and proposed zoning.

The site is 17.34 acres currently zoned as D3 (single family, 3 dwelling units per acre). The comprehensive plan land use designation is ULDR (Urban Low Density residential). The area has City water and sewer. It is accessed via Montana Creek Road and is currently vacant land where there was previously a sand and gravel extraction operation.

According to rezone requirements, the site must be 2 acres or more and a similar request cannot have been made within the past year. This lot meets those requirements.

According to the comprehensive plan and the land use code (Title 49) D3 should be located outside of the urban service area. Land within the urban service area with public water and sewer should be up zoned to at least D5 so as to offset the cost of CBJ public utilities. D5 is primarily for single family and duplex dwellings with up to 5 dwelling units per acre and allows for accessory units.

In comparison to D3, Rock crushing, sand and gravel operations, and mining operations are allowed D3 but not in D5. Some recreation facilities are allowed in D5 but not in D3.

Public comments received have included concerns regarding potential for increased traffic, winter maintenance along Montana Creek Road, overcrowding at Auke Bay Elementary School, and noise from surrounding established used.

Agency comments were requested. The Juneau School District responded that increased density on the subject lot has the potential to impact enrollment at Auke Bay Elementary School. In light of this proposal coupled with Pederson Hill and other recent developments, the School Board is considering re-drawing district maps. With the redraw, there is sufficient capacity in the existing school system. No other agencies expressed concerns.

According to CBJ 49.74.130(a), the Commission has certain options regarding the request. They may recommend approval, approval with modifications or deny the rezone request. Ms. Maclean reminded the Commission there have been rezones recently that do not follow boundary lines or streets and cautioned them that if they were to do that they be deliberate in how they draw the line to be very clear of the boundaries of the one district to another.

Staff findings were:

1. The request meets the submittal requirement and the rezoning initiation, zone change restrictions, and procedural requirements of the CBJ Land Use Code. The application was filed in July, is an expansion of an existing zoning district, is more than 2 acres, and is not similar to a request rejected in the past year.
2. Based on the preceding analysis, the proposal substantially conforms to the Land Use Maps and policies of the Comprehensive Plan.

Ms. Maclean added that she should have included in Public Comments that after the staff report was completed CDD received comments regarding Montana Creek Road being an easement. She consulted with CBJ Engineering that there are often streets referred to as easements when originally laid out but Montana Creek Road is a CBJ adopted street or right of way. Another public comment concerned fourplexes. Ms. Maclean said D5 does not allow

fourplexes. It does allow single family duplex and common walls but even common walls would be limited to pairs of two and not three or more. Mr. Alper asked if it would be allowed for there to be a situation where a duplex had an accessory apartment on each side thereby putting four units in a single building. Ms. Maclean said that would not be allowed with a duplex because the duplex already counts as the second unit for the lot. She pointed out that if there is a common wall (separate ownership with property line down the middle), they each could have an accessory unit. Even though a duplex and a common wall might look similar, one is on one parcel and the other is on two. Mr. Dye clarified that accessory apartments do not count as dwelling units toward density. Mr. LeVine asked if a mobile home park would be allowed in D5. Ms. Maclean said that yes that would be allowed. Mr. LeVine asked why this area has not already been zoned D5. Ms. Maclean explained that often subdivisions started out as gravel pits that are required to be prepped for development upon closure. When this particular area was ready for rezone to D5, there was a lot of neighborhood opposition. It has received a planned unit development allowing for smaller lots. Mr. LeVine stated he is thinking to when the current gravel pit closes in 2029, the new owner will want to up zone that to D5 and was concerned about the potential increase in housing and the impact on roads, etc., in the area. Ms. Maclean explained that the intent in the comprehensive plan is to increase zoning as utilities are expanded come online to help support those costs.

#### Public Testimony:

Lisa Arehart – 9154 Blackwolf Way- is concerned with some of the development plans that she has seen for the area. She has seen duplexes and fourplexes in the plan. Her belief is that if you buy property at D3 then you should develop it at a D3. She believes Juneau needs more housing but she does not believe we need to put such high density into a low-density area.

#### Questions for Staff:

Mr. Arndt asked where are the boundaries of the urban service area. Ms. Maclean explained that it encompasses the property in question. Mr. Alper clarified the area on the map designated at Montana Creek West PUD. He asked if the PUD would be developable. Ms. Maclean answered that it is part of the area set aside as open space. Mr. LeVine noted a 'large, diamond shaped area' in the maps and asked what that is. It is a private home.

Ms. Maclean added that if the rezone is approved, it would still require permitting for any development to take place. Regardless of whatever development plans people have seen, that is not what is before the Commission and is not what is being approved. Ms. Moers clarified that this is a recommendation for rezone and not a decision. The Commission is just making a recommendation to the Assembly. Mr. Hickok asked for the reasoning why the applicant had been given a PUD rather than being rezoned to D5 in the past. Is it not just to increase density? Ms. Maclean explained that it is not necessarily just to increase density. If, for example, a parcel is wet or otherwise not allowing for large separate lots, a PUD would allow for clustering structures toward buildable land. Mr. LeVine was concerned that one of the advantages of PUD is that it allows for setting aside open spaces but did not believe D5 had the same requirement.

His worry is with the loss of open spaces. Mr. Dye asked why there were designated open spaces in the current D5 district in the slides but they cannot be required now. Ms. Maclean explained that overtime, the rules governing subdivisions have changed. Prior to 2015, subdivisions were required to go through a conditional use permit process wherein the Commission could require open spaces (called green belts) could be required in D5 areas but that is no longer an option to the Commission. Rezones can only be conditioned in the case of public safety. Mr. Arndt asked who owned a particular large portion on the map. Ms. Maclean stated she does not recall exactly but that it is publicly owned. Mr. Arndt commented that it would then be likely a green area for a long time. Mr. Dye asked, based on Ms. Maclean's discussion on transition zones and the Commission's option to change boundary lines on rezones, could this rezone encompass the D3 lot as a transition from D3 to D5 upon cessation of gravel operations? Ms. Maclean deferred to Ms. Mores on whether the Commission *could* but suggested they not do so without the owner's knowledge.

**MOTION:** *by Mr. LeVine to accept staff's findings and recommend the assembly approve the rezone requested at AME2019 0008.*

Roll Call Vote:

Aye: Mr. LeVine; Mr. Dye; Ms. Crossley; Mr. Arndt; Mr. Hickok; Mr. Alper

Nay: Mr. Haight noted that we need the open spaces. He does like to support housing but does support open spaces as well.

Ms. Mores reminded the Commission that their procedure requires written findings be submitted to support recommendations made to the assembly.

Mr. LeVine suggested their findings include that D5 will allow for additional affordable housing, is consistent with the comprehensive plan designation within the urban service boundary and he would also like to recommend they maintain open spaces.

*The findings passed without objection.*

**RECESS 8:49 pm**

**RETURN TO ORDER 8:53 pm**

**B: (moved from CONSENT AGENDA)**

**USE2019 0018:** A Conditional Use Permit  
**Applicant:** Nugz LLC  
**Location:** 9331 Glacier Highway

**Staff Recommendation**



It is recommended that the Planning Commission adopt the Director's analysis and findings and grant the requested Conditional Use Permit. The permit would allow the development of a marijuana cultivation facility.

The approval is subject to the following conditions:

1. Prior to approval of CBJ marijuana license, it shall be demonstrated that surveillance cameras have an unobstructed view of each doorway in the building, and it shall be demonstrated that security cameras have an unobstructed view of areas of regular activity without site blockages from lights, hoods, plants, fixtures, or other equipment in the building.
2. CBJ-approved signage shall be posted for the van-accessible parking space prior to final certificate of occupancy.
3. Striping for all required parking spaces be provided prior to final certificate of occupancy.
4. Debris must be removed from vegetative cover areas prior to final certificate of occupancy.
5. A complete copy of the applicant's approved state license application must be submitted to the department for review prior to operating.
6. All waste containing marijuana product shall be stored in a locked enclosure until transported to the CBJ landfill.

Ms. Liu explained that per the Table of Permissible Uses, a marijuana cultivation facility in the Light Commercial (LC) zone may be allowed with an approved Conditional Use Permit.

The existing building is on fractions of Lot 3 and Lot 4; the subject lot contains the existing building for the proposed cultivation as well as a single-family dwelling immediately across from the building and encroaching across property lines. Subdivision is not proposed at this time so the encroachment is not addressed in this application. The existing building was approved in 2004 under USE2004-00034 as a commercial storage building with an apartment. It is located on an easement with access to Glacier Highway. The building is conforming to dimensional standards based on supplemental material for the 2004 Conditional Use Permit.

Staff requested comments from CBJ Building Division, CBJ Assessors Office and Capital City Fire and Rescue. The assessor's office and CCFR had no concerns. Building division explained sprinklers may be required in the future. This would be addressed at the building permit stage.

The total area of the building is 2,626 square feet. The exterior of the building will be unchanged. Modifications to the interior will include shelving, security systems and those needed to convert the existing apartment to an office space as well as a marijuana cultivation facility. There are no windows on the first story but there are on the second story and at the top of each bay sheet door.

No traffic impact analysis is required because the project is not anticipated to generate 250 average daily trips. Per 49.41.210, the facility is required to have three standard parking spaces with one of them van accessible. The current spaces do not have required signage and striping. These will be included in conditions of approval.

The project is not anticipated to generate any noise or external impacts out of harmony with the existing neighborhood. The vegetative cover requirement is met. However, there is debris at the site. As a condition of approval, the debris will need to be removed.

The project is in conformance with the Comprehensive Plan.

### **Commission Discussion**

Mr. Dye asked for clarification as to which parcel was subject to the application because it was unclear in the packet. Ms. Liu explained that the labels had shifted in the presentation due to an error in formatting. She showed on screen the correct location of the proposed site. Mr. Alper asked for clarification regarding access to the building and the existing easement. He asked how did the easement got there and if it was required for the facility to have access to a major road. Ms. Liu explained that the easement would not be an issue and other inconsistencies in the property would be out of scope for this project.

Mr. Dye asked about condition number 5 and whether this is usual for marijuana cultivation. Ms. Liu explained that this was based on the staff report for another cultivation application. She assumed the condition is added to emphasize that between the conditional use permit and the applicant obtaining a new license, the department will check for consistency and the Director has the discretion to determine if there is consistency or need for another review. Mr. Dye expressed concern that this condition would be duplicative. Ms. Mores clarified that in the section on CUs for marijuana established it says the applicant is required to submit a complete copy of the applicant's approved State license application to the department for review prior to operating. Mr. Dye expressed concern that he had not seen that condition in prior applications.

### **APPLICANT Testimony**

David Smith, applicant, explained that the easement was a result of when the ELKS lodge used to be a home and there was another behind it. That easement was how to get to the house.

### **NO OTHER PUBLIC TESTIMONY**

Mr. Dye asked Ms. Mores for the code citation supporting condition number 5. Ms. Mores said it is 49.65.1245(d).

**MOTION:** *by Mr. LeVine to accept staff's findings, analysis and recommendations subject to following discussion about changing the wording of the conditions.*

*Mr. Dye then suggested they strike second sentence of condition number 5.*

*Mr. Arndt clarified that condition number 5 would be that the applicant shall submit a completed application.*

Mr. Dye suggested replacing condition number “Prior to approval of the CBJ Marijuana license it shall be demonstrated that surveillance cameras have an unobstructed view of each doorway in the building and shall be demonstrated that the security cameras have unobstructed view of areas or regular activities without sight blockages from lights, hoods, plants, fixtures, or other equipment in the building.

Mr. Dye suggested adding condition number 6, “All waste containing marijuana product shall be stored in a locked enclosure until transported to the CBJ landfill.

Mr. Dye suggested a change to condition number 4 to change to “Discarded construction material be cleaned up”. Mr. LeVine suggested they state for the record that the intention of the condition is that large discarded construction debris that has possibility of obstructing vegetative cover and preventing it from growing must be removed.

**MOTION:** *by Mr. LeVine to accept staff’s findings, analysis and recommendations and approve subject to condition 1 being replaced with language as suggested by Mr. Dye, striking the second sentence of condition 5, and condition 6 added as proposed by Mr. Dye.*

***The motion passed with no objection.***

## **IX. BOARD OF ADJUSTMENT**

## **X. OTHER BUSINESS**

**APL2019 0007:** Notice of Appeal: APL2019 0007, an appeal of Director’s determination regarding VDM2019 0004 – consideration whether to hear appeal per CBJ 49.20.110

**Applicant:** Lisa and Thomas Daugherty

**Location:** 9223 N. Douglas Highway

Ms. Mores explained the appeal process and that this is not the time for in-depth discussion. Rather, they are here to decide whether or not the commission will hear the appeal.

**MOTION:** *by Mr. LeVine to hear the appeal*

Motion passed with no objection

Ms. Mores explained now they must decide whether to hear part or all of the appeal

**MOTION:** *by Mr. LeVine to hear the entire appeal*

Motion passed with no objection

Ms. Mores explained now they must decide whether to hear the appeal on the record or de novo.

**MOTION:** *by Mr. Dye to hear the appeal on the record*

Mr. LeVine asked for clarification between on the record and de novo as it pertains to what else could be added. Ms. Mores explained the pretrial and hearing processes with the potential for new information and witnesses but there could also be limits and sidebars that could be in place. Mr. LeVine asked if Ms. Mores is allowed to advise the Commission on this topic. Ms. Mores is not in a position to give advice on how to hear this issue as she has already consulted with the Director on this item.

Mr. Dye asked how many cases have been heard de novo as opposed to on the record in the past. Ms. Mores could not recall any cases during her 12 years held de novo.

Mr. Dye asked if it were possible to add new information if the case were heard on the record. Ms. Mores said that if both parties agreed, new information could be added.

Motion passed with no objection

Mr. Haight appointed Mr. Dye as presiding officer.

#### **XI. STAFF REPORTS**

Maclean reported Marjorie Hamburger is no longer with CBJ as she has moved to a new position. Chelsea Wallace has taken her place. Ms. Mores is also leaving CBJ in the near future.

The nonconforming ordinance will be presented for public hearing on August 27 taking public testimony then again in September. Mr. Arndt asked if possible, could the commission get a copy of draft as it stands. Ms. Maclean explained they are already planning to get draft to commission this week.

Next blue print meeting is August 29<sup>th</sup>, 6pm

Next title 49 meeting September 4, noon

Mr. Mores reported that the hearing officer has issued a proposed decision in the Harris appeal. It will be before Assembly on Monday, August 19. No objections were filed with respect to the decision. That decision affirms Planning commission's decision dismissing the appeal was affirmed.

#### **XII. COMMITTEE REPORTS**

Mr. Dye reported he missed last Downtown Blueprint about parks and he is looking forward to seeing what came of that meeting. The Title 49 committee met and discussed downtown zoning extensively. Feels they are making good headway. Next meeting is September 4.

Mr. LeVine reported Juneau Commission on Sustainability has been busy working on composting, updating their website and the sustainability plan. They will be getting a tour of a cruise ship to see their water and air treatment facility.

### **XIII. LIAISON REPORTS**

Mr. Bryson reported at the assembly meeting on July 22, they passed onsite consumption, and passed senior housing tax abatement. They removed responsibility of lease negotiations from planning commission. This now goes directly from Lands to Assembly. They passed Vista Drive rezone. A 2% hotel tax increase will be on the ballot. Centennial hall and New JACC funding will be on ballot. Eaglecrest has presented to the Assembly regarding its development projects. The new aquatics board has been appointed.

### **XIV. CONTINUATION OF PUBLIC PARTICIPATION ON NON-AGENDA ITEMS - None**

### **XV. PLANNING COMMISSION COMMENTS AND QUESTIONS**

Mr. Dye has been to the Planning Commission website and noted that the site lists members who are no longer on the commission.

Mr. LeVine requested when supplemental materials are emailed, please note those items in the subject line.

### **XVI. EXECUTIVE SESSION**

### **XVII. ADJOURNMENT - 9:41 pm**

**Planning Commission  
Nonconforming Ad Hoc Committee**

Friday, August 30, 2019, 12:00 p.m.

Community Development Department, Marine View Building, Fourth Floor

**Planning Commissioners Present:**

Nathaniel Dye (Chair)  
Shannon Crossley  
Michael LeVine

**Community Development Staff Present:**

Beth McKibben, Senior Planner, CDD  
Alexandra Pierce, Planning Manager, CDD  
Jill Maclean, Director, CDD  
Jane Mores, Assistant City Attorney, CDD  
Brenwynne Grigg, Administrative Officer, CDD

**I. Roll Call**

The meeting was called to order at 12:03 p.m., and a quorum was determined.

**II. Approval of Minutes**

None

**III. Agenda Topics**

**Nonconforming Development – Repeal and Replace CBJ 49.30**

Consensus was reached to begin by discussing larger topics related to the nonconforming section of code before going through the Nonconforming Ordinance line-by-line.

**Discussion of Terms: Nonconforming Situations and Legally Nonconforming**

The Committee began by addressing two key concepts in the draft Nonconforming Ordinance, why we include the term ‘situations’ in the Ordinance language, and residential density.

Beginning with the term situation, Mr. Levine asked why specific nonconforming situations must be defined, as opposed to defining the term, nonconforming and listing things that could be nonconforming. He also suggested that when we say nonconforming, we really mean legally nonconforming, because the structure was legal when it was built, but due to changes in our code, could be illegal today. This is very different from something that was built today that is nonconforming.

Ms. McKibben provided context that the concept of using the term situation, is that it differentiates between different types of nonconforming uses, such as the lot, use, parking, or structure, and there could be some or all of those nonconforming situations on one lot. This provides clarity that each type of nonconformity is a unique situation.

Ms. Maclean supported the use of the term situation, and went on to clarify that in CBJ 49.30.110 – Purpose and Intent, there is language that this Ordinance only speaks to legally nonconforming situations.

Ms. Mores further supported the discussion by stating there are generally applicable provisions at the beginning of the Ordinance that may apply to many situations, and the term is more of a high level way of viewing things that are covered in more detail later in the Ordinance. As to Mr. LeVine’s statement around the use of legally nonconforming, the opposite of that is noncompliant. There is no nonconforming that is illegal, because that would make it noncompliant.

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Mr. Levine then replied that the Committee should strike the word legally, because when using legally nonconforming together, then using just nonconforming later in the Ordinance, it implies they could be two different things and it becomes confusing to the reader.

Ms. Maclean suggested using language added to the first line of CBJ 49.30.120 – Application, that a nonconforming situation is allowed or not prohibited by law when created. Perhaps that could also be used in CBJ 49.30.110 – Purpose and Intent, replacing the term legally, yet defining it up front, and removing the term legally throughout the document. The Committee agreed that was a good solution for moving forward.

The Committee then moved to the term situation, and Mr. LeVine requested that staff define the words, nonconforming, and situation. Ms. Maclean directed the Committee to the definition of a nonconforming situation in CBJ 49.80.120 – Definitions, on page 18 of the draft Ordinance.

*“Nonconforming situation means a situation that 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 present requirements. A nonconforming lot, use, number of on-site parking spaces, structure or density, or any combination thereof.”*

Mr. Levine agreed that the definition was helpful.

Mr. Dye cautioned against using words together, with a definition for the term, because the average reader will not think to dive into the definitions section of code, and might instead use a common definition. Therefore, he recommended defining the term in the beginning of the Ordinance.

Ms. Maclean encouraged the use of situation, because otherwise, the Ordinance would become very long, listing out of the different types of situations. Additionally, there would be challenges when making changes to the code, to not overlook one of the many places where they are listed.

Mr. Dye then suggested the use of the word, nonconformity, instead of using nonconforming situation. Ms. McKibben was concerned with using that term, because there could be multiple nonconformities.

Mr. LeVine suggested addressing this from a different angle, by striking the repetitive definitions throughout the Ordinance, and listing the definitions once at the end. He would prefer using the term nonconformity, but if nonconforming situation is the term used in land use planning, then he could be okay with that. He also suggested that since nonconforming is defined appropriately at the end, perhaps only the term ‘situation’ needs defining, instead of a defining the phrase ‘nonconforming situation’.

Mr. Dye asked the Committee if there was any disagreement, and hearing none, moved on to the topic of nonconforming density.

### **Discussion of Concept: Nonconforming Residential Density**

Ms. McKibben addressed a concern brought up by the Planning Commission that a residential density is a subset of use. Staff spent some time on page 18 of the Ordinance, defining nonconforming residential density, and separating the concept of density and use. The challenge lies in the Table of Permissible Uses listing a variety of uses under residential, including multifamily, which is a use, but also implies a level of density. In light of further clarification, the draft Ordinance now reads:

*“Nonconforming residential density means a residential use that was allowed, or not prohibited by law, in the zoning district and was constructed at a lawful density, but which subsequently, due to adoption,*

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*revision or amendment of a zoning ordinance, now has greater density than allowed in the zoning district."*

The intent of the revised language is to resolve concerns of how it might conflict with language in the Table of Permissible Uses, and a note would be added to the Table of Permissible Uses, referencing this section of code.

Mr. LeVine suggested it is unnecessary to state, "...and was constructed at a lawful density", since the use has something to do with the density. Ms. McKibben agreed the language could be removed. Mr. LeVine suggested the language, "...when constructed, which subsequently, due to adoption..."

Mr. Dye asked if the scenario of a D-18 area with multifamily construction, being rezoned to D-10, would still be covered under lawful density, because they are still multifamily, but different densities. Also, perhaps the first sentence of the definition should read, "Nonconforming residential density means a residential use or density..."

Ms. Maclean expressed concern over including the words 'use' and 'density' in the first sentence. She explained that the Ordinance is saying a single family home can always be kept in industrial and waterfront industrial zones, and this is not the direction the CBJ or the Planning Commission sees as the best path forward.

Mr. LeVine asked if there was not a separate place in the code that addresses this, specifically disallowing that occurrence. Ms. Maclean suggested that would cause an area of conflict in the code that is best to avoid.

Mr. LeVine went on to discuss whether reader might interpret the use as being a particular type of structure, and a density interpreted as the density of structures. Therefore, there exists the possibility of having a density of structures that is allowed, but a use that is prohibited.

Ms. Pierce suggested that the superscripts to the Table of Permissible Uses should clarify that.

Ms. Maclean suggested the Committee look at this a different way, and call it something other than residential use in the definition, still adding the note in the Table of Permissible Uses. Ultimately, the goal is to allow for density, and it is always residential which has density.

Mr. LeVine then recommended removing the word 'means', and replacing it with the word 'occur'. The reasoning, is that a property owner has something that is too dense for what is now allowed, and they want it to be able to continue.

Mr. Dye appealed to the Committee to define things as much as possible in this Ordinance, and to not rely so much on superscripts in the Table of Permissible uses, because it is just another place to remember to look. He then asked if the Law Department had given any thought to the takings aspect as it relates to industrial preservation.

Ms. Mores replied that there is already a distinction between commercial and industrial when it comes to houses, and this Ordinance is continuing to maintain that distinction.

Mr. Dye asked why it would not be considered a taking, if someone built a house legally and the area was later rezoned to industrial. Then, the house was destroyed, and they are not allowed to rebuild.



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Mr. LeVine argued that would not be considered a taking, because other uses are allowed on that property, and the property owner has options besides a single family home.

Ms. Mores then called for a synthetization of the discussion for the minutes.

The Committee agreed to delete the definition of nonconforming situations at the top of the Ordinance and define it only at the end of the Ordinance. Mr. LeVine then suggested the Committee decide whether to clarify or simplify the definitions.

**Edits to Ordinance Going Line by Line**

Mr. Dye asked for comments or edits on page 1 of the Ordinance.

***CBJ 49.30.110 Purpose and intent.***

Mr. LeVine suggested removing the terms 'legally' and 'legal' from lines 19 and 20, or adding them to the definitions of a nonconforming situation. Ms. Mores agreed to that edit. Mr. LeVine went on to add a sentence at the end of the definition of nonconforming, distinguishing it from noncompliant.

***CBJ 49.30.120 Application.***

The question then came up from Mr. LeVine on page 2, as to why we feel compelled to point out what the nonconforming chapter does not cover, when the chapter already spells out what it does cover.

Ms. Mores explained that when a potential noncompliant issue is expected to arise, it is better to call it out as not being covered, so that there cannot be a question as to whether it was inadvertently forgotten.

The Committee also discussed the designation of properties that do not have a nonconforming certification, but only due to the fact that they have not needed the certification, since they are not actively trying to sell or refinance. Are those properties then noncertified or noncompliant?

Ms. Maclean suggested that if they would otherwise qualify as a nonconforming property, then they would simply be noncertified. She added that if the property owners of a nonconforming lot never sell their home or need financing, then it is a non-issue and does not change their nonconforming state.

***CBJ 49.30.210(b) Change of nonconforming situation to conforming situation.***

Mr. LeVine suggested striking the words, "...by right..." The reasoning being, that if a nonconforming situation may be changed to a conforming situation by right, this would negate the necessity of a Conditional Use Permit for a use that otherwise requires one, creating a conflict in the current code.

Ms. Maclean supporting striking the suggested language. Mr. LeVine then pointed out that the same phrase occurs elsewhere in the document, and he would recommend replacing the phrase with, "...according to the usual code provisions, or in accordance with the rest of this title".

Ms. McKibben supported using the language Mr. LeVine suggested and cautioned against removing the term, 'Conditional Use Permit', elsewhere in the Ordinance, because while it may seem obvious to planning staff, it may not seem obvious to the multiple audiences reading this language.

Ms. Mores supported striking the language and replacing it with language that states the change to a conforming situation must comply with code.

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Mr. LeVine pointed out that conforming situations are not a category, so the phrase should be stricken and reworded to state that, "...any nonconforming situation may be brought into conformance with the code, in accordance with normal code procedures..." Mr. Dye agreed with that suggested change.

***CBJ 49.30.210(c) Ownership.***

Mr. LeVine asked why we must specify that nonconforming situations run with the land, and suggested deleting it, since it is implied elsewhere in the chapter.

Ms. Maclean explained that if a property owner wanted to subdivide a large piece of land, and the nonconforming use was on a portion of the land, then the nonconforming situation is not running with the whole land.

Ms. Mores interjected that the language is simply trying to say that change of ownership does not change the status of the land.

The Committee then discussed whether to make these nonconforming certificates recordable. It was decided that this could create unintended errors in the future, if improvements are made to a property, bringing it into conformance. The recorded certificate could not be removed from the recorders website, and the question of its status could be confusing without additional research.

Ms. Maclean brought up the fact that some things do not transfer with ownership, and suggested striking the sentence, "Nonconforming situations run with the land". Perhaps even, replace "nonconforming situations" with "nonconformity/nonconformities".

Mr. LeVine agreed that the sentence Ms. Maclean referenced should be stricken as redundant, but asked the Committee to consider "A change of ownership of the parcel does not affect the legality of the nonconformity." Mr. Dye agreed to that change.

***CBJ 49.30.210(e) Discontinuation of nonconforming situation.***

Mr. LeVine asked about the purpose of this language, when there is an entire section in CBJ 49.30.220 that deals with the subject of abandonment. Ms. McKibben explained that this was a product of an earlier draft, before the abandonment section had been written.

Ms. Mores pointed out a potential issue in the abandonment language, by stating that in theory, a property owner could discontinue the use of something for 30 days, but that does not always mean it has been abandoned. Ms. McKibben agreed and acknowledged that more work was needed on the abandonment section.

***CBJ 40.30.210(g) Certification of legal nonconforming status prior to issuance of permit.***

Mr. Levine asked if it were a fact that a Certificate of Nonconforming Status must be obtain every time any city permit was needed to perform work. Ms. McKibben clarified that the intent of the language was for zoning and building permits only.

Discussion ensued on whether the City was interested in building a database of these certificates, and if so, that would guide the stipulations for when a certificate might be needed. However, the City could be inadvertently dis-incentivizing people to obtaining permits in general, out of fear that they would not qualify for a nonconforming certificate, and instead be deemed as noncompliant.

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Ms. Maclean preferred the language for needing a certificate be specific to permits that affect the nonconformity. Ms. Mores then encouraged a full review be conducted at that point on all nonconformities for the future, and not just on the nonconformity the permit affects.

***CBJ 49.30.210(j) Intentional damage, destruction or demolition.***

Mr. LeVine asked what the term, “nonconforming development rights” meant, and was that not implying the right to rebuild based on section CBJ 49.30.210(i), Structure deemed destroyed.

Ms. McKibben provided clarification that the term is addressing the right to maintain a nonconforming situation.

Mr. LeVine then suggested replacing nonconforming development rights with more specific language. Otherwise, it could be interpreted to mean, the right to maintain or rebuild a nonconforming situation when it is intentionally destroyed, when in fact, the rights go away at that point.

There was then discussion over whether recklessness or negligence could be interpreted as intentionally destroyed. Also, what if a lessee destroyed a property intentionally, are they an agent of the owner? Ms. Mores became concerned at this point of making litigation a pre-requisite, and suggested the Committee look at language that steers away from that.

Ms. Maclean stated that before the Committee becomes too entrenched with this aspect of the Ordinance, there should be consultation with the Building Division and the Fire Department, since their codes address this issue as well. She stated that many municipalities use the phrase, “acts of god” to describe unintentional destruction of property, so perhaps intentional destruction could be anything other than an “act of god”.

Ms. Crossley brought up the dilemma of a lessee potentially destroying the property, and asked if the Ordinance should not clarify whether the lessee is responsible for the recklessness.

Mr. Dye stated that the Alaska Landlord Tenant Act covers that scenario fully enough.

There continued to be discussion on clarifying what is meant by the term abandonment, and under what scenarios something might be deemed abandoned. Ms. McKibben stated that some of these issues are accounted for in CBJ 49.30.225, Overcoming presumption of abandonment, and perhaps the Committee could look at that to see if it is enough.

***CBJ 49.30.225(c) Directors decision.***

Mr. LeVine stated that the Ordinance says the Directors decision can be appealed to the Planning Commission, but that it is not evident in the section if the Director is making a determination about abandonment.

Ms. Mores stated that in CBJ 49.30.225(a), there is language that states, “...a finding by the director...”, but she agreed that she would include additional clarification language in the Ordinance.

***49.30.230(a) Change of nonconforming use to another nonconforming use.***

Mr. LeVine suggested changing the language of the opening sentence to a more active voice, stating, “The owner may...” instead of “A nonconforming use may...” in this section and all other sections.

Ms. Mores agreed on the change, but added that the Committee needs to define who is allowed to apply for a Certificate of Nonconforming Status.

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Ms. Maclean informed the Committee that all permits must be accompanied by a Development Permit Application (DPA), where the property owner's signature is required. Therefore, by default, an applicant, if not the property owner, must always have the owner's permission.

Ms. Mores then suggested adding language in the beginning, stating generally, who can apply.

***CBJ 49.30.230(d) Operational modifications to nonconforming use.***

Mr. LeVine quoted the section, "...the external impacts of such modification, are nominal...", and asked what is meant by that term, external impacts.

Ms. McKibben replied this language is mostly intended for noise, traffic, lighting, etc., encouraging harmony with the residential neighborhood.

Mr. LeVine then questioned the need for the phrase "external impacts", and suggested just the word, 'impacts'.

Mr. Dye supported that modification of language.

***CBJ 49.30.230(e) Nonconforming residential uses in industrial and waterfront industrial zoning districts.***

Mr. Dye acknowledged the difficulty in distinguishing a nonconforming residential use from density.

Ms. McKibben replied that there could never exist a single family home in an industrial zone, because the use of the single family home is prohibited. However, in other zoning districts, the residential uses are allowed, but the density is the driving factor, which is why it is broken out by different types of uses. To clarify, she added, there is never an acceptable level of density in an industrial zoning district.

Mr. Dye then asked about caretaker units being a density of 1, to which Ms. Maclean stated that Title 49 does not consider caretaker units or accessory apartments as counting toward a density.

Ms. Maclean then had an idea for how it could be worded differently, by replacing nonconforming with noncompliant so that it reads, "When a noncompliant residential use in the industrial and waterfront industrial zoning districts..." Mr. Dye agreed with that iteration and stated it seemed clearer.

***CBJ 49.30.230(e)(1)***

Mr. LeVine then asked staff to work on the language around the damaged or destroyed statements in this section, due to inconsistencies and poor wording. Ms. Maclean stated that staff would address these.

Mr. Levine also asked staff about the 3 year language in 49.30.230 (e)(1). He wondered what event triggers the 3 year timeframe. Additionally, stating that the "...nonconforming residential use rights are lost..." seems confusing and it would be easier to use language stating that they lose the ability to rebuild to the original nonconforming state.

Ms. McKibben clarified that the Committee's intent is to enable a damaged property up to one year to submit their intent to reconstruct, then they have 3 years from the time they receive a building permit to obtain their Temporary Certificate of Occupancy (TCO).

Mr. LeVine agreed with the intent and added that the current language did not make that interpretation clear.

Ms. McKibben agreed to clarify that language.

Ms. Maclean asked the Committee to consider whether 3 years was sufficient, and should it be extended to 5 years.

Mr. Dye felt that 3 years was appropriate and if needed, they could ask for an extension.

Ms. Crossley spoke in support of 5 years.

Mr. LeVine reminded the Committee that an extension could be granted for up to 18 months, so now the timeline has increased to 5 years and 6 months from the time the damage occurs.

The Committee reached consensus that 3 years was sufficient.

#### **IV. Adjournment**

The next meeting date was determined to be Tuesday, September 3 at 12 noon.

The meeting adjourned at 1:34 p.m.

**Planning Commission  
Nonconforming Ad Hoc Committee**

Tuesday, September 3, 2019, 12:00 p.m.

Community Development Department, Marine View Building, Fourth Floor

**Planning Commissioners:**

Nathaniel Dye (Chair)  
Shannon Crossley  
Michael LeVine

**Community Development Staff:**

Beth McKibben, Senior Planner, CDD  
Alexandra Pierce, Planning Manager, CDD  
Jill Maclean, Director, CDD  
Jane Mores, Assistant City Attorney, CDD  
Brenwynne Grigg, Administrative Officer, CDD

**I. Roll Call**

The meeting was called to order at 12:02 p.m., and a quorum was determined.

**II. Approval of Minutes**

None

**III. Agenda Topics**

**Nonconforming Development – Repeal and Replace CBJ 49.30**

Mr. Dye asked the Committee to pick up where they left off on August 30, in reviewing the ordinance line-by-line. Ms. McKibben stated that they last reviewed CBJ 49.30.230 Nonconforming uses, and next up for discussion is CBJ 49.30.240 Nonconforming residential densities.

**Edit to Ordinance Going Line-by-Line**

***CBJ 49.30.240 Nonconforming residential densities in zoning districts that allow residential development.***

Mr. LeVine, in reviewing this section, noted that dwelling units do not constitute a nonconforming residential density.

***CBJ 49.30.240(a)(1) Modification to existing dwelling units.***

Mr. LeVine asked staff if we want to keep the language in here, that anything requiring a building permit needs a certification. Or, would a certification only be needed for a building permit that will affect the nonconformity.

Ms. Mores stated that the nonconforming certification review needs to happen, whether or not the applicant gets the certificate, because it will affect the conditions of the permit. She added that staff has tried to tie the review to work relating to or affecting the nonconforming situation. This may or may not lead to a certification, because the review could end up determining that a property is noncompliant instead of nonconforming.

Mr. LeVine explained the same exact language appears in CBJ 49.30.240(b)(1), so suggested working this through and making adjustments, if needed, to both sections. Additionally, he supported using the term 'building permit' as opposed to just 'permit', because building permits are more likely to affect a nonconforming situation. He emphasized the need for this review to occur before applying for a building permit so that staff know what they are dealing with.

Ms. Maclean explained that there are two separate processes, a nonconforming certification, and a situation review. The latter is when you can't prove that you are nonconforming, so an applicant would definitely want that situation review before taking out any permits.

Mr. LeVine suggested the City would want to know about any nonconformities in both situations, so before an applicant applies for a building permit, they must apply for one of the internal certifications.

Ms. McKibben shared that from a practical approach, applicants are likely to be unaware that they have a nonconforming or potentially nonconforming situation. So in reality, this nonconformity will be discovered during the plan review stage, after the building permit has been applied for, but before the building permit is issued. Ideally, staff will contact those properties they know about to encourage proactivity in applying for these certifications, but that will not always be the case.

Mr. LeVine suggested the wording say, "In conjunction with application for building permit....".

Ms. Mores asked how failing to obtain a certification impacts an applicant's ability to receive their building permit, and suggested we require the nonconforming review, as opposed to requiring the nonconforming certification.

Mr. Dye stated there is already a precedence set that when conducting a massive remodel, once a certain percentage of the building being modified is exceeded, the entire structure must be brought up to code. He went on to state that this is proving to present the problem of affordability when updating these old downtown structures in need of fire sprinkler installations.

Mr. LeVine suggested, "Existing structure(s) constituting a nonconforming residential density may be modified subject to the following:

- (1) Nonconforming certification or satisfactory completion of the certification review process."

Mr. Dye asked what the outcome will be if someone does not get a certification or go through the certification review process.

Mr. LeVine replied that the applicant would have a noncompliant structure and he was not sure what the outcome of that would be.

Mr. Dye then supported clarifying this, so there is not that question.

Mr. LeVine suggested that by adding, "...to show you have a nonconforming structure" onto the end of (1), would alleviate some gray area.

Ms. Maclean informed the Committee that staff already do this work day-to-day during the zoning review of all building permits, so she thought the language would work.

Mr. Dye then asked what happens today, with current processes, if someone is determined to be noncompliant during the course of that zoning review, and suggested the course of action be outside of this chapter.

Mr. LeVine supported dealing with noncompliant structures outside the purview of this title. He went on to clarify, that in practice, when someone comes in for a building permit, they need to either have a certification of nonconformity, or go through the review process of nonconformity. Then, if neither thing occurs, they are either conforming or noncompliant.

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Ms. Maclean and Ms. McKibben confirmed that this is the current practice of staff, and this language will simply formalize the process.

Mr. Dye asked that this be applied to all nonconforming situations, not just for residential densities, and staff agreed.

Ms. McKibben gave the example of a property owner who may want to perform some extensive remodeling on their nonconforming structure. They would need go through the certification review process, and become certified, at which time, they could receive their building permit. However, maybe the primary structure is certifiable, but the addition that was added later, and was not properly permitted at the time, is noncompliant. If the intended remodel is only affecting the nonconforming structure, then it is a non-issue, but if the remodel is occurring in the noncompliant structure, then that would be an issue to address between the Director and the Compliance Officer.

Mr. Levine clarified that we want to allow units to be modified in a way that maintains or reduces the density allowed as a result of the nonconformity, and asked that the language reflect that intent. He noted that we are actually allowing a change in the density, but only if reducing the density.

***CBJ 49.30.240(b) Accidental damage or destruction.***

Ms. Mores spoke to a gray area in this section by using the example of an owner arguing that a boiler which blows is accidental. Technically, that is something within the control of the owner, because perhaps the installation was faulty. She asked if the language stating "...or other causes beyond the control of the owner or authorized agent of the owner..." was appropriate, because that could be argued. She expressed the need for a designee to determine whether something is accidental or intentional.

Ms. Maclean stated that if fire is involved in the damage or destruction, that designee would be the Fire Marshal, and if the damage or destruction was caused by anything other than a fire, the designee would be the Building Code Official. She added that she would discuss the other language with Mr. Ford, the Building Code Official, to get his opinion on this.

Mr. Dye added that willful neglect should not be a reason to rebuild. Ms. Mores recommended that based off this discussion, the word 'intentional' needs to be broadened, because in the legal world, there is a big difference between negligent and intentional. Perhaps the Committee should broaden this section to negligent, reckless, and intentional, so that anything accidental really does become more like an 'act of god'.

Ms. McKibben confirmed that their intent with the current language was for accidental to mean acts of god. However, what if you had a scenario where a neglected building was purchased by a new owner and they wanted to rehabilitate it. Would we want the building to lose its nonconforming status, or allow the new owner to make the repairs needed to maintain its nonconformity?

Mr. Dye replied that the scenario Ms. McKibben presented is the ultimate problem in Juneau, especially in the downtown.

Mr. LeVine asked for clarification as to whether we are also talking about destruction, and not just damage. He suggested the scenario, of a structure succumbing to a small fire, which results in a hole in the floor. He asked if this subject triggered this section, and we would not allow a repair. Or, is it just when something is destroyed and has to be rebuilt.



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Ms. McKibben answered that in the nonconforming residential density section, the Ordinance allows for reconstruction regardless of the extent of the damage or destruction. In other sections, we are limiting it if deemed destroyed by the Building Official, which is the 75% threshold.

Ms. Mores commented that it still does not get to Mr. LeVine's question as to whether something was deemed accidental or intentional.

Mr. LeVine went on to reflect that the Committee does not want to get into intentional, versus reckless, versus negligent, versus accidental. He wondered if that is still the case, and if so, is there an insurance standard that could be applied here. For instance, would the insurance company pay the claim? If so, perhaps that is the hint as to how the decision is made.

Mr. Dye thought using the payment of an insurance claim as a standard may or may not help, because many of the old properties in town that will face this dilemma, do not carry insurance.

Ms. Mores replied that still, between the Fire Marshal, the Building Code Official, and the insurance standards, that would provide an objective way of making these determinations.

Ms. Maclean asked to speak with the Building Code Official because she suspected there was something used in the Building Division to make those determinations.

***CBJ 49.30.240(b)(5)***

Mr. LeVine asked what triggers the 3 year deadline, and remembered dealing with that earlier in the Ordinance, asking that the same language be applied here as well.

***CBJ 49.30.240(c) Occupancy status.***

Ms. Mores started off by saying this section ties into the abandonment issues. She reminded the Committee that we now know what constitutes abandonment, and what constitutes the presumption of abandonment. The language says that 365 days of discontinuance gives the presumption of abandonment. Here, the language is saying that your rights are lost after 3 years. Does the Committee want that to mean that after 3 years, a presumption of abandonment is elevated to an event of abandonment?

Mr. Dye then suggested that this should be moved under the abandonment section of the Ordinance.

Mr. LeVine was not sure what was special about this scenario and different from the discontinuance of use scenario earlier in the Ordinance.

Ms. Maclean replied that the Committee wanted to include a timeframe to account for density rights, because prior to this, density rights were for forever.

Mr. LeVine clarified that the idea, is that a property owner could lose their nonconforming status after 1 year for other things, but lose their density rights in regards to residential after 3 years? To which Ms. Maclean confirmed that was the correct idea.

Mr. LeVine then suggested the 1 year language of presumption of abandonment, and the 3 year language of an event of abandonment, should be together in the Ordinance language for the sake of clarity. However, he went on to state that in his opinion, both the 1 year and the 3 year timeframes should be a presumption of abandonment.

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Mr. Dye agreed with the idea that both timeframes only result in a presumption of abandonment, because the intent is to be lenient with nonconforming residential density.

***CBJ 49.30.250 Nonconforming structures.***

Mr. LeVine began by addressing parking, because if an owner is already nonconforming or noncompliant on parking, this section would suggest that an owner must come into compliance with current parking standards before performing any type of work. He added, that this does not seem to be in line with what the Planning Commission means to happen.

Ms. McKibben clarified that if an addition is occurring on a single family home, the parking requirement would not change. Only in adding an additional dwelling unit, would the parking requirement change.

Mr. LeVine agreed, but added that the way the Ordinance is currently written, suggests that an owner would need to come into compliance with the current parking standards before any work could be performed on the house.

Ms. Maclean suggested adding language that states, "...unless otherwise provided in this title", to which Mr. LeVine agreed.

***CBJ 49.30.250(a)***

Mr. LeVine addressed an interesting interplay between the language, "...does not increase the nonconformity...", and being allowed to add additional stories to the structure through the Conditional Use Permit. If the bottom floor is nonconforming and built into the setback, and we allow an additional story to be built above the nonconforming portion of the house, does this not worsen the nonconformity? This term seems difficult to interpret, he stated.

Mr. Dye replied that it did not matter, because we allow it elsewhere in this code.

Mr. LeVine therefore stated that we need to add language here that states, "...unless otherwise allowed for in this chapter."

Ms. Mores clarified that a property owner cannot continue building in the setback, thereby increasing the nonconformity, except if adding additional stories, in which case they are then able. She suggested finding a way to address that discrepancy in this chapter. Perhaps by referencing CBJ 49.30.250(c) in this section, because it is always better to be specific when able.

***CBJ 49.30.250(f)***

Mr. LeVine asked why the phrase, "...any distance..." is included in this code section, as it seems redundant to the term, "...moved..."

Ms. Crossley supported the added phrasing, because if a home is lifted up to repair a foundation of a historic structure, then that is technically moving it, but not moving it a distance.

Mr. LeVine suggested it could be argued that the distance moved is up, and this would still apply. Perhaps the language should read, 'permanently moved' instead of simply 'moved'.

Mr. Dye speculated that if someone was going to the trouble of lifting a house off its foundation for repairs, why could they not slide it over a bit to bring it into conformity, or more conformity? Although, he admitted that he did not want to make that a requirement.

***CBJ 49.30.250(g) Accidental damage or destruction.***

Mr. LeVine observed that this language is being reiterated over and over again, and suggested it be included as a section, so as to avoid the repetition, and simply reference the section.

***CBJ 49.30.260 Nonconforming lots and lot fractions.***

Ms. McKibben mention that staff have gone back and forth between calling this idea a 'nonconforming lot' or a 'nonconforming lot or lot fraction', and asked that the Committee provide direction as to which language is preferred.

Ms. Maclean stated that it should be stated as 'nonconforming lot or lot fraction' in all places.

***CBJ 49.30.260(4)***

Ms. Mores again reminded the Committee that specificity is needed in the Ordinance to verify who is deeming something accidental.

Mr. LeVine suggested that the specificity needed to be put into one place and referencing it, as opposed to having this language in multiple places throughout the Ordinance.

***CBJ 49.30.270 Nonconforming off-street parking spaces.***

Mr. LeVine advocated for the language to be shortened to say, "Any use that adds parking may not reduce that parking without a waiver." Because in all instances, it is creating more conformity, and moving backwards should not be allowed.

Ms. McKibben replied that this language was for the potential scenario of a property owner having a nonconforming home constructed without a parking requirement, then later adding a garage to provide a covered parking area, still prior to a parking requirement. In the scenario, they now want to convert the garage to a living space. Staff have been advised that the property owner should not be able to remove the parking, because their parking has become more conforming. However, the parking is still not completely conforming, because current code requires two on-site parking spaces.

Ms. Maclean spoke about ways for someone to avoid meeting the parking requirement, such as exceptions provided in other sections, like fee in lieu and parking waivers. She added that variance should also be listed, because it is an option to pursue. She also stated that the current language makes it clear for the people interpreting the code.

Mr. LeVine then suggested it be kept in line with other sections, and state that if a parking space is added, the property owner loses their nonconforming rights.

Ms. Mores rebutted that, saying that if they need 2 spaces, and have only added 1 space prior to the parking requirement, and today they've lost their nonconforming rights, then they would be noncompliant due to needing 2 spaces.

Mr. Dye stated that staff and the Committee is trying to parse this too much and it could be simpler, because there are more ways that parking could be nonconforming. There could be back-out parking, angle in parking, the space could be too small, etc.

Mr. LeVine then countered with the only fair way of dealing with this, is if it is forward looking. Because the

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City could get into a scenario where they have retroactively taken away a property owners rights. He suggested the scenario, where they added parking to their property, prior to a parking requirement taking effect. In doing so, they were giving up their rights 20 years down the road, without realizing it.

Therefore, they will need to get a certificate of nonconforming prior to construction, because they are still nonconforming whether they have 1 or 0 parking spaces, because the minimum parking requirement is 2. With that certificate of nonconforming, they should be able to remove that parking space in favor of enlarging their home, if they choose.

Ms. McKibben replied that if an applicant approached our department today with this scenario, we would tell them they cannot convert their parking space back to living space, unless they can provide 1 off-street parking space to accommodate for it. Ms. Maclean agreed.

Mr. LeVine concern over that practice because someone gave up their rights, without knowing they were giving up their rights, and he wonders about the legality of that. He encouraged Ms. Mores to research that scenario.

Ms. Crossley presented a different approach to the scenario, and suggested that many of these older garages falling into these scenarios are not built to the current dimensional standards of a car, so we could argue that is not a parking spot.

Ms. Maclean stated that she understood the argument and staff needed time to work on it.

***CBJ 49.30.310(b) Certificate of nonconforming status.***

Ms. Mores spoke that this section is an example of having a review of the nonconforming status as opposed to having a certification of the nonconforming status. She suggested there could be a situation where someone wants to do something, and the certification is not a prerequisite to obtaining the permit, but a review would be appropriate, and the outcome of the review might affect conditions on the permit.

Additionally, this sounds like the section is telling staff that when someone comes in for a permit, this review needs to be conducted. She went on to state she was not sure whether a distinction needed to be made between staff conducting a review, and someone coming in to pay money for a certification.

Ms. McKibben suggested offering a reduction in the certificate fee if the review is accompanied with a building permit application. This might reduce the disincentive.

Mr. LeVine suggested the permit application fees being adjusted so that the nonconforming certificate fee is wrapped into the building permit fee.

Ms. Maclean replied that we would not always know at the time they apply for a building permit, whether the nonconforming review/certificate is needed, so staff would be unable to charge for that at the time payment is required for the building permit.

Mr. LeVine argued that it did not seem right to tell someone they have to pay \$150 for a certificate that tells someone their house is too close to the setback, when that is something they already know.

Ms. Maclean replied that most applicants are not aware of a nonconformity on their lot, and staff may not be aware either, until they get into the plan review process.

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***CBJ 49.30.310(c) Certification.***

Mr. LeVine stated that this section creates an inconsistency with the abandonment section, and asked that this just point to the abandonment section.

Ms. McKibben stated that spelling it out in this way will be easier for the practitioner.

Mr. LeVine replied that he understood, but every time something is repeated in code, the likelihood that an inconsistency with another section will be created is increased.

Ms. McKibben agreed that item 2 could be removed, because if it has not been abandoned, then it has either been continuously maintained, or maintained enough to maintain its status.

***CBJ 49.30.310(d) Application.***

Mr. LeVine references the language, “with evidence establishing the factors set out in (c) above”, and stated that in real life scenarios, this evidence will actually be assertions, so a narrative explanation with supported documentation should be allowed for, instead of requiring evidence.

Ms. Mores agreed that the term ‘evidence’ would be replaced with ‘relevant information’ everywhere this occurs.

Mr. Dye recommended an edit to change the word ‘believed’ to ‘known’.

***CBJ 49.30.310(e) Relevant evidence.***

Mr. Dye stated that the same edit regarding evidence from the discussion above, is relevant here as well.

***CBJ 49.30.310(f) Decision.***

Mr. Dye commented that the phrase, “... in a timely manner” is not clear, and asked for a specific timeline to be applied.

Ms. Maclean replied that this decision could be reached in as little as a day, or if the situation is complex, it could take a couple of weeks.

Mr. Dye then suggested removing the language altogether, if a timeline could not be applied.

***CBJ 49.30.320 Nonconforming situation review.***

***CBJ 49.30.320(a) Purpose.***

Ms. Mores asked for suggestions on the purpose language, as she is not completely satisfied with it.

Mr. LeVine suggested striking the purpose, since the current language is not a purpose at all, but a statement. The purpose, he continued, is allowing people to change their nonconforming situations. He added that it was important to keep the part stating that these will be reviewed by the Board of Adjustment.

Ms. McKibben suggested including something about public process in the language.

Mr. Dye suggested that staff work on the purpose statement and bring it back before the Ad Hoc Committee.

***CBJ 49.30.320(d) Director's review procedure.***

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Mr. LeVine observed that this is a new section which has been added, and requested review of this at the next meeting, after having time to study it.

***CBJ 49.30.320(e) Fee.***

Ms. Maclean suggested working with Ms. Grigg, the Administrative Officer, and Mr. Ford, the Building Code Official, to see what might be a practical way of dealing with the fees. Then, she would bring a proposal forward to the Committee.

Mr. Dye encouraged looking at a fee structure that would provide for residential versus construction, and allowing for one fee, or a reduced fee, be applied to residents of multifamily residential structures.

**IV. Adjournment**

The meeting was adjourned at 1:35 p.m.

DRAFT

**Planning Commission  
Nonconforming Ad Hoc Committee**

Tuesday, September 10, 2019, 12:00 p.m.

Community Development Department, Marine View Building, Fourth Floor

**Planning Commissioners:**

Nathaniel Dye (Chair)  
Ben Haight  
Michael LeVine  
Paul Voelckers

**Community Development Staff:**

Beth McKibben, Senior Planner, CDD  
Alexandra Pierce, Planning Manager, CDD  
Jill Maclean, Director, CDD  
Jane Mores, Assistant City Attorney, CDD  
Brenwynne Grigg, Administrative Officer, CDD

**I. Roll Call**

The meeting was called to order at 12:34 p.m., and a quorum was determined.

**II. Approval of Minutes**

None

**III. Agenda Topics**

**Nonconforming Development – Repeal and Replace CBJ 49.30**

***Director's Overview of Outstanding Issues***

Ms. Maclean brought the Committee back to an earlier conversation regarding who has the authority to decide whether a nonconforming structure is damaged or destroyed, and whether it was accidental. She stated that after research, it has been determined that this decision lies with the Building Code Official, and that authority is given in the Building Code, Title 19.

Ms. Maclean also stated that she met with the Community Development management team to discuss the handling of fees associated with nonconforming certifications, and she has come prepared with a suggestion for the Committee, once they reach that portion of the Ordinance.

***Overarching Issue: Nonconforming development lacking permits.***

Mr. Voelckers suggested that after going through the Ordinance, there might be an area for further clarification. He presented an example to help demonstrate his point. He asked the Committee to consider a structure that was built to the code specifications of the time, yet without any of the required permits. In this scenario, we have a development that is nonconforming, yet also illegal. He asked if this would be considered legally or illegally nonconforming.

Mr. LeVine appreciated the comment and agreed that the scenario falls neither into nonconforming or noncompliant, but a third category. Mr. LeVine processed that it might be difficult in every situation to fully prove whether something received all the necessary permits for the time, and suggested that might even be unnecessary. He recommended that regardless of how it was permitted, if staff determine through the nonconforming review process, that the development was constructed to the code which was current at the time, then it should be viewed as nonconforming. He went on to add that since this was a gray area which might cause some confusion, the definition for nonconforming should clarify that a nonconforming status is not dependent on whether the property owner at the time received all the correct permits.

Ms. Maclean was concerned that if the development was not legally permitted at the time, then staff would be unable to determine if the development was constructed to the health and safety standards of the time.

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Mr. LeVine understood the concern, but went further to state that the Committee did not want to be in the business of removing structures that are 30 years old because they were not legally permitted.

Mr. Voelckers validated Mr. LeVine's position, reaffirming that it is wrong to force property owners to tear down a building just because the property owner before them did not obtain the proper permits.

Ms. McKibben stated that sometimes staff have no record at all of an original building permit, but they have records of later permits. In practice, staff have taken the position that since later permits were allowed issuance, then any outstanding issues with the original construction, if any, would have been addressed with the more recent permits.

Mr. LeVine asked then if it were not the position of the City, that if a property owner cannot show they properly permitted the development, then they had to show in some other way they were compliant with everything at the time.

Mr. Ford confirmed Mr. LeVine's assumption and stated that when something of this nature is in question, CDD asks the property owner to hire an engineer or another applicable professional to inspect and sign off on the construction, so that the City does not take on any liability.

Mr. LeVine again recommended that the Ordinance state their intent on nonconforming structures, where the legality of the original permitting is in question.

Mr. Voelckers agreed that intent language is needed in the Ordinance. He added that the City should allow the property owners the burden of proof to show that the construction is not dangerous, so that the structure may continue to be allowed.

***Overarching Issue: Nonconforming rights***

Mr. LeVine expressed concern over the phrase, 'nonconforming rights', stating that he is not sure the Ordinance means to confer 'rights' on anyone. He added that a property owner does not accrue to any rights; they either have a nonconforming situation, which allows them to do certain things, or they do not. He reiterated that this Ordinance is not about rights, but about sections of the Code applying, or not applying.

Ms. Mores asked to hear what Ms. McKibben had seen during her research of other zoning codes on nonconforming development. She suggested that the entire purpose of this Ordinance is to give people some sort of 'grandfathered rights', so there is predictability in what they can do with their property moving forward.

Ms. McKibben answered that 'rights' is a term used in other zoning codes. However, if the Committee directed, she could suggest another term.

Mr. LeVine asked that at a minimum, the term be defined as pertaining to the sections in this chapter, because rights is a strong word and comes with a lot of presumption. He did not think the Committee intended the term to be broadly interpreted.

There was consensus among the Committee to include a definition of nonconforming rights in the Ordinance.



**49.30.110 Purpose and intent.**

Mr. LeVine asked to strike the second sentence in this section relating to intent.

*"The intent is to reduce the impacts of nonconforming situations; promote public health, safety and general welfare; and minimize unreasonable impacts to property impacted by zoning changes."*

Ms. McKibben encouraged the Committee to keep the sentence, especially because of the portion on public health, safety, and welfare.

Ms. Maclean added that the intent language helps provide the clarification that going from a nonconforming use, to a nonconforming residential use with higher density, may not be okay, if there are "...unreasonable impacts to property impacted by zoning changes."

Mr. Dye stated that the Committee had already shortened this section significantly, and he preferred it as currently written.

Ms. McKibben also supported the first part of the sentence on intent, because it provides for a property owner to improve their nonconforming situation, without being forced to immediately come into full compliance with current code standards.

Mr. LeVine agreed with Ms. McKibben's reasoning on this last point, and accepted that it was best to keep the intent language in the Ordinance.

**General Wordsmithing**

Mr. LeVine stated that he had several wordsmithing edits which did not impact the interpretation or application of the Ordinance, and asked Ms. Mores if he could email them to her for the sake of time.

**CBJ 49.30.210(j) Accidental damage or destruction.**

Mr. Voelckers suggested adding nonconforming lots to this section, because sometimes there is a scenario where the structure and use on the lot are conforming, but the lot is undersized, making it nonconforming.

Mr. Dye felt this is already cared for in other sections of the Ordinance.

Mr. LeVine asked staff to ensure that sections CBJ 49.30.210 (i) and (j) are not redundant with other sections of the Ordinance, as it was decided to include these in definitions.

**CBJ 49.30.220(d) Determination of abandonment is made by the director.**

Mr. LeVine asked what determination is being made by the Director. Is the determination whether something is abandoned according to (b), or whether something is presumed to be abandoned according to (c) of this section?

Ms. Mores replied that this is meant to capture both abandonment, and the presumption of abandonment. Then, in CBJ 49.30.225, we allow for a property owner to overcome the determination of the presumption of abandonment.

Mr. LeVine suggested that the Director was in fact determining something to be abandoned, because it did not make sense that the Director would determine that something is presumed to be abandoned, because there is still room in the determination for more information that might change its status. So, he felt that (d) should state that the Director will make a determination based on (b) and (c) that the property is abandoned.

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Ms. Mores replied that there could be added specificity to (d).

***CBJ 49.30.225(b) Overcoming presumption of abandonment.***

Mr. LeVine asked about the use of the word applicant, and whether we resolved whether this means owner or applicant.

Mr. Voelckers pointed out that throughout the Ordinance there is inconsistency with the two words, and sometimes they are even used together.

Mr. Dye explained that according to current processes, he is in favor of using the word applicant, because an applicant cannot apply for any type of development without the signature of the property owner. Additionally, property owners often hire contractors to handle permitting for them, so applicant would be most convenient.

***CBJ 49.30.225(a)(5)***

Mr. LeVine stated he was unsure of the purpose of (5). He asked why a director's determination of abandonment can be overcome by an owner applying for a nonconforming situation review to Board of Adjustment.

Ms. McKibben replied that by applying for the nonconforming situation review, they could show their intent to not abandon, while also buying themselves time to do something with the property, so as not to run into an issue with the 365 consecutive day timeline under CBJ 49.30.220(c)(2).

Mr. LeVine said that made a lot of sense, but perhaps the 'and' should be removed in the list after (4), and it should instead say 'or'.

Ms. McKibben confirmed that (5) was meant to be an option, not a requirement, and agreed that 'or' was appropriate.

***CBJ 49.30.230(b) Expansion of nonconforming uses.***

Mr. LeVine asked if there should be an exemption in this section if there were de minimis changes approved.

Ms. McKibben clarified that Mr. LeVine is asking that a nonconforming use be allowed to expand to a greater area of land if a prior permit or exception allowed for that expansion. She went on to say that this section was intended to not even allow for small expansions, which may be allowed for by the Variance process, but that certain expansions like the application of exsulation, does not increase the use, so they should be allowed.

Mr. LeVine asked that this be made clear.

Mr. Dye stated that certain things, like applying exsulation, should be outright allowed, because the Committee does not want people receiving variances on top of a nonconforming certification.

Mr. Voelckers agreed with the direction of Mr. LeVine and Mr. Dye.

Ms. Maclean stated that if there are too many specific situations mentioned in the section, it increases the chance for inconsistencies when other sections of code are changed. She suggested perhaps stating that these specific sections of code may be used for exceptions, without stating the specific situations.

There was consensus that there would be a section of code referenced, instead of specific exceptions listed out.

***CBJ 49.30.230(c) Operational modifications to nonconforming uses.***

Mr. LeVine asked if the Committee could consider defining operational modifications.

Ms. McKibben replied that in a previous version of the Ordinance, there were examples of operational modifications, but it was thought best that they be removed, and that they could be added back in if the Committee so desired. She added that some of the examples were hours of operation, number of employees, and ways the use operates, all of which do not have external impacts.

Ms. Pierce clarified that changes to the operation that does not aggravate or impact the nonconformity are allowed, so that it does not pose an external impact.

Mr. LeVine was concerned that if a category was created for operational modifications, then there could be argument as to what that means. He recommended striking operational and just stating modifications, so that a category is not created.

***CBJ 49.30.240(a) Modification or maintenance of existing dwelling units.***

Mr. Voelckers called out an issue in CBJ 49.30.240(a)(1), stating there needs to be a period after the code reference CBJ 49.30.310, with additional language. It currently reads:

“The nonconforming residential density is certified pursuant to the procedures provided in section CBJ 49.30.310 prior to commencing any modification that requires a building permit”

Mr. Voelckers recommended it should read:

“The nonconforming residential density is certified pursuant to the procedures provided in section CBJ 49.30.310. Certification of nonconforming status is required prior to commencing any modification that requires a building permit”

Mr. Voelckers stated this is necessary because there are two issues being addressed here, the issues of modifications and of maintenance.

Mr. LeVine then asked why we needed to say existing dwelling units can be maintained, because he felt like this was already addressed elsewhere.

Ms. Maclean reminded the Committee that they requested the term maintenance be added to this section at the September 3 meeting.

Mr. Voelckers then asked if it was necessary to further address maintenance as an existing right.

Mr. LeVine realized that he misread this to mean maintenance in terms of maintaining the rights, and it is meant to read maintenance in terms of cleaning and general upkeep.

Ms. McKibben stated that the idea behind this section is to provide for nonconforming residential densities the ability to be improved with decks and porches that other sections of the code provides for, which is beyond the scope of being maintained.

Mr. Dye suggested striking the term maintenance and just using the term modification.

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There was consensus to strike maintenance.

***CBJ 49.30.240(b) Accidental damage or destruction***

Ms. Maclean stated that she and Mr. Ford met about this section to discuss the specifics around a decision on whether something was accidentally damaged or destroyed. The conclusion was that the decision made is based on the certifications and expertise of the Building Code Official. Therefore, language has been added making it clear this is the decision of the Building Official.

***CBJ 49.30.250 Nonconforming structures***

Mr. Voelckers addressed the graphic of the expansion of a nonconforming structure, and expressed the need for more arrows depicting where expansion is allowed, and whether the additions shown are acceptable or unacceptable.

***CBJ 49.30.250(c)***

Mr. Voelckers recommended the following edit to the section:

“Additional stories may be added to a nonconforming structure pursuant to CBJ 49.25.430(4)(M), and ~~are not considered an aggravation~~ **not determined an aggravation** of the nonconforming situation.”

Mr. Dye brought the Committee back to the point of exsulation, and asked if there was not a better way of writing (c) to encompass ways of expanding the structure without having to site code.

Ms. McKibben shared from the perspective of a practitioner of the code, that it is understood that any nonconforming structure can be modified in any way that is currently allowed for in code. For example, if an owner wants to add a front porch, they may do so in conformance with the front yard setback. This includes any out-of-the-box exceptions, of which exsulation is one that applies. She added that (c) is more of a pointer to the up-fill conditional use process.

Mr. Dye understood the perspective that this pointer is here because most other exceptions are over-the-counter permits, and the up-fill conditional use process involves the Planning Commission.

Mr. LeVine thought it would be advantageous to put a catch-all statement in this chapter, stating this is not meant to diminish rights otherwise provided for. He went on to state that at some point, with staff turnover, this could become an issue with a neighbor and it is better to be clear so there no room for confusion to develop.

Mr. Dye asked to eliminate (c) and for this catch-all language to become the new (c).

Mr. LeVine replied that he would like to include other code sections, in addition to the catch-all language, and perhaps some examples.

Ms. Maclean recommended directing to the code section, CBJ 49.25.430, that includes all the special exceptions for setbacks. That way, if the section of code is changed, we do not have a specific example in this chapter we need to go back and correct.

Mr. LeVine suggested the language, “...and anything covered in CBJ 49.25.430 may not be considered an aggravation of the nonconformity.”

Mr. Dye liked that idea, and consensus among the Committee was reached.

**CBJ 49.30.250(f)**

Mr. LeVine suggested the entire sentence is redundant, because this is now addressed in the abandonment section.

*"With or without certification of nonconforming status, if a nonconforming structure is moved, the nonconforming structure situation is abandoned and the nonconforming structure rights are lost."*

There was consensus amongst the Committee to delete section (f).

**CBJ 49.30.260 Nonconforming lots and lot fractions.**

Mr. Voelckers suggested some rearrangement of the numbering of the section. He asked that CBJ 49.30.260(4), "Unless located in an industrial....", be renumbered to CBJ 49.30.260(b), because it is fresh criteria, not subject to CBJ 49.30.60(a)(1-3).

There were no objections.

**CBJ 40.30.260(a)(2)**

Mr. LeVine asked if staff were trying to prohibit uses that have larger area requirements than the minimum size in the district.

Ms. McKibben replied that the Auke Bay area entertained the idea of a minimum lot size for retail establishments at one point, and some uses require minimum lot sizes.

**CBJ 49.30.270 Nonconforming parking.**

Mr. Voelckers asked that CBJ 49.30.270(a)(1) should become CBJ 49.30.270(b). Additionally, that CBJ 49.30.270(a)(2) should become CBJ 49.30.270(b)(1).

Mr. Voelckers went on to suggest that CBJ 49.30.270(a), should read:

*"Nonconforming parking may continue, be placed or reconstructed under this subsection with the same number and type of off-street parking spaces as were provided for the original structure or use, unless the following apply: if the government entity that controls the right-of-way determines that it does not endanger public health, safety or welfare."*

Mr. Dye thought appreciated the edit as making sense and Mr. Haight agreed.

Mr. LeVine recommended removing "...nonconforming parking rights..." and replacing the term with "...the newly provided parking may not be removed other than in accordance with this chapter, including the right to obtain a parking waiver..."

**Process before Board of Adjustment**

Ms. Maclean asked the Committee if they would like to see the Board of Adjustment process for Nonconforming Situation Reviews more reflective of the current ADOD process, or the Variance process.

Mr. Voelckers asked for a brief explanation of the major differences between the two processes.

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Ms. Maclean explained both processes go to the Board of Adjustment, but the standard of review is briefer in the Variance process. The ADOD process is more in-depth, laying out the procedures of review more clearly, similar to a Conditional Use Permit.

Mr. Dye expressed his preference for the ADOD process.

Mr. Voelckers agreed with Mr. Dye, because the ADOD process calls for the review of neighborhood harmony and looks at the surrounding situation.

There was consensus among the Committee to use the ADOD process.

***Fee Discussion***

Mr. Dye moved the discussion of the Committee to fees related to nonconforming certifications.

Ms. Maclean acknowledged that though this ordinance is new, staff regularly conduct a nonconforming review through other processes, so staff has a good idea of the volume and scenarios it will encounter. Ms. Maclean met with Mr. Ford, Ms. Grigg, and Ms. Pierce on the subject of fees, and staff's recommendation is to conduct the review at no charge, and charge \$150 if an applicant wants an official copy of the Certificate of Nonconforming Status. The thought was that often, an applicant will be unaware they need a review, and it will only be discovered during plan review through the building permit process. Staff did not think it seemed fair or feasible to go back to a customer and request an additional fee for something they were unaware they needed and did not request. However, there are other instances where a customer will specifically request a certification, because it is needed in order to sell or refinance their home. In this scenario, staff would charge a fee.

Mr. Dye liked that staff would be compensated for some of the work they are currently performing, but wished there was a way for more compensation of the reviews to occur.

There was additional discussion over how staff would charge condo owners, where the review is only conducted once, but multiple condo owners might request a certification.

Ms. McKibben suggested advising condo owners to have the Condo Association pay for the review of the entire condo development, and subsequent certification, then it would be made available to everyone.

There was consensus that an applicant would only pay the \$150 certification fee, if applying for a certificate without development attached to the application, and the review had not already been performed prior.

**IV. Adjournment**

The meeting was adjourned at 2:24 p.m.

Next meeting – Consensus was reached to bring the Ordinance before the Planning Commission on September 19, 2019 at 7 p.m. in Assembly Chambers.



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**Date:** September 12, 2019

**To:** Ben Haight, Planning Commission Chair

**From:** Beth McKibben, AICP, Senior Planner

**Subject:** AME2018 0009, text amendment to revise Title 49 to repeal and replace 49.30 - Nonconforming Development

### **ATTACHMENTS**

Attachment A – Ordinance 2019-37 v2

Attachment B – August 21, 2019 staff report and attachments

### **BACKGROUND**

The Planning Commission held a public hearing on August 27, 2019 for the draft ordinance 2019-37, which is intended to repeal and replace CBJ 49.30 – Nonconforming Development. The Commission formed an ad hoc committee to continue working with staff on the draft ordinance. The Committee met three times: August 30, September 3, and September 10, 2019. The Committee's work focused primarily on clarification and refinement, as directed by the Planning Commission at the August 27, 2019 public hearing.

For the purposes of continuing the review and discussion from the previous hearing and Committee meetings, Attachment A Ordinance 2019-37 v2 has been drafted as follows:

- **Bolded** words/phrasing indicate the revisions from the public hearing to the Committee meetings
- **Bolded and underlined** words/phrasing indicate revisions based upon input from the last Committee meeting and further review by CBJ staff

### **DISCUSSION**

The committee's work focused primarily on the following revisions:

#### *Nonconforming residential uses in Industrial and Waterfront Industrial zoning districts*

Residential uses are not permissible in these zoning districts. Only caretaker units are permissible as an accessory use to a primary use, and therefore are not counted as density. Therefore, reconstruction of nonconforming, residential uses in these districts is treated more strictly than in zoning districts where residential uses are permitted.

#### *Takings*

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A distinction between residential uses already exists in code between commercial and residential zoning districts and industrial zoning districts. This distinction is maintained with this ordinance. Additionally, property owners in the industrial zoning districts are able to redevelop their property for other uses that are permissible in the industrial districts, and thus it is not a taking.

### **Nonconforming Situations in General**

#### *Certification of nonconforming situations*

This ordinance clarifies that a certificate of nonconforming status is not necessarily required before *any* work on a nonconforming situation can take place.

#### *Damage and destruction*

Language has been added to clarify that the Building Official makes the official determination of the extent and cause of damage or destruction. This applies to determining whether damage or destruction was intentional or accidental, and whether the damage has reached the threshold to be deemed destroyed.

#### *Failure to qualify for nonconforming status*

A new section has been added to clarify that when a situation fails to be certified, or cannot be certified, it is noncompliant and subject to enforcement.

#### *Abandonment*

This ordinance has two statuses of abandonment: when all nonconforming rights are lost and when they are presumed lost and may be overcome. Clarification has been added for how the Director determines abandonment. The process for rebutting a director's determination of abandonment has been refined.

### **Nonconforming Uses**

Minor revisions were made providing clarification to what is considered acceptable modification. Additionally, clarification was added for reconstruction of nonconforming residential uses in Industrial and Waterfront Industrial zoning districts.

### **Nonconforming Residential Density**

The definition for nonconforming residential density was revised. The reconstruction section was refined. The Committee discussed adding a superscript to lines 1.200 and 1.300 of the Table of Permissible Uses (49.25.300), directing users to a new Note AC, which would state "Refer to 49.30.240".

### **Nonconforming Structures**

This section was clarified to include that nonconforming structures can be modified, enlarged, or altered if the modification does not aggravate the nonconformity. Additionally, the ordinance now references section CBJ 49.25.430(4), exceptions to setbacks, which includes the opportunity to apply to add stories



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to a nonconforming structure through the conditional use process. This clarifies that nonconforming structures may be modified in compliance with the existing code, including available setback exceptions. Figure 1 was refined to better show what expansion is and is not allowed.

### **Nonconforming Parking**

Language has been added that provides for the government entity controlling the right-of-way accessing the parking must find the replacement or reconstruction of nonconforming parking does not endanger the public health, safety, or welfare. This includes back out parking, as well as the number of off-street parking spaces. Clarification was provided for a nonconforming-parking situation that becomes more conforming.

### **Nonconforming Status Review (Approved by Director)**

Review of a situation(s) is required to establish whether the situation is nonconforming or noncompliant. When the situation is nonconforming, the review will then determine whether or not a nonconforming situation is aggravated by the permit that is being sought. In other words, if an owner is seeking a permit that directly relates to a nonconforming situation, certification of the nonconforming situation must occur prior to issuing the permit, but if the permit being sought *does not* relate to the nonconforming situation, then certification is not required. The “*review*” is needed to make this determination. Certification is still required as a component of the Nonconforming Situation Review (discussed below). It may take place before, or concurrently, with the Nonconforming Situation Review. Certification of Nonconforming Situations may still be requested at any time and separate from other permits.

### **Nonconforming Situation Review (approved by Board of Adjustment)**

The process for review was revised to more closely follow that of the Alternative Development Overlay District (ADOD) process (49.70.1200), which is also under the Board of Adjustment’s purview. The Director’s review procedure has been added, and includes the requirement to solicit input from other agencies, as is currently required for the ADOD, Conditional Use Permits, and subdivisions.

### **Definitions**

As discussed above, the definition of nonconforming residential density was refined. Additionally, the definition of nonconforming parking has expanded from narrowly addressing off-street parking to include the type of parking, such as back out.

Two new suggested definitions of nonconforming rights have been added as requested by the Committee. The Commission needs to decide if a definition is necessary, and if so, choose one.

### **Fees**

The fee for the Nonconforming Situation Review remains at \$400, which is the same as a Non-Administrative Variance and Alternative Development Permit. This process requires legal notification of the public hearing including legal ads and abutter notification.

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The fee for certification of a nonconforming situation(s) remains at \$150. The fee is to receive the certification if the Nonconforming Status Review is the only application being applied for. If a certification of the nonconforming status is in conjunction with a development permit, the fee is waived.

**Additional Amendments to Be Incorporated Prior to Presentation to the Assembly**

CBJ 49.25.430(4)(M) provides the opportunity for nonconforming structures to add stories with an approved Conditional Use Permit. The section now includes the term “lawfully nonconforming”. To be consistent with the revised nonconforming chapter the word “lawfully” will be deleted.

CBJ 49.25.430(5) replacement and reconstruction of certain nonconforming buildings will be amended to refer to 49.30, rather than 49.30.500(b).

CBJ 49.25.510(f) replacement and reconstruction of certain nonconforming buildings will be amended to refer to 49.30, rather than 49.30.500(b).

Presented by: The Manager  
Introduced:  
Drafted by: R. Palmer III

**ORDINANCE OF THE CITY AND BOROUGH OF JUNEAU, ALASKA**

**Serial No. 2019-37**

**An Ordinance Amending the Land Use Code to Repeal and Replace the Nonconforming Development Code.**

BE IT ENACTED BY THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA:

**Section 1. Classification.** This ordinance is of a general and permanent nature and shall become a part of the City and Borough of Juneau Municipal Code.

**Section 2. Amendment of Chapter.** Chapter 49.30 Nonconforming Development is repealed and replaced to read:

**Chapter 49.30 - NONCONFORMING SITUATIONS**

**ARTICLE I. GENERAL**

**49.30.110 Purpose and intent.**

This chapter provides standards for the review of nonconforming situations, including a process for obtaining certification of nonconforming status by the director, and a process for obtaining a nonconforming situation review by the board of adjustment. The intent is to reduce the impacts of nonconforming situations; promote public health, safety and general welfare; and minimize unreasonable impacts to property impacted by zoning changes. **Nothing in this chapter is intended to affect otherwise existing rights under CBJ Code.**

**49.30.120 Application.**

(a) This chapter applies to the following nonconforming situations, whether existing alone or in any combination:

- (1) Nonconforming uses (49.30.230),
- (2) Nonconforming residential densities (49.30.240),
- (3) Nonconforming structures (49.30.250),
- (4) Nonconforming lots and lot fractions (49.30.260),
- (5) Nonconforming off-street parking spaces (49.30.270).

(b) This chapter does not apply to nonconforming signage, which is addressed in chapter 49.45.

**ARTICLE 2. STANDARDS**

**49.30.210 Nonconforming situations in general.**

(a) *Continuation of nonconforming situations.* Except as otherwise provided in this chapter, nonconforming situations may ***remain***.

(b) *Change of nonconforming situation to comply with code.* Any nonconforming situation may be changed to comply with **code**. Once a nonconforming situation becomes compliant, the nonconforming rights **under this chapter** are lost, **with respect to that nonconforming situation**, and the nonconforming situation may not be re-established.

(c) *Ownership.* Change in ownership does not affect the legal status of a nonconforming situation.

- (d) *Routine maintenance and repair.* Nothing in this chapter prohibits normal maintenance and routine repairs, **which** include, but are not limited to, roofing repair or replacement, window replacement, and **minor** structural repairs.
- (e) *Certification of nonconforming status.* A property owner or authorized agent of the owner may apply for a certification of nonconforming status at any time, pursuant to the procedures provided in section 49.30.310.
- (f) **Nonconforming status review** prior to issuance of permit. Prior to the issuance of a permit for work or development related to a potentially nonconforming situation, **nonconforming status review** pursuant to the procedures provided in section 49.30.310, is required. **Review and issuance of permits related to a nonconforming situation(s) will be subject to this chapter.**
- (g) *Certification of nonconforming status prior to a nonconforming situation review.* Certification of nonconforming status **must be obtained prior to proceeding with** a nonconforming situation review pursuant to the procedures provided in section 49.30.320.
- (h) *Structure deemed destroyed.* A nonconforming structure or structure containing a nonconforming use shall be deemed destroyed when damaged by any means to an extent of more than 75 percent of the cost of the replacement of the entire structure, exclusive of foundations, ~~**except as provided for in this chapter.**~~
- (i) *Intentional damage, destruction, removal or demolition.* **The** nonconforming rights provided in this chapter are lost when a nonconforming situation is damaged, destroyed, demolished or removed by any means **intentionally and** within the control of the owner or the authorized agent of the owner.

(j) *Accidental damage or destruction.* **The** nonconforming rights provided for in this chapter are retained when a nonconforming structure or structure containing a nonconforming use or residential density is damaged or destroyed **accidentally or by any means** beyond the control of the owner or the authorized agent of the owner.

(k) ***Building official determinations under (h), (i) and (j).*** The building official shall determine the extent and cause(s) of damage and/or destruction under **subsections** (h), (i) and (j) **of this section**, pursuant to CBJ 19.01 Building Regulations, Administrative Code.

(l) ***Failure of a situation to qualify for nonconforming status certification. If a situation does not qualify for, or is denied, nonconforming status certification, it remains noncompliant and subject to applicable enforcement action.***

(m) ***Effect of loss or abandonment of nonconforming situation or nonconforming situation rights. The loss or abandonment of a nonconforming situation or of nonconforming situation rights under this chapter means compliance with all of code is required.***

#### 49.30.220 Abandonment of a nonconforming situation.

(a) The abandonment of a nonconforming situation extinguishes all nonconforming rights associated with that situation.

(b) A nonconforming situation is abandoned if and when any of the following events occur:

- (1) The owner indicates in writing that the nonconforming situation is being permanently discontinued or abandoned;
- (2) The nonconforming situation becomes compliant with this title;

**(3) The nonconforming situation is intentionally damaged, destroyed, removed or demolished, as provided in CBJ 49.30.210(i).**

**(4) With respect to a nonconforming structure, the structure is moved.**

(c) A nonconforming situation is presumed to be abandoned if:

- (1) The owner takes action consistent with an intent to abandon the nonconforming situation;
- (2) The structure(s) associated with the nonconforming situation has been vacant or the nonconforming use or situation has been discontinued for 365 consecutive days;
- (3) The nonconforming situation has been replaced by another nonconforming situation, through the nonconforming situation review process provided in 49.30.320; or

**(4) With respect to nonconforming residential density, the structure has been unoccupied for more than three years or, if being reconstructed pursuant to CBJ 49.30.240(b), the structure does not have a temporary certificate of occupancy within three years of the building permit being issued.**

(d) Determination of abandonment **shall be made by the director and supported by findings under CBJ 49.30.220(b) or (c).**

#### **49.30.225 Overcoming presumption of abandonment.**

(a) A director's determination of abandonment under 49.30.220(c) is rebuttable and may be overcome upon a finding by the director that the information submitted establishes all of the following with respect to the nonconforming situation:

- (1) The owner has been maintaining the land and structure(s) in accordance with applicable building, fire and other codes and regulations;
- (2) The owner has been maintaining or pursuing applicable permits and licenses; **and**
- (3) The owner has filed applicable tax documents.

**(b) Other factors that may be considered include whether:**

(1) The owner has been engaged in activities that are consistent with or would affirmatively prove there was no intent to abandon, such as actively and continuously marketing the land, business or structure for sale or lease; and

(2) The owner has applied for a nonconforming situation review in accordance with section 49.30.320.

(c) The burden of proof for overcoming a presumption of abandonment is on the applicant.

**49.30.230 Nonconforming uses.**

(a) *Change of nonconforming use to another nonconforming use.* The owner may change a nonconforming use to another nonconforming use if approved by the board of adjustment pursuant to section 49.30.320, including a change from a nonconforming non-residential use to a residential use that exceeds the allowed maximum density in RR, D1, D3, D5, D10SF, D10, D15 and D18 zones.

(b) *Expansion of nonconforming use.* A nonconforming use within a structure may be extended to any portion of the existing structure, but may not be expanded to other structures or to other land beyond the original structure. A nonconforming use of land may not be increased or extended to occupy a greater area of land.

(c) **Modifications to nonconforming use.** **Modifications** to a nonconforming use are permissible and do not constitute a change or expansion of the nonconforming use, providing the impacts of such modification are **nominal and do not impose a significant or new impact** that is out of harmony with the neighborhood, as determined by the director.

(d) *Nonconforming residential uses in industrial and waterfront industrial zoning districts.*  
When a structure containing a nonconforming residential use in the industrial and waterfront



industrial zoning districts is accidentally damaged, **as provided in CBJ 49.30.210(j)**, the following applies:

- (1) Nonconforming residential use rights are maintained and the structure may be rebuilt within three years if all of the following are met:
  - (A) Nonconforming residential use **is or** has been certified pursuant to the procedures set forth in section 49.30.310;
  - (B) **The building official has not deemed the structure destroyed, under CBJ 49.30.210(h);**
  - (C) Written notice of intent to reconstruct is provided to the department within 365 days of **the date the accidental damage or destruction occurred, as determined by the building official;**
  - (D) The reconstruction complies with applicable zoning district dimensional, development and design standards including but not limited to setbacks, parking and landscaping, that apply to new development.
- (2) If a temporary certificate of occupancy for the structure has not been obtained within three years of issuance of a building permit, the nonconforming residential use rights are lost, and existing and future development on the site must comply with all provisions of code.
- (3) The director, in consultation with the building official, may approve one 18-month extension for the reconstruction, **or for obtaining the temporary certificate of occupancy**, of the nonconforming residential use upon written request showing good cause.

**49.30.240 Nonconforming residential densities in zoning districts that allow residential development.**

(a) ***Modification of existing dwelling units.*** Structures containing nonconforming residential density may be modified subject to the following:

- (1) The nonconforming residential density is certified pursuant to the procedures provided in section 49.30.310 prior to commencing any modification that requires a building permit.
- (2) Applicable dimensional standards and parking requirements of this title are met unless otherwise provided in this chapter.

(b) ***Accidental damage or destruction.*** A structure containing nonconforming residential density, **which is** damaged or destroyed may be reconstructed, regardless of the cost of **replacement or building official's determination under CBJ 49.30.210(h)**, subject to the following:

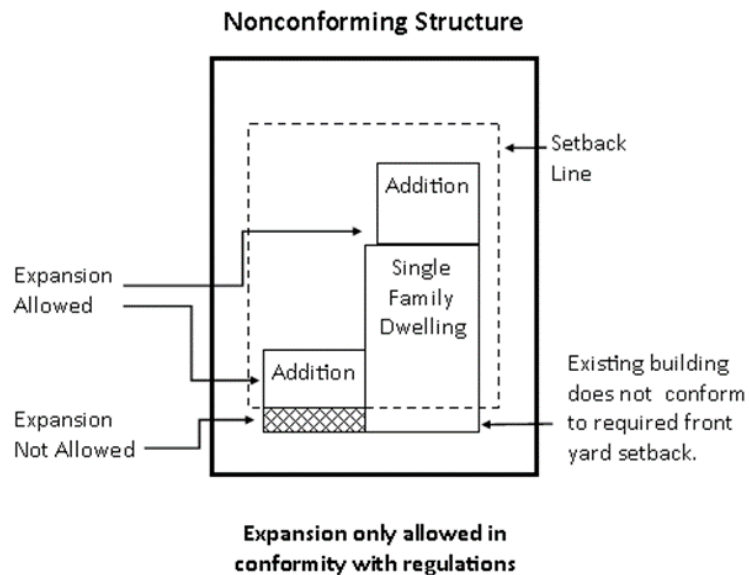
- (1) The nonconforming residential density is **or has been** certified pursuant to the procedures provided in section 49.30.310 prior to any work that requires a building permit;
- (2) Written notice of intent to reconstruct is provided to the department within 365 days of **the date** the damage or destruction **occurred, as determined by the building official;**
- (3) The total number of dwelling units established by the certification of nonconforming status **is not** increased;
- (4) Reconstruction may occur in the existing footprint, with the exception of encroachments into rights-of-way or adjacent property;

- (5) A temporary certificate of occupancy for the structure has been obtained within three years of issuance of the building permit; and
- (6) The director, in consultation with the building official, may approve one 18-month extension for the reconstruction **or for obtaining the temporary certificate of occupancy**, upon written request showing good cause.

**49.30.250 Nonconforming structures.**

- (a) A nonconforming structure may be enlarged, altered or reconstructed as long as the enlargement, alteration, or reconstruction does not increase **or aggravate the nonconforming situation** and complies with other dimensional and parking standards of this title, except as otherwise provided in this chapter. (See Figure1)

Figure 1



- (b) Certification of nonconforming status pursuant to section 49.30.310 must be obtained prior to any enlargement, alteration or reconstruction of a nonconforming structure.

(c) Improvements or renovations within an existing structure shall not be considered an enlargement, alteration, or reconstruction for purposes of this section.

(d) **Projections allowed in yard setbacks under CBJ 49.25.430(4) shall not be considered to increase or aggravate a nonconforming situation.**

(e) This subsection shall not be interpreted to allow the expansion of a nonconforming use or nonconforming residential density, which are governed by sections 49.30.230 and 49.30.240.

(f) *Reconstruction.* A nonconforming structure or nonconforming portion of a structure that the building official has deemed destroyed, shall not be reconstructed except in conformity with the provisions of this chapter. This does not preclude the reestablishment of nonconforming residential density and its footprint as allowed by subsection 49.30.240(b).

#### **49.30.260 Nonconforming lots and lot fractions.**

(a) A nonconforming lot **has the same development rights as a compliant lot** subject to the following:

- (1) A certification of nonconforming status is obtained pursuant to the procedures provided in section 49.30.310;
- (2) The use **on a lot** does not have a minimum lot size requirement greater than the minimum lot size required by the underlying zoning district, unless otherwise authorized by this title; and
- (3) Applicable zoning district dimensional, development and design standards including, but not limited to setbacks, parking, landscaping are met.

**(b) Unless located in an industrial or waterfront industrial zoning district,** an undeveloped nonconforming lot or lot fraction that adjoins and has continuous frontage with

one or more other undeveloped lots under common ownership, may each be developed with a single-family dwelling or as otherwise provided in this title.

**49.30.270 Nonconforming parking.**

(a) **A nonconforming situation that involves nonconforming parking may continue**, be replaced or reconstructed under this subsection with the same number and type of off-street parking spaces as were provided for the original structure or use, **if the government entity that controls the right-of-way determines that it does not endanger public health, safety or welfare, including but not limited to back-out parking.**

(b) When a nonconforming parking situation is changed to become more compliant with 49.40, **newly provided parking may not be removed unless in accordance with this chapter.**

This does not preclude the applicant's right to obtain a parking waiver in accordance with sections 49.40.210(d) Exceptions or 49.20.200 Variance.

### **ARTICLE 3. REVIEWS**

**49.30.310 Nonconforming status review and certification.**

(a) *Purpose.* **The purpose of nonconforming status review is to determine whether nonconforming rights under this chapter exist, and certification is therefore appropriate.** In addition, it is intended to determine the current use of the lot, based on the use categories in section 49.25.300. In the case of nonconforming residential **density, the review also determines** the maximum extent of the nonconforming residential density.

(b) *When to seek certification of nonconforming status.* An owner may apply for certification of nonconforming status, **at any time**. An owner must have a certificate of nonconforming status prior to a nonconforming situation review.

(c) *Certification.* A nonconforming situation will be certified as having nonconforming status, if the director finds the applicant's information establishes all of the following:

(1) The nonconforming situation **was allowed or not prohibited by law** when it was created or established; and

(2) The nonconforming situation has not been abandoned.

(d) *Application.* An application for certification of nonconforming status shall be submitted with the department on forms approved by the director, with relevant information establishing the factors set out in (c) above. The application should identify and include each nonconforming situation known to exist on the subject property.

(e) *Relevant information.*

(1) Information that may be relevant to nonconforming status may include, but is not limited to, the following:

(A) Building, land use, or development permits;

(B) Zoning codes or maps;

(C) Recorded plats;

(D) Dated photographs;

(E) Dated aerial photography;

(F) Insurance maps that identify use or development, e.g. Sanborn Maps.

(2) Information that may be relevant to whether the nonconforming situation has been continuously maintained without interruption may include, but is not limited to the following:

- (A) Utility bills;
- (B) Income tax records;
- (C) Business licenses;
- (D) Telephone listings;
- (E) Advertisements in dated publications;
- (F) Building, land use, or development permits;
- (G) Insurance policies;
- (H) Leases;
- (I) Dated photographs;
- (J) Dated aerial photographs;
- (K) Insurance maps that identify use or development, e.g. Sanborn Maps; or
- (L) Land use and development inventories prepared by a government agency.

(f) *Decision.* The director shall review the applicant's information and issue a written decision that includes separate certification findings on each nonconforming situation included in the application.

(g) *Burden of proof.* The burden of proof to establish nonconforming status is on the applicant.

(h) *Fee.* An application for a certification of nonconforming status shall include a fee as established by chapter 49.85.

**49.30.320      Nonconforming situation review.**

- (a) *Purpose.* The board of adjustment shall hear all nonconforming situation reviews for the purpose of reviewing proposed changes to nonconforming situations as provided in this chapter. The nonconforming situation review process provides an opportunity for public input, and authorizes the board of adjustment to review, limit, approve or deny proposed changes.
- (b) *Applicability.* The following may be allowed through a nonconforming situation review as provided in this chapter:
  - (1) A change of a nonconforming use to another non-conforming use that is prohibited in the zoning district.
  - (2) A change from a nonconforming nonresidential use to an allowed residential use that exceeds the allowed density in the RR, D1, D3, D5, D10SF, D10, D15 and D18 zoning district.
- (c) *Submittal.* An application for a nonconforming situation review shall be submitted to the board of adjustment through the department on forms approved by the director.
- (d) *Director's review procedure.*
  - (1) The director shall endeavor to determine whether the application accurately reflects the applicant's intentions, shall advise the applicant whether or not the application is acceptable, and, if it is not, what corrective action may be taken.
  - (2) After accepting the application, the director shall schedule it for a hearing before the board of adjustment and shall give notice to the applicant and the public in accordance with CBJ 49.15.230.
  - (3) Copies of the application or the relevant portions thereof shall be transmitted to interested agencies as specified on a list maintained by the director for that purpose.



Referral agencies shall be invited to respond within 15 days unless an extension is requested and granted in writing for good cause by the director.

- (4) The director shall forward the application to the board of adjustment together with a report setting forth the director's recommendation for approval or denial, with or without conditions, and the reasons therefore. The director shall **review and make findings on the approval criteria** specified in subsection CBJ 49.30.320(f).

(e) *Fee.* An application for a nonconforming situation review shall include a fee as established by 49.85.

(f) *Approval criteria for nonconforming situation reviews.*

(1) All nonconforming situation review approvals require the following findings:

- (A) The value of adjoining property will not be **more negatively affected from the proposed nonconforming situation than it is** from other permitted or conditionally permitted uses in the district;
- (B) Public services and facilities are, or will be prior to occupancy, adequate to serve the proposed use, density and structure;
- (C) **The nonconforming situation proposed will not cause undue harmful effects or be out of harmony with property in the neighboring area on account of its** scale, bulk, coverage and density, generation of traffic, the nature and intensity of the proposed use, and other relevant effects; and
- (D) The **nonconforming situation proposed** will not materially endanger the public health, safety or welfare.

(2) Additional findings required for approving nonconforming use proposals:

- (A) The proposed nonconforming use is more appropriate to the district than the existing nonconforming use and does not significantly jeopardize future development of the area in compliance with the intent of the zoning district;
- (B) Any characteristics of the nonconforming use that are out of compliance with this title are not changed to become less compliant with the requirements of this title;
- (C) The nonconforming use will not result in the creation of additional nonconforming situations or the need for any variances;
- (D) With mitigation measures, there will be no measurable increase in overall detrimental impacts (over the impacts of the last legal use or development) on the surrounding area taking into account factors such as:
  - (i) The hours of operation;
  - (ii) Vehicle trips to the site and impact on surrounding on-street parking;
  - (iii) Noise, vibration, dust, odor, fumes, glare, and smoke;
  - (iv) Screening, public safety, neighborhood harmony;
  - (v) The amount, location, and nature of any outside displays, storage, or activities.
- (E) If the nonconforming use is in a single-family or multi-family residential zoning district, and if any changes are proposed to the site, the appearance of the new use or development will not lessen the residential character of the area. This is based on taking into account factors such as:
  - (i) Building scale, placement, and facade;
  - (ii) Parking area placement;

(iii) Buffering or screening and the potential loss of privacy to abutting residential uses; and

(iv) Lighting and signs.

(3) Additional findings required for approving nonconforming residential density proposals:

(A) When a nonconforming use is proposed to become a nonconforming residential density, it will have no measurable increase in overall detrimental impacts on the surrounding area taking into consideration factors such as:

(i) Vehicle trips and impact on surrounding on street parking;

(ii) Lot coverage,

(iii) Vegetative cover;

(B) The proposed nonconforming residential density does not exceed 1.5 times the base density permissible for the underlying zoning district in RR, D1, D3, D5, and D10SF zoning districts, and 1.25 times the base density permissible for the underlying zoning district in the D10, D15 and D18 zoning districts, rounded to the nearest whole number.

(4) Even if the proposed nonconforming situation complies with all the requirements

**above and all recommended conditions of approval, the director may**

nonetheless recommend denial of the application if it is found that the development:

(A) Will materially endanger the public health or safety;

(B) Will not be in general conformity with the land use plan, thoroughfare plan, or other officially adopted plans.

*(g) Board of adjustment hearing and determination.*

- (1) At the hearing on the nonconforming situation review, the board of adjustment shall review the director's **findings and recommendation(s) and determine:**
  - (A) Whether the application is complete;
  - (B) Whether the proposed nonconforming use is appropriate according to this section;
  - (C) Whether the development as proposed will comply with other applicable requirements of this title;
- (2) The board of adjustment shall adopt the director's **finding** on each item set forth in paragraph (f) of this section unless it finds, by a preponderance of the evidence, that the director's **finding** was in error, and states its reasoning for each finding with particularity.
- (3) Even if the board of adjustment adopts the director's **findings**, it may nonetheless deny or condition **approval of the proposed nonconforming situation** if it concludes, based upon its own independent review of the information submitted at the hearing, that the nonconforming situation will more probably than not:
  - (A) **The nonconforming situation lacks sufficient conformity with the comprehensive plan, land use plan, thoroughfare plan or other officially adopted plans; or**
  - (B) **The nonconforming situation conflicts with the chapter's intent to reduce the impacts of nonconforming situations and promote public health, safety and general welfare and is not needed to minimize an unreasonable impact to the subject property caused by a zoning change.**

**Section 3. Amendment of Section.** CBJ 49.80.120 Definitions, shall be amended to incorporate the following definitions in alphabetical order:

**49.80.120 Definitions.**

...

***Nonconforming parking*** means the provision of less than the number and type of off-street parking spaces required under this title because fewer off-street parking spaces, if any, were required by law at the time the use was established.

*Nonconforming residential density* means a residential development that was allowed, or not prohibited by law, in the zoning district and was constructed, but which subsequently, due to adoption, revision or amendment of a zoning ordinance, now has greater density than allowed in the zoning district.

Choose one of the following or delete both:

***Nonconforming rights*** means the rights provided in 49.30 applicable to situations that are certified or qualify to be certified as nonconforming situations.

Or

***Nonconforming rights*** means the rights provided in 49.30 applicable to situations that are certified or qualify to be certified as nonconforming situations. , including rights relating to the perpetuation, maintenance, modification and reconstruction of nonconforming situations.

*Nonconforming situation* means a situation is one that was allowed or not prohibited by law when created but became illegal by a subsequent change in the law and/or by the adoption or amendment of this title and has been continuously maintained without interruption as specified in this chapter..

*Nonconforming use* means a use that was allowed by right when established or a use that obtained a required land use approval when established, but that subsequently, due to a change in the zoning district or zoning regulations, the use, or the amount of area devoted to the use, is now not permitted under the current zoning designation.

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

*Discontinued* means that a nonconforming use has ceased, and has not substantially resumed.

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

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

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

...

**Section 4. Amendment of Section.** CBJ 49.85.100 Generally, is amended to read:

**49.85.100      Generally.**

Processing fees are established for each development, platting and other land use action in accordance with the following schedule:

...

(10) Board of adjustment.

- (A) Administrative variance, \$120.00;
- (B) Non-administrative variance, \$400.00;
- (C) Alternative development permit, \$400.00;
- (D) Nonconforming situation review, \$400.00.

...

(20) Certification of nonconforming status, \$150.00; fee is waived if in conjunction with a development permit;

**Section 5.    Effective Date.** This ordinance shall be effective 30 days after its adoption.

Adopted this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

Attest:

\_\_\_\_\_  
Beth A. Weldon, Mayor

\_\_\_\_\_  
Elizabeth J. McEwen, Municipal Clerk



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

**DATE:** August 21, 2019

**TO:** Planning Commission

**FROM:** Beth McKibben, AICP, Senior Planner  
Community Development Department

**FILE NO.:** AME2018 0009

**PROPOSAL:** Text amendment to revise Title 49 to repeal and replace 49.30 - Nonconforming Development.

A handwritten signature in black ink, appearing to be 'BMc', is located to the right of the 'TO' and 'FROM' fields.

The City and Borough of Juneau Code states in CBJ 49.10.170(d) that the Commission shall make recommendations to the Assembly on all proposed amendments to this title, zonings and re-zonings, indicating compliance with the provisions of this title and the Comprehensive Plan.

#### **ATTACHMENTS**

Attachment A – Ordinance 2019-37

Attachment B – Memorandum to December 11, 2018 Planning Commission Committee of the Whole, Dated November 27, 2018

Attachment C – Minutes, December 11, 2018 Planning Commission Committee of the Whole

#### **BACKGROUND**

Zoning nonconformities are existing uses, structures, densities, or lots that were legally established prior to a change in zoning provisions, which do not comply with new (current) zoning regulations. Neither the existing ordinance nor this proposed ordinance remedy illegal nonconformities, e.g. development constructed without a permit. For the purposes of this report, the word “nonconformities” refers to legal nonconformities unless specifically stated otherwise.

As land use policies and zoning regulations are revised and updated, questions may arise regarding the continued use, replacement, or expansion of nonconformities. In the existing code, the various nonconformities are blended into single paragraphs and not written in a user-friendly manner, particularly the reconstruction section, which makes it challenging to understand. Further, certain nonconformities may create financial challenges for buyers and sellers.



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

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

The Planning Commission referred the consideration of amendments to CBJ 49.30 - Nonconforming Development to the Title 49 Committee. Staff previously identified this section of code as needing revisions to provide clarity. More critically, prospective buyers have been encountering challenges in financing nonconforming developments that previously have been financed, which has raised the level of urgency to improve this chapter.

The Title 49 Committee reviewed and considered a complete revision to CBJ 49.30 at four meetings in 2017. The Planning Commission Committee of the Whole discussed the proposed language at the December 11, 2018 meeting (Attachments B & C). In May 2019, CDD staff met with a small group of real estate, mortgage, and appraisal professionals. The proposed revisions to the nonconforming development code were presented and discussed. On August 13, 2019, staff presented the proposed revisions to the Southeast Alaska Board of Realtors, and informed them of the public hearing schedule.

### **DISCUSSION**

The proposed ordinance establishes 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, benign nonconformities are treated differently than those likely to have significant detrimental effects.

The proposed ordinance mixes the phasing out of detrimental nonconformities and recommends maintaining the status quo or allowing limited modification and expansion to benign nonconformities. The proposed ordinance repeals and replaces all of 49.30. The ordinance clarifies and defines the following non-conforming situations:

1. Nonconforming use;
2. Nonconforming residential density;
3. Nonconforming structure;
4. Nonconforming lot;
5. Nonconforming on-site parking spaces;

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

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Nonconforming development in stream buffers will be addressed with the work on the stream buffers ordinance, which is underway.

### **1. *Nonconforming Use***

Nonconforming use, in general, is a use that was allowed or legally permitted when established, but due to changes in a zoning district (rezone) or zoning regulations, is no longer allowed.

The proposed ordinance allows for nonconforming uses to continue to operate. Changes in the operation may be allowed so long as the external impacts of the changes comport or harmonize with the neighborhood. A nonconforming use may be changed to another nonconforming use through a nonconforming situation review (discussed later page 8 of 11).

Additionally, in the residential zoning districts, through a nonconforming situation review, a nonconforming, nonresidential use may be changed to an allowed residential use that exceeds the density of the zoning district. 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 of the nonconforming use would then be lost.

Nonconforming uses may be expanded within the existing building, but may not be expanded to other buildings or take up a greater area of land, e.g. an addition to the building that expanded the nonconforming use operations would not be allowed.

Once a nonconforming use is determined to be abandoned, subsequent uses must comply with current code unless the use is reestablished through the nonconforming situation review. If a nonconforming use is accidentally destroyed and the cost of repair is more than 75% of the cost of replacement, the nonconforming use cannot be reestablished.

For developments that are nonconforming residential use, the nonconforming dwelling(s) may not be reconstructed when the cost of repairs exceeds 75% of the cost of replacement of the building, exclusive of foundations, using new materials. The extent of the damage shall be determined by the building official. **Currently, only the Industrial and Waterfront Industrial zoning districts would have a situation of a nonconforming residential use.** These two zoning districts currently only allow a caretaker unit that is accessory to another use; single- and multi-family development are not allowed. Nonconforming residential uses are treated more strictly than nonconforming residential densities, because there is a need for industrial land in Juneau, and residential uses are generally incompatible with industrial uses. When a nonconforming residential use is unintentionally damaged:

- Nonconforming residential use rights are maintained and the structure may be rebuilt within three (3) years if:
  - Nonconforming residential use is accepted as legally nonconforming with a certification of legal nonconforming status
  - Written notice of intent to reconstruct is provided to the department within 365 days.
  - The structure is not deemed destroyed by the Building Official.
  - The reconstruction complies with existing associated district-specific dimensional, development, and design standards such as setbacks, parking, landscaping, etc. that would apply to new development.
- If a temporary certificate of occupancy has not been obtained for the structure within three (3) years, the nonconforming residential use rights are lost, and all existing and future development on the site must comply with current CBJ Code.
- The Director, with the concurrence of the Building Official, may approve one 18-month extension for the reconstruction of the nonconforming residential use upon written request showing good cause.

Nonconforming residential use rights are lost when the structure is intentionally destroyed.

## **2. *Nonconforming Residential Density***

Nonconforming residential density is a new concept that is not in the existing code. Nonconforming residential density occurs when a residential use is an allowed use in the zoning district and was constructed at a lawful density at the time it was constructed, but due to changes in the zoning district or zoning regulations, now has greater density than is currently allowed in the zoning district.

An example of nonconforming residential density is an existing four-plex on one (1) lot in a D5 zoning district. Residential uses are allowed in the D5 zoning district, but the density on the lot (four-plex = 4 units) exceeds what the current zoning district allows (one (1) single-family / duplex per lot).

The addition of this concept implements the Housing Action Plan by preserving existing housing. Additionally, it addresses the challenge that owners of nonconforming residential densities struggle with when trying 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 a certificate of nonconforming status (refer to page 7 of 19 in Attachment A).

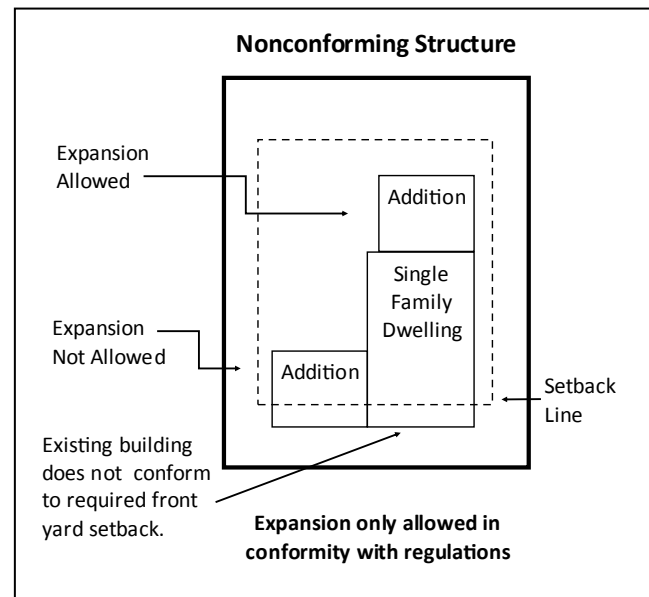
- Nonconforming residential densities may be altered or reconstructed when an approved certificate of legal nonconforming status is obtained.

- Nonconforming residential density rights continue even if a building is unoccupied for any amount of time.
- If the building is accidentally destroyed or damaged, the nonconforming density rights are maintained as long as it is reconstructed within three (3) years.
- Written notice of intent to reconstruct must be provided within 365 days.
- 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 right-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 a temporary certificate of occupancy is not been obtained within three (3) years, nonconforming residential density rights are lost, the site is considered vacant, and redevelopment must comply with current codes.
- There is an opportunity for one 18-month extension to substantially complete the reconstruction.

### 3. **Nonconforming Structure**

Nonconforming structures are those structures that do not meet one or more of the dimensional standards set forth in 49.25 Article IV such as height, setbacks, or lot coverage. These structures may be continued and maintained. Nonconforming structures may be expanded, but only if the expansion 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 the addition complies with the current dimensional 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 a nonconforming residential density may be reconstructed in the existing footprint, except they may not encroach onto right-of-ways or onto adjacent property. This is also true for structures on nonconforming lots, which are discussed below.

All other nonconforming structures (with uses other than residential) must be reconstructed in compliance with current regulations if they are accidentally damaged and the cost of repair is greater than 75% of the cost of replacement, exclusive of foundations, using new materials. The extent of the damage shall be determined by the Building Official. This is different than nonconforming residential density, which may be reconstructed regardless of the cost of replacement when it is damaged accidentally.

If a nonconforming structure is intentionally destroyed, it may only be reconstructed in accordance with current code requirements. This true for all nonconformities.

Nonconforming rights are lost when the damage is intentional. Nonconforming rights are lost if a nonconforming structure is proven to be abandoned. Nonconforming rights are lost if the structure is brought into conformity.

#### **4. *Nonconforming Lot***

Nonconforming lots are those lots that do not meet one or more of the dimensional standards set forth in 49.25 Article IV such as lot area, lot depth, or lot width for the zoning district in which the lot is located.

A nonconforming lot may be used for any permitted use in its zoning district, if the use does not require a minimum lot size greater than the minimum lot size required by the zoning district.

Nonconforming lots may be developed for any use permitted in the zoning district if any associated district requirements may be met, such as setbacks and parking. In order for these lots to be developed, they must be certified as legally nonconforming (refer to page 10 of 19 in Attachment A). Nonconforming structures on these lots may be reconstructed in the same footprint, except that the structure cannot encroach into right-of-ways or across property lines.

As the existing code allows, when an undeveloped, nonconforming lot adjoins and has continuous frontage with one or more undeveloped lots and are under the same ownership, each lot may be developed with a single-family dwelling, unless located in the Industrial or Waterfront Industrial zoning districts.

#### **5. *Nonconforming Parking***

Nonconforming parking is parking that does not meet the minimum on-site space requirements set forth in 49.40 Article II. 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.

The proposed ordinance contains new language that clarifies that when a use (conforming or nonconforming) has a nonconforming number of on-site parking spaces, and later becomes

more conforming for off street parking spaces, the parking may not revert back to the less conforming number of off-street parking spaces.

An example of this is a single-family dwelling that was built prior to the requirement for two off-street parking spaces. Later, a single-car garage was added to the property, providing one off-street parking space. The garage cannot now be converted to living space and thereby eliminates the one off-street parking space, unless another off-street parking space is provided or a parking waiver [49.40.210(d)(6)] is approved.

#### **6. *Overcoming the Presumption of Abandonment***

Nonconforming situations may be considered “abandoned” through a variety of ways. For example, if a nonconforming use is changed to an allowed use, or an approved conditional use, the nonconforming rights are lost.

However, there are also circumstances when a nonconforming situation is “presumed” to be abandoned. For example, if a structure associated with a nonconforming use has been vacant, or the use has been inactive for 365 days, the use is “presumed” abandoned.

The proposed ordinance includes a method for a property owner to “overcome” a determination that a nonconforming situation has been abandoned (refer to page 5 of 19 in Attachment A). The review of such a determination would be approved by the Director and may be appealed to the Planning Commission through the procedures set out in CBJ 49.20.

#### **7. *New Review Processes for Certifying Legal Nonconforming Status***

The proposed ordinance creates two new review processes to address legal nonconforming situations: Certification of Legal Nonconforming Status and Nonconforming Situation Review.

##### ***Certification of Legal Nonconforming Status***

Certification of legal nonconforming status provides the property owner the opportunity, and responsibility, for providing evidence proving that the nonconforming situation was allowed when it was established and has been continuously maintained over time. Examples of standard evidence to prove the nonconforming situation are provided in the ordinance, as are examples for proving the situation was maintained over time. The Certification review also determines the number of non-conforming dwelling units on sites that exceed the maximum residential density standards.

A certificate of legal nonconforming status is approved by the Director and may be appealed to the Planning Commission through the procedures set out in CBJ 49.20. An approved certificate of legal nonconforming status runs with the land. The fee proposed is the same as a certification of zoning compliance letter (\$150).

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### ***Nonconforming Situation Review***

Nonconforming Situation Review (NCSR) 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 zoning district;
- 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;

The NCSR provides for a public hearing before the Board of Adjustment. Public notice requirements are the same as for a Non-Administrative Variance or a Conditional Use Permit. The fee proposed is the same as for a Non-Administrative Variance (\$400). 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.

### **COMPLIANCE WITH THE COMPREHENSIVE PLAN**

The following discussions, policies, and objectives in the 2013 Comprehensive Plan are relevant to the proposed amendment addressing nonconforming situations:

#### **From COMPREHENSIVE PLAN VISION AND GUIDING PRINCIPLES (Page 2):**

*The City and Borough of Juneau is a vibrant State Capitol that values the diversity and quality of its natural and built environments, creates a safe and satisfying quality of life for its diverse population, provides quality education and employment for its workers, encourages resident participation in community decisions and provides an environment to foster state-wide leadership.*

*To achieve this vision, the CBJ followed these principles in formulating its Comprehensive Plan:*

- ***A safe place to raise a family.*** *Maintain safe neighborhoods and circulation systems; provide public spaces and facilities that foster community interaction and cohesiveness.*
- ***Quality education from Pre-school to University levels.*** *Promote quality educational programs and experiences in the schools and lifelong learning for our residents as well as a healthy lifestyle with adequate recreational facilities, resources and programs. Support a vital arts community, celebrating our diverse cultural heritage and unique historic resources.*
- ***A balanced economy.*** *Ensure a balanced, sustainable, and diverse economy, actively encouraging employment opportunities for residents of all levels and ages that provide a livable wage and a dependable municipal tax base.*

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- **Natural resources.** *Highlight and protect our scenic beauty, protect our streams and fish and wildlife habitat and foster the sustainable use of our natural resources.*
- **A balanced community.** *Ensure a balance between natural resource protection and the built environment, the efficient provision of infrastructure and goods and services, and housing affordable to all income levels.*
- **Neighborhood livability and housing.** *Maintain the identity and vitality of our neighborhoods, actively pursuing affordable housing for a diversity of households while promoting compatible livability and high quality design in new buildings.*
- **Mobility.** *Provide an accessible, convenient and affordable transportation system that integrates vehicle, vessel, rail and aircraft transport with sustainable and innovative transportation options— including convenient and fast public transit service, particularly for commuters to work, and bicycle and pedestrian networks throughout the community.*
- **Involved citizenry.** *Solicit resident participation and leadership in implementing the Plan policies and actions from all sectors of the community, encouraging mutual understanding and cooperation among all.*

## CHAPTER 2 - SUSTAINABILITY:

POLICY 2.1 TO BUILD A SUSTAINABLE COMMUNITY THAT ENDURES OVER GENERATIONS AND IS SUFFICIENTLY FAR-SEEING AND FLEXIBLE TO MAINTAIN THE VITAL AND ROBUST NATURE OF ITS ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUPPORT SYSTEMS.

## CHAPTER 4 – HOUSING:

POLICY 4.2. TO FACILITATE THE PROVISION OF AN ADEQUATE SUPPLY OF VARIOUS HOUSING TYPES AND SIZES TO ACCOMMODATE PRESENT AND FUTURE HOUSING NEEDS FOR ALL ECONOMIC GROUPS.

### Implementing Action

4.2IA5 Encourage preservation of rental housing and avoid its conversion to transient housing or non-residential uses.

POLICY 4.4. TO FACILITATE THE PRESERVATION AND REHABILITATION OF EXISTING HOUSING, PARTICULARLY HOUSING AFFORDABLE TO LOW-INCOME RESIDENTS.

POLICY 4.7. TO ENCOURAGE PRESERVATION OF RESIDENTIAL STRUCTURES THAT ARE ARCHITECTURALLY AND/OR HISTORICALLY SIGNIFICANT TO THE CBJ AND WHICH CONTRIBUTE TO THE HISTORIC AND VISUAL CHARACTER AND IDENTITY OF THE NEIGHBORHOOD.



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## **CHAPTER 10 – LAND USE:**

**POLICY 10.2. TO ALLOW FLEXIBILITY AND A WIDE RANGE OF CREATIVE SOLUTIONS IN RESIDENTIAL AND MIXED USE LAND DEVELOPMENT WITHIN THE URBAN SERVICE AREA.**

### Implementing Action

10.2 - IA Continue to revise the land use code to define and allow, where appropriate, a variety of housing types and to facilitate their location in suitable locations. A diverse mix of housing types should be accommodated and facilitated in the community, including, but not limited to single room occupancy (SRO) units or their equivalent compact living unit type; loft housing; live-work units; artist studio housing in commercial or industrial structures; float homes, houseboats, and live-aboards; panelized, modular, “kit” and manufactured homes on permanent foundations; and other types of housing suitable to diverse residents’ lifestyles and budgets.

**POLICY 10.3. TO FACILITATE RESIDENTIAL DEVELOPMENTS OF VARIOUS TYPES AND DENSITIES THAT ARE APPROPRIATELY LOCATED IN RELATION TO SITE CONDITIONS, SURROUNDING LAND USES, AND CAPACITY OF PUBLIC FACILITIES AND TRANSPORTATION SYSTEMS.**

**POLICY 10.7 TO DESIGNATE ON LAND USE AND ZONING MAPS, AND TO PROVIDE SERVICES TO, SUFFICIENT VACANT LAND WITHIN THE URBAN SERVICE AREA APPROPRIATELY LOCATED TO ACCOMMODATE FUTURE COMMERCIAL AND INDUSTRIAL USES.**

Development Guideline 10.7 - DG2- D Residential, retail, office, personal service and similar non-industrial uses should not be permitted within heavy industrial districts, although light industry such as building contractors, repair services, storage yards, and similar business and household services would be compatible with heavy industrial uses.

10.7 - DG2- F Residential uses, other than caretaker units, should be prohibited in industrial zones.

Additionally, the Housing Action Plan, adopted by resolution 2780 in December 2016, indicates that for Juneau’s housing market to become “unstoppable” more units of all types must be added. One of the plan’s recommendations is the preservation of existing affordable housing. Creating the nonconforming residential density situation, and allowing those units to be reconstructed, implements this recommendation.

The 2015 Juneau Economic Development Plan found that Juneau’s housing supply does not meet demand in terms of housing type, size, price, or location. One of its ten initiatives is to “Promote Housing Affordability and Availability”. The Juneau Economic Development Plan further

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strengthened the case for the critical need of housing for all ages and income groups in order to obtain and maintain a strong and stable economy.

The proposed amendment balances the diverse Comprehensive Plan policies and is generally consistent with the overall vision.

#### **COMPLIANCE WITH TITLE 49**

The proposed amendment to Title 49 will not create any internal inconsistencies within the Code. As stated in CBJ 49.05.100, the purposes and intent of Title 49 are as follows:

- 1. To achieve the goals and objectives, and implement the policies of the Juneau comprehensive plan, and coastal management program;*
- 2. To ensure that future growth and development in the City and Borough is in accord with the values of its residents;*
- 3. To identify and secure, for present and future residents, the beneficial impacts of growth while minimizing the negative impacts;*
- 4. To ensure that future growth is of the appropriate type, design and location, and is served by a proper range of public services and facilities such as water, sewage, and electrical distribution systems, transportation, schools, parks and other public requirements, and in general to promote public health, safety and general welfare;*
- 5. To provide adequate open space for light and air; and*
- 6. To recognize the economic value of land and encourage its proper and beneficial use.*

The proposed amendment was drafted with the purpose and intent of Title 49 taken into account. If it is approved as drafted, then it will be found to be consistent with the above purposes.

#### **FINDINGS**

Based upon the above analysis, staff finds that the proposed text amendment to Title 49 is consistent with the goals and policies in the Comprehensive Plan. Additionally, this amendment would not create internal inconsistencies with adopted plans or codes.

#### **RECOMMENDATIONS**

Staff recommends that the Planning Commission review and consider the proposed ordinance and forward a recommendation to adopt this ordinance to the Assembly.

Presented by: The Manager  
Introduced:  
Drafted by: R. Palmer III

**ORDINANCE OF THE CITY AND BOROUGH OF JUNEAU, ALASKA**

**Serial No. 2019-37**

**An Ordinance Amending the Land Use Code to Repeal and Replace the Nonconforming Development Code.**

BE IT ENACTED BY THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA:

**Section 1. Classification.** This ordinance is of a general and permanent nature and shall become a part of the City and Borough of Juneau Municipal Code.

**Section 2. Amendment of Chapter.** Chapter 49.30 Nonconforming Development is repealed and replaced to read:

**Chapter 49.30 - NONCONFORMING SITUATIONS**

**ARTICLE I. GENERAL**

**49.30.110 Purpose and intent.**

This chapter provides standards for the review and development of legally nonconforming property, including a process for obtaining certification of legal nonconforming status by the Director, and a process for obtaining a nonconforming situation review by the Board of Adjustment. The intent is to reduce the negative or less desirable impacts of nonconforming situations; promote public health, safety and general welfare; and avoid unnecessary and unreasonable burdens to the use and development of property impacted by zoning changes. Alteration of nonconforming nonresidential situations in residential zones may be reviewed more strictly than nonconforming nonresidential situations in commercial or industrial zones,

to protect the livability and character of residential neighborhoods. Similarly, nonconforming residential situations in residential zones may be reviewed more leniently to the extent they are less likely to present a major disruption to the neighborhood and may provide desirable housing opportunities.

**49.30.120 Application.**

(a) This chapter applies to the following nonconforming situations, whether existing alone or in any combination:

- (1) nonconforming lots,
- (2) nonconforming structures,
- (3) nonconforming uses,
- (4) nonconforming residential densities,
- (5) nonconforming onsite parking spaces.

(b) This chapter does not apply to nonconforming signage, which is addressed in chapter 49.45.

A nonconforming situation is one that was allowed when created but became illegal by a subsequent change in the law and/or by the adoption or amendment of this title, and has been continuously maintained without interruption as specified in this chapter.

**ARTICLE 2. STANDARDS**

**49.30.210 Nonconformities in general.**

(a) *Continuation of nonconforming situations.* Except as otherwise provided in this chapter, nonconforming situations may continue.

(b) *Change of nonconforming situation to conforming situation.* Any nonconforming situation may be changed to a conforming situation by right. Once a nonconforming situation becomes

conforming, the nonconforming rights of that specific situation are lost and the nonconforming situation may not be re-established.

(c) *Ownership.* Nonconforming situations run with the land. A change in ownership does not affect the status of a nonconforming situation.

(d) *Routine maintenance and repair.* Nothing in this chapter prohibits normal maintenance and routine repairs. Examples of routine maintenance include, but are not limited to: roofing repair or replacement, window replacement, and structural repairs.

(e) *Discontinuation of nonconforming situation.* Except as otherwise provided in this chapter, the discontinuation of, or failure to maintain, a nonconforming situation for 365 consecutive days creates a presumption of abandonment of the nonconforming situation.

(f) *Certification of legal nonconforming status.* A property owner or agent may seek a certification of legal nonconforming status review and determination at any time, pursuant to the procedures set out in section 49.30.310.

(g) *Certification of legal nonconforming status prior to issuance of permit.* Prior to the issuance of a permit for work or development on the site where a nonconforming situation exists, certification of legal nonconforming status, pursuant to the procedures set out in section 49.30.310, is required.

(h) *Certification of legal nonconforming status prior to nonconforming situation review.* Certification of legal nonconforming status, pursuant to the procedures in section 49.30.310, is required to request a nonconforming situation review under section 49.30.320.

(i) *Structure deemed destroyed.* A nonconforming structure or structure containing a nonconforming use shall be deemed destroyed when the structure is damaged by any means to an extent of more than 75 percent of the cost of the replacement of the entire structure,

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

(j) *Intentional damage, destruction or demolition.* All nonconforming development rights provided by this chapter are lost when a nonconforming situation is intentionally damaged, destroyed or demolished by any means within the control of the owner or agent of the owner.

**49.30.220 Abandonment of a nonconforming situation.**

(a) The abandonment of a legal nonconforming situation extinguishes all nonconforming rights and any subsequent development of the property shall comply with all applicable provisions of this title.

(b) A nonconforming situation will be presumed to be abandoned if:

- (1) The owner has indicated in writing that the nonconforming situation is being permanently discontinued or abandoned;
- (2) A nonconforming situation is replaced with a conforming situation;
- (3) A nonconforming situation, approved through section 49.30.320 nonconforming situation review, has replaced a prior nonconforming situation;
- (4) An approved conditional use, has replaced the nonconforming use; or
- (5) The building or structure that houses the nonconforming situation has been intentionally destroyed, demolished or removed.
- (6) The owner has taken one or more actions showing an intent to abandon the nonconforming situation.
- (7) The structure(s) associated with the nonconforming situation has been vacant or the nonconforming use or situation has been inactive or discontinued for a period of 365 days.

**49.30.225 Overcoming presumption of abandonment.**

(a) A presumption of abandonment is rebuttable and may be overcome upon a finding by the director that the evidence submitted establishes all of the following:

- (1) The owner has been maintaining the land and structure in accordance with all applicable regulations, including applicable building and fire codes;
- (2) The owner has been maintaining or pursuing all applicable permits and licenses;
- (3) The owner has filed all applicable tax documents;
- (4) The owner has been engaged in activities that would affirmatively prove there was no intent to abandon, such as actively and continuously marketing the land, business or structure for sale or lease; and
- (5) The owner has applied for a nonconforming situation review in accordance with section 49.30.320.

(b) The burden of proof for overcoming a presumption of abandonment is on the applicant.

(c) The director's decision under this section may be appealed to the Planning Commission pursuant to CBJ 49.20.110.

**49.30.230 Nonconforming uses.**

(a) *Change of nonconforming use to another nonconforming use.* A nonconforming use may be changed to another nonconforming use if approved through a nonconforming situation review, pursuant to section 49.30.320, including a change from a nonconforming nonresidential use to an allowed residential use that exceeds the allowed density in a RR, D1, D3, D5, D10SF, D10, D15 and D18 zones.

(b) *Change of nonconforming use to conditional use.* A nonconforming use may change to a conditional use if approved through the conditional use permit process pursuant to 49.15.330.

(c) *Expansion of nonconforming use.* A nonconforming use within a structure may be extended to any portion of the existing structure, but may not be expanded to other structures or to other land outside of the original structure. A nonconforming use of land may not be increased or extended to occupy a greater area of land.

(d) *Operational modifications to nonconforming use.* Operational modifications to a nonconforming use are permissible and do not constitute a change or expansion of the nonconforming use, as long as the external impacts of such modification, if any, are nominal and do not impose a significant, new impact that is out of harmony with the neighborhood as determined by the director.

(e) *Nonconforming residential uses in industrial and waterfront industrial zoning districts.* When there is a nonconforming residential use in the industrial and waterfront industrial zoning districts, and the structure containing the dwelling unit(s) is damaged or destroyed by fire or other causes beyond the control of the owner the following applies:

- (1) Nonconforming residential use rights are maintained and the structure may be rebuilt within 3 years if:
  - (A) Nonconforming residential use is accepted as legally nonconforming with a certification of legal nonconforming status, pursuant to the procedures set out in section 49.30.310.
  - (B) Written notice of intent to reconstruct is provided to the department within 365 days.
  - (C) The structure is not deemed destroyed by the building official.



- (D) The reconstruction complies with existing associated district-specific dimensional, development and design standards such as setbacks, parking, landscaping etc. that would apply to new development.
- (2) If a temporary certificate of occupancy has not been obtained for the structure within three years, the nonconforming residential use rights are lost, and all existing and future development on the site must comply with all provisions of current CBJ Code.
- (3) The director, with the concurrence of the building official, may approve one 18-month extension for the reconstruction of the nonconforming residential use upon written request showing good cause.

**49.30.240 Nonconforming residential densities.**

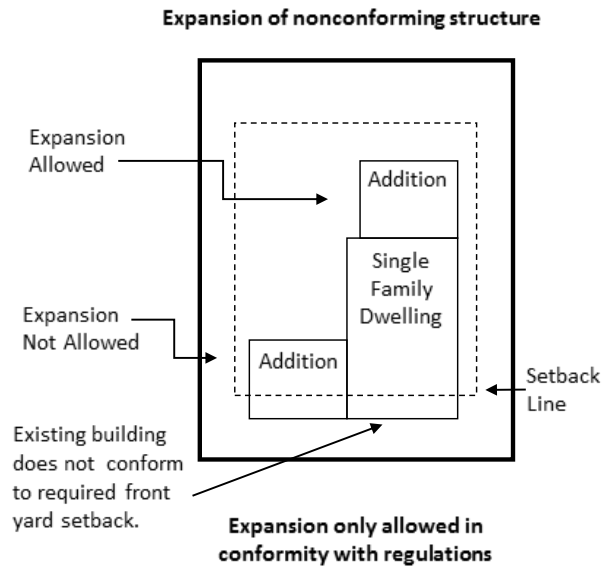
- (a) *Modification or improvement to existing dwelling units.* Existing dwelling units that constitute a nonconforming residential density may be modified or improved, subject to the following:
  - (1) Nonconforming residential density is accepted as legally nonconforming with a certification of legal nonconforming status, pursuant to the procedures set out in section 49.30.310 prior to commencing any modification or improvement that requires a building permit.
  - (2) The current dimensional lot requirements such as setbacks and lot coverage, and on-site parking requirements are met unless otherwise provided in this chapter.
- (b) *Accidental destruction.* A structure containing nonconforming residential densities damaged by fire or other causes beyond the control of the owner may be reconstructed, regardless of the cost of replacement, subject to the following:

- (1) Nonconforming residential density is accepted as legally nonconforming with a certification of legal nonconforming status, pursuant to the procedures set out in section 49.30.310 prior to any work that requires a building permit.
  - (2) Written notice of intent to reconstruct is provided to the department within 365 days.
  - (3) The total number of dwelling units established by the certificate of legal nonconforming status may not be increased.
  - (4) Reconstruction may be in the existing footprint, with the exception of encroachments into public rights-of-way or adjacent property.
  - (5) If a temporary certificate of occupancy has not been obtained for the structure within three years, the nonconforming residential use rights are lost, and all existing and future development on the site must comply with all provisions of current CBJ Code.
  - (6) The director, with the concurrence of the building official, may approve one 18-month extension for the reconstruction of the nonconforming residential use upon written request showing good cause.
- (c) *Occupancy status.* Nonconforming density rights continue even when a building has been unoccupied for any length of time.

**49.30.250 Nonconforming structures.**

- (a) A nonconforming structure may be enlarged or altered as long as the enlargement or alteration does not increase the nonconformity. See: Illustration #1.

Illustration #1



- (b) A certification of legal nonconforming status pursuant to section 49.30.310 must be obtained prior to any enlargement, alteration or reconstruction of a nonconforming structure.
- (c) A nonconforming structure may add additional stories through the conditional use process, pursuant to CBJ 49.25.430(4)(M),
- (d) Tenant improvements or renovations within an existing structure shall not be considered an enlargement or an alteration for purposes of this section.
- (e) This subsection shall not be construed to allow the expansion of a nonconforming density or use of structure, which is governed by sections XXXX.
- (f) With or without legal nonconforming status certification, if a nonconforming structure is moved for any distance whatsoever it shall thereafter conform to the code provisions applicable to the zone in which it is relocated.

(g) *Accidental destruction.* When a nonconforming structure or nonconforming portion of a structure is damaged by fire or other causes beyond the control of the owner and deemed destroyed by the building official, it shall not be reconstructed except in conformity with the provisions of this code. This does not preclude the reestablishment of nonconforming residential density and its footprint as allowed by subsection 49.30.240(b).

**49.30.260 Nonconforming lots and lot fractions.**

A lot rendered substandard in area, depth or width by the adoption of, or amendments to, this title may be developed in conformity with all other provisions of this title even though such lot fails to meet currently applicable minimum area, width, and/or depth requirements, subject to the following provisions:

- (1) The lot is accepted as legally nonconforming with certificate of legal nonconforming status, pursuant to the procedures set out in section 49.30.310;
- (2) The use does not have a minimum lot size requirement greater than the minimum lot size required by the underlying zoning district unless otherwise authorized by this title;
- (3) Any associated district-specific, dimensional, and development and design standards such as setbacks, parking, landscaping, etc. are met;
- (4) When a nonconforming lot or lot fraction contains a dwelling unit that is damaged or destroyed for any reason, the structure may be reconstructed in the existing footprint, with the exception of encroachments into public rights-of-way or adjacent lots;
- (5) When an undeveloped nonconforming lot adjoins and has continuous frontage with one or more other undeveloped lots under the same ownership, each lot may be developed with single-family dwellings, unless located in the industrial or waterfront industrial

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

**49.30.270 Nonconforming on-site parking spaces.**

A structure may be replaced or reconstructed under this subsection with the same number of off-street parking spaces as were provided for the original building. Any use that had nonconforming on-site parking and later became more conforming for on-site parking spaces provided, may not revert to the original, lesser, nonconforming parking unless they qualify for and obtain a parking waiver in accordance with subsection 49.40.210(d) Exception (5) Fee-in-Lieu or (6) Parking Waivers.

**ARTICLE 3. REVIEWS**

**49.30.310 Certification of legal nonconforming status.**

- (a) *Purpose.* This review is intended to determine whether legal nonconforming situation rights exist. In addition, it is intended to determine the current legal use, based on the use categories in section 49.25.300. In the case of a nonconforming density, this review is also intended to determine the maximum legal nonconforming density.
- (b) *When to seek certification of legal nonconforming status.* At any time, a property owner may apply for certification of legal nonconforming status. A property owner must apply for and obtain a certificate of legal nonconforming status prior to applying for a nonconforming situation review. A property owner must also apply for certification of legal nonconforming status prior to applying for a permit required by this title for activity on a lot or in a structure containing a nonconforming situation.
- (c) *Certification.* A nonconforming situation will be certified as having legal nonconforming status, if the Director finds the applicant's evidence establishes all of the following:

- (1) The nonconforming situation is present on or with the property because the law allowed or did not prohibit the situation when it was created or established.
  - (2) The nonconforming situation has been continuously maintained without interruption.
  - (3) The nonconforming situation has not been abandoned.
- (d) *Contents of application.* An application for certification of legal nonconforming status shall be filed with the department on forms approved by the Director, with evidence establishing the factors set out in (c) above. The application must identify and include each nonconforming situation believed to exist on the subject property.
- (e) *Relevant evidence.*
- (1) Evidence that may be relevant to legal nonconforming status may include, but is not limited to:
    - (A) Building, land use, or development permits;
    - (B) Zoning codes or maps;
    - (C) Recorded plats;
    - (D) Dated photographs;
    - (E) Sanborn Maps.
  - (2) Evidence that may be relevant to whether the nonconforming use or other situation has been continuously maintained over time may include but is not limited to:
    - (A) Utility bills;
    - (B) Income tax records;
    - (C) Business licenses;
    - (D) Telephone listings,
    - (E) Advertisements in dated publications;

- (F) Building, land use, or development permits;
  - (G) Insurance policies;
  - (H) Leases;
  - (I) Dated aerial photos;
  - (J) Insurance maps that identify use or development, such as the Sanborn Maps; or
  - (K) Land use and development inventories prepared by a government agency.
- (f) *Decision.* The Director shall review the applicant's evidence and issue a written decision that includes separate certification findings on each nonconforming situation included in the application. The director's decision under this section may be appealed to the Planning Commission pursuant to section 49.20.110.
- (g) *Burden of proof.* The burden of proof to establish legal nonconforming status is on the applicant.
- (h) *Fee.* An application for a certification of legal nonconforming status shall include a fee as established by chapter 49.85.

**49.30.320 Nonconforming situation review.**

- (a) *Purpose.* A nonconforming situation review provides an opportunity for the Board of Adjustment to review, limit, approve or deny proposed changes to certain nonconforming situations.
- (b) *Applicability.* The following may be allowed through a nonconforming situation review:
- (1) The change of a nonconforming use to a different use, also prohibited by the base zone.
  - (2) 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.

- (c) *Submittal.* An application for a nonconforming situation review shall be submitted to the board of adjustment through the department on forms approved by the Director.
- (d) *Fee.* An application for a nonconforming situation review shall include a fee as established by 49.85
- (e) *Public Notice.* Upon determination the application for a Nonconforming Situation Review is complete, the public notice according to section 49.15.230, shall be given prior to a public hearing on the application by the board of adjustment.
- (f) *Approval criteria.* An application for a nonconforming situation review shall be reviewed by the Board of Adjustment at a public hearing; upon review of the nonconforming situation, the Board of adjustment shall issue a decision supported by written findings. The decision may include special restrictions or conditions deemed necessary to further the intent of this code.
  - (1) All nonconforming situation review approvals require the following finding:
    - (A) The value of the adjoining property will not be negatively affected greater than that anticipated from other permitted or conditionally permitted uses in this district.
    - (B) Public services and facilities are or will be, prior to occupancy, adequate to serve the proposed use, density and structure.
    - (C) Considering harmony in scale, bulk, coverage and density, generation of traffic, the nature and intensity of the proposed use, and other relevant effects, the proposal will not cause undue harmful effect upon desirable neighborhood character and harmony.
    - (D) The proposal will not materially endanger the public health or safety;



(2) Additional findings required for approving nonconforming use proposals:

- (A) The proposed nonconforming use is more appropriate to the district than the existing nonconforming use and does not significantly jeopardize future development of the area in compliance with the intent of the zoning district;
- (B) Any characteristics of use that are out of compliance with this title are not changed to become less compliant with the requirements of this title;
- (C) The nonconforming use will not result in the creation of additional nonconformities or the need for any variances;
- (D) With mitigation measures, there will be no net increase in overall detrimental impacts (over the impacts of the last legal use or development) on the surrounding area taking into account factors such as:
  - (i) The hours of operation;
  - (ii) Vehicle trips to the site and impact on surrounding on-street parking;
  - (iii) Noise, vibration, dust, odor, fumes, glare, and smoke;
  - (iv) Screening, public safety, neighborhood harmony;
  - (v) The amount, location, and nature of any outside displays, storage, or activities.
- (E) If the nonconforming use is in a single-family or multi-family residential zone, and if any changes are proposed to the site, the appearance of the new use or development will not lessen the residential character of the area. This is based on taking into account factors such as:
  - (i) Building scale, placement, and facade;
  - (ii) Parking area placement;

- (iii) Buffering or screening and the potential loss of privacy to abutting residential uses; and
    - (iv) Lighting and signs.
  - (F) Any characteristics of use that are out of compliance with this title are not changed to become less compliant with the requirements of this title.
- (3) Additional findings required for approving nonconforming residential density proposals
  - (A) When a nonconforming use will become a nonconforming residential density it will have no net increase in overall detrimental impacts on the surrounding area taking into consideration factors such as:
    - (i) Vehicle trips and impact on surrounding on street parking;
    - (ii) Lot coverage, vegetative cover;
    - (iii) Nonconforming residential density shall not exceed 1.5 times the base density permissible for the underlying zoning district in RR, D1, D3, D5, and D10SF zoning districts, and 1.25 times the base density permissible for the underlying zoning district in the D10, D15, D18, and LC zoning districts, rounded to the nearest whole number.

**Section 3. Amendment of Section.** CBJ 49.80.120 Definitions, shall be amended to incorporate the following definitions in alphabetical order:

**49.80.120 Definitions.**

...

*Nonconforming parking* means the provision of less than the number of on-site spaces required

under this title but met the number of on-site spaces required at the time the use was established.

*Nonconforming residential density* means a residential use that is an allowed use in the zoning district and that was constructed at a lawful density, but which subsequently, due adoption, revision or amendment of a zoning ordinance, now has greater density than is allowed in the current zoning district.

*Nonconforming situation* means a situation that 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 present requirements. A nonconforming lot, use, number of on-site parking spaces, structure or density, or any combination thereof.

*Nonconforming use* means a use that was allowed by right when established or a use that obtained a required land use approval when established, but that subsequently, due to a change in the zoning district or zoning regulations, the use, or the amount of area devoted to the use, is now not permitted under the current zoning designation.

*Abandon* includes the following:

- (a) with respect to a use, the cessation of such use for any length of time, combined with intent to indefinitely cease such use, or;
- (b) with respect to a structure, the cessation of occupancy of such structure for any length of time, combined with intent to indefinitely cease occupancy of such structure.

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

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

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

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

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

...

**Section 4. Amendment of Section.** CBJ 49.85.100 Generally, is amended to read:

**49.85.100      Generally.**

Processing fees are established for each development, platting and other land use action in accordance with the following schedule:

...

(10) Board of Adjustment.

(A) Administrative variance, \$120.00;

- (B) Non-administrative variance, \$400.00;
- (C) Alternative development permit, \$400.00-;
- (D) Nonconforming situation review – to Planning Commission \$400.00.

...

- (20) Certification of legal nonconforming status – staff review \$150.00.

**Section 5. Effective Date.** This ordinance shall be effective 30 days after its adoption.

Adopted this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

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Beth A. Weldon, Mayor

Attest:

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Elizabeth J. McEwen, Municipal Clerk



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

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 be 'BMc', is written 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



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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**

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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.

**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 provided exterior changes, and changes in hours of operation, or other external impacts of such changes comport with the neighborhood.

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

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 may be allowed through a nonconforming situation review.

**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).

**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.

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

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

**Loss of nonconforming use status.**

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

The owner has indicated, in writing intent to abandon the use.

A conforming use has replaced the nonconforming use.

A different nonconforming use has been approved by the Board of Adjustment through the Nonconforming Situation Review.

The building or structure that houses the nonconforming use has been removed.

The use has been discontinued, has been vacant, or has been inactive for a continuous period of at least one year, unless the owner can demonstrate that the owner has been making substantial efforts to continue the use.

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

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

**Accidental destruction.** When a nonconforming use is damaged by fire or other causes beyond the control of the owner, the re-establishment of the nonconforming use is prohibited if 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.

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

#### **Nonconforming Residential Densities**

##### **Changes to dwellings.**

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

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

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

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

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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

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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;

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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

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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.

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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 at 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.



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October 5, 2018

**Memorandum**

To: Title 49 Subcommittee

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.

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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,

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- 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

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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.



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.

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.

**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).

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;

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5. Advertisements in dated publications;
6. Building, land use, or development permits;
7. Insurance policies;
8. Leases;
9. Dated aerial photos;
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 consider nonconforming uses changes of use within the same use category, which 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, the change may be allowed through a nonconforming situation review.

**Applicability.** A change to a use in a different use category which is prohibited by the base zone may be allowed through a nonconforming situation review. 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 may be allowed through a nonconforming situation review. On sites that exceed the maximum residential density standards, reconstruction of the non-conforming dwelling units may be approved through a nonconforming situation review 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.

**Procedure.** A nonconforming situation review is processed..... Refer to public notice section – 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 8<sup>th</sup> 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 12<sup>th</sup> 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 12<sup>th</sup> 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 12<sup>th</sup> 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, 3<sup>rd</sup> 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 4<sup>th</sup> 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.

# 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

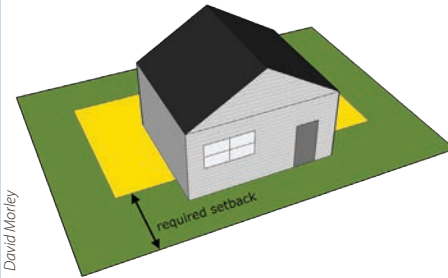
Communities have typically applied zoning standards prospectively. In other words, new standards only apply to new development. Existing nonconforming lots, structures, and uses are grandfathered under new zoning standards. The early framers of zoning law did this on purpose to take the sting out of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

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

Rosenthal, Deborah. 2011. "Nonconforming Uses: Part 2." *The Commissioner*, Winter. Available at [www.planning.org/thecommissioner](http://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](http://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](http://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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> With such restrictions, the theory was that market forces would eventually force operators and owners to eliminate these nonconforming uses.<sup>4</sup> This expectation, however,

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\*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.

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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.<sup>5</sup> More recently, attention has been focused on the legal nonconformities of development standards.<sup>6</sup>

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.<sup>7</sup> However, most states do not address the subject of nonconforming uses in these statutes.<sup>8</sup> 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.<sup>9</sup> The periods of vacancy, discontinuance, or abandonment that may trigger a permanent cessation of use can range from 30 days to two years.<sup>10</sup>

Many jurisdictions have established a two-pronged subjective test to determine if a property owner has abandoned a nonconforming use.<sup>11</sup> 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.”<sup>12</sup> The owner has the burden of proof by a preponderance of evidence to show “the use is a continuing and definite intention.”<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

### **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:

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**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**

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**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

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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***



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*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

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- 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.<sup>18</sup>



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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.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup>

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

Remembering that the goal of zoning is to ultimately bring

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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.<sup>28</sup>

### **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,

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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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

**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

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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.<sup>32</sup> 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

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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.<sup>33</sup>

**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,

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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.<sup>34</sup> Half-hearted efforts of complying with chronological requirements have not been sufficient to rebut the presumption of abandonment.<sup>35</sup>

In *Zall v. Zoning Board of Appeals of Salisbury*,<sup>36</sup> 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.<sup>37</sup>

#### **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.<sup>38</sup> Likewise, courts have not allowed the reversion to a previously abandoned more expansive nonconforming use once it has been abandoned.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

#### **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

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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-**



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**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

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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.**<sup>45</sup>

**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;

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- 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

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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

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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:

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

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

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

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

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

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

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

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

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

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

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

<sup>11</sup>*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).

<sup>12</sup>*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).

<sup>13</sup>*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)).

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

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

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

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

<sup>18</sup>*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).

<sup>19</sup>*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*



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

<sup>21</sup>Ghindia v. Buckeye Land Development, LLC., 2007 Ohio App. LEXIS 694, \*\*12 (Ohio Ct. App., 2007).

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

<sup>23</sup>S&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).

<sup>24</sup>Ghindia v. Buckeye Land Development, LLC., 2007 Ohio App. LEXIS 694, \*\*12 (Ohio Ct. App., 2007).

<sup>25</sup>Ghindia v. Buckeye Land Development, LLC., 2007 Ohio App. LEXIS 694, \*\*12 (Ohio Ct. App., 2007).

<sup>26</sup>Pezzullo v. Ure, 2008 R.I. Super. LEXIS 167, \*18 (R.I. 2008).

<sup>27</sup>Face 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).

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

<sup>29</sup>Purich v. Draper Properties, Inc., 395 Md. 694 (2006).

<sup>30</sup>Smith 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).

<sup>31</sup>Greer v. Washougal Motorcross, LLC., 2007 Wash. App. LEXIS 497, \*11 (Wash. Ct. App. 2007).

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

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

<sup>34</sup>Bialik 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).

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

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

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

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

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

ZONING AND LAND USE PLANNING

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

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

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

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

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

<sup>45</sup>Mt. Zion Code sec. 150.146 (1999).



Agenda  
**Planning Commission**  
***Committee of the Whole***  
 CITY AND BOROUGH OF JUNEAU  
*Ben Haight, Chairman*  
 December 11, 2018

**I. ROLL CALL**

Ben Haight, Chairman, called the Committee of the Whole Meeting of the City and Borough of Juneau (CBJ) Planning Commission (PC), held in the Assembly Chambers of the Municipal Building, to order at 5:45 p.m.

**Commissioners present:** Ben Haight, Chairman; Dan Miller, Dan Hickok, Andrew Campbell, Nathaniel Dye, Carl Greene

**Commissioners absent:** Percy Frisby, Paul Voelckers, Michael LeVine

**Staff present:** Jill Maclean, CDD Director; Beth McKibben, Senior Planner; Laura Boyce, Senior Planner

**Assembly members:** Wade Bryson

**II. REGULAR AGENDA**

**AME2018 0009:** Proposed amendments to 49.30 – Nonconforming Development

Ms. McKibben told the Commission that the primary concept of this proposed amendment to 49.30 is to be less stringent on benign nonconforming situations and more stringent on those that would have a more detrimental effect on public health and safety. The best way to address conformity is to make sure that zoning works, she said. The ADOD (Alternative Development Overlay District) is a good example of this. The other concept is to sanction benign developments. Every community decides what is benign for them, she said. In some residential uses, allowed density may not be conforming to the current code, she said.

The community is experiencing challenges as the finance community is reticent to finance nonconforming properties, said Ms. McKibben.

The other goal is to phase out detrimental nonconforming uses, said Ms. McKibben. There are not too many of these within the community, she noted. Some of these properties truly do not

belong in their existing neighborhood, she said. The goal is that over time these properties will be moved to an area in which they fit, she said.

A change which had recently been made to the draft ordinance is the nonconforming use. The language states that a nonconforming use may be expanded as long it still comports with the neighborhood, she said, with no negative impact.

Other changes were made based upon the discussion at the last meeting regarding nonconforming structures, said Ms. McKibben. A nonconforming structure may be reconstructed in compliance with regulations when they are accidentally damaged or destroyed. If it is intentionally destroyed, it can only be reconstructed in accordance with the current code, said Ms. McKibben. Previously the language stated that a nonconforming structure could be reconstructed whether its damage was by accident or intentional, said Ms. McKibben.

Additional new language was added concerning overcoming a presumption of abandonment, said Ms. McKibben. 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 at a Nonconforming Situation Review. This draft has language which specifically defines what abandonment is, said Ms. McKibben.

Proof of Nonconforming Situation was changed by the staff to Proof of Nonconforming Status, said Ms. McKibben. It is now clearer to have a group defined as nonconforming status such as if someone wanted to sell their four plex which was legally nonconforming. They would have proof of nonconforming status, said Ms. McKibben. The process has not really changed even though the name changed, she noted.

The Nonconforming Situation Review language has also changed since last viewed by the Commission, said Ms. McKibben. This process allows the Board of Adjustment to review, limit, or deny:

- ✓ The change of use to a different use which is prohibited by the base zone
- ✓ Expansion of nonconforming use
- ✓ 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 a nonconforming dwelling unit on sites that exceed the maximum residential density standards when an applicant does not provide standard evidence for a Proof of Nonconforming Situation when the Director does not find the evidence to be satisfactory

#### *Commission Comments and Questions*

Mr. Miller asked for clarification of a legal nonconforming status. He asked if this would fit

within the Nonconforming Situation Review and if there was an avenue other than the Planning Commission which could review the status.

Ms. McKibben said the proof of nonconforming status which is a staff review. As part of this work CDD needs to reach out to the business and finance communities, the appraisers and the title companies. They could then notify their client that they need to obtain a legal nonconforming status, she said. Often people don't know that their property is nonconforming until it comes to sale, said Ms. McKibben. That would enable the sale to proceed much more smoothly, she said. If they want to appeal the staff decision on the nonconforming status, then the next step would be the Nonconforming Situation Review, she said.

The adoption of ordinance 15-03 provides the opportunity for the Planning Commission to approve right-of-way acquisitions that create nonconforming situations if each lot has at least one building that can be reasonably developed, explained Ms. McKibben. The nonconforming situations created by these acquisitions will be considered legally nonconforming and should be documented as such. This draft nonconforming code works with that process.

In general, a legally nonconforming use that is 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 five years, to become conforming, or else move. This is not a process that Juneau has used and is not proposed with this language. 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 the problem.

At the last meeting it was discussed what transpires when a nonconforming status is lost, said Ms. McKibben. Language currently in the code states that it is lost if the repair cost of the structure is more than 75 percent of the cost of the replacement of the entire building, exclusive of foundation, with new material. The extent of building damage shall be determined by the building official.

The current proposal is 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 percent threshold, then the nonconforming use cannot be reconstructed or 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 to one dwelling unit - if intentionally destroyed, nonconforming density rights are lost. If accidentally destroyed to the 75 percent cost threshold, the nonconforming density cannot be reconstructed.

- ✓ Nonconforming structure - if intentionally destroyed, nonconforming rights are lost and the construction must comply with current regulations. If accidentally destroyed to the 75 percent threshold, the reconstruction must comply with the current dimensional standards.

Mr. Miller inquired about the case of a nonconforming density.

Ms. McKibben referred the Commission to the table presented earlier which allows for the reconstruction of the dwelling which has a nonconforming density.

Mr. Miller said he has never liked the 75 percent rule. Mr. Miller said he believed that a lot of the legally nonconforming situations in Juneau are in the downtown area. Most of these lots are benign, said Mr. Miller. Referring to more recently constructed and deemed nonconforming buildings along Glacier Highway, Mr. Miller said if they were to be destroyed for over 75 percent of the value, they would not be able to reconstruct their buildings at the same location. They would have to conform to the newer code.

Mr. Dye said he agreed with much of what Mr. Miller said. The purpose of zoning is to spur development in a certain direction, said Mr. Dye. He said he does have some concern about it being too easy to rebuild to a non-conforming standard. He said he does not want nonconforming construction so easy to obtain that zoning regulations become meaningless.

A nonconforming density with a nonconforming structure on a nonconforming lot are exempt from the 75 percent rule, said Mr. Miller. He said he feels this is a good rule. He said he did not think it was fair that some structures were exempt from this 75 percent rule while the others are not. He said they should both be able to rebuild on the same footprint without having to meet the existing setback requirements.

Mr. Dye said he did agree that single-family nonconforming residential units are more benign than other multi-residential nonconforming structures. He said it did seem to be a little unfair that the 75 percent rule still exists for single-family units. Mr. Dye asked the staff if they could set a date which would encompass 100 percent rebuild.

Ms. Maclean said for the most part it is the two town areas which have the most nonconforming single-family residences and structures. The ADOD's are in place to protect those residences, she said.

Ms. McKibben said perhaps once they accomplished the downtown zoning, that they look again at the nonconforming structures in that area. She said they have a number of exceptions for an instance with a nonconforming lot to be granted reduced setbacks. The evaluation for the downtown zoning should result in very few nonconforming structures, she said. It may be a better time to discuss this particular issue when they have a better idea of what the new

downtown zoning will be like, she added.

Mr. Dye said they are trying to protect single-family residences as well as multi-family residences until the zoning is fixed.

In answer to a question posed by Mr. Dye, Ms. McKibben said there are currently no sidebars placed upon what the nonconforming density could be increased to. Referring to line 261 of the draft ordinance, Ms. McKibben read that in all residential zones, (RR – D18) a change from a nonconforming nonresidential use to an allowed residential use that exceeds the allowed density would be the expansion of a nonconforming use. On line 301 of the draft ordinance, Ms. McKibben read that nonconforming residential density will have no net increase in overall detrimental impact on the surrounding area taking into consideration factors such as vehicle trips, impact on surrounding street parking and on lot coverage, vegetative cover, and conformity with the Land Use Plan.

Mr. Dye said he was thinking of a chart similar for the one developed for the Alternative Residential Subdivision (ARS). For D5 zoning for example, maximum development would fall just a little under the zoning for D10, he explained.

Ms. McKibben said she understood they are talking about making a nonconforming use to be changed to a nonconforming density. If this was in a D1 zone there would be the highest density possible.

Mr. Dye said he did have a concern that the ordinance would limit rezone work. He said perhaps it opened up a bigger area than may be optimal.

Mr. Miller posited that if the propane business on Mendenhall Boulevard decided to purchase an industrial lot for their business and change their nonconforming uses to a nonconforming density, their lot could be a D10 zone when everyone around them was zoned D5.

This is an incentive to get rid of nonconforming uses, said Ms. McKibben. This is a concept that has existed in the language, but they had not discussed it very much, she said. The idea is that residential uses are probably more compatible with the neighborhood, she said. They could be more specific about criteria evaluated in the Nonconforming Situation Review that would make the Commission more comfortable, she said. They could put in language as suggested by Mr. Dye, she added. They could combine the two approaches, she said.

Ms. Maclean said she liked the limits suggested by Mr. Dye. She added they do already have bonuses in Title 49 such as the apartments on Riverside Drive which received extra units. There are alternative ways to gain units or density, she said.

The Board of Adjustment through the Nonconforming Situation Review could deny a request, said Ms. McKibben, or it could apply conditions. If there is a density of D15 proposed in a D5 zoning district, and the Commission found that the traffic was incompatible with the area or the site could not be adequately buffered from the adjacent D5 zoning, the Commission could apply conditions, she said.

Mr. Dye clarified that to apply for a change in density the applicant would already have to be in a legally nonconforming situation.

Ms. McKibben clarified for Mr. Dye that things that are not legal need to go away, or become legal.

To clarify what is “intentional” Ms. McKibben said if an individual burns their own house down, that is intentional. If someone else burns that house down, that is not intentional, she said, unless there is evidence that the owner paid someone else to burn their house down, she said.

#### *Changes within the Current Draft Ordinance*

On line 44, under nonconforming uses for continued operation, the continued operation has changed to reflect the conversation from the last meeting, said Ms. McKibben. She said based upon the conversation at the last Planning Commission meeting, the Commission seemed to be fine with expansion of the use inside of the building as long as there were not external negative impacts that affected the neighborhood.

“Overcoming presumption of abandonment” on line 208 of the draft ordinance, said Ms. McKibben, has been adjusted. It defines abandonment, and this is decided by the Director. If the applicant is not satisfied with the Director’s decision, that decision can be protested through a Nonconforming Situation Review by the Board of Adjustment. All of the Director’s decisions within this ordinance can be protested through the Board of Adjustment through the Nonconforming Situation Review, said Ms. McKibben.

Mr. Miller asked if there are time frames associated with abandonment.

Abandonment would be a little bit different depending upon the nonconforming situation, said Ms. McKibben. A nonconforming residential density, for example, can be reconstructed no matter how long it has been vacant or abandoned, she said. Once the reconstruction process has begun, it must be completed within three years, she explained. There is a timeline for a nonconforming use, she said. “Once abandoned, the prior legal nonconforming status of the use shall be lost and any use of the property should comply with all applicable provisions of this title, unless the nonconforming use is established to the Nonconforming Situation Review.”

If the propane store changes to a duplex, the previous use of the propane store cannot be regained, said Ms. McKibben. A property would be considered abandoned if no action had been

taken on the property within a year unless the owner can demonstrate that they had to make substantial efforts to continue the use. That is consistent with the current code, said Ms. McKibben.

One dwelling unit that is nonconforming can be reconstructed within three years, said Ms. McKibben.

Mr. Dye asked why there is no time limit for residential density on residential abandonment.

This concept had been discussed at the Title 49 meeting in the support of residential uses and densities, said Ms. McKibben. Ms. McKibben said one example she could think of that was discussed at the Title 49 meeting, was a residence which had been abandoned for several years because it was stalled in the probate process.

Mr. Miller said perhaps it could be placed under the Director's determination of abandonment that proof of a necessary absence such as to take care of a relative could be used as a reason for abandonment not to be declared.

Mr. Hickok asked if a nonconforming use continued to pay property tax if it still would have to be considered abandoned.

If a business stops operating for a period of time, and taxes are still paid on it, the use itself is abandoned, said Ms. McKibben.

Mr. Hickok asked if there is a notification process for abandoned uses.

Educating the community about this new code will be the challenge, said Ms. McKibben.

In answer to a question posed by Mr. Greene, Ms. McKibben said that a nonconforming use can be transferred with ownership. If the new owners wanted to use the property for a different use then they would have to comply with the current code, she explained. There is a process within this ordinance for an owner to go from one nonconforming use to a different nonconforming use, she added.

Ms. McKibben added that she believes there has yet to be added to this draft ordinance a time limit for the nonconforming structure reconstruction.

Mr. Miller said if there is a structure of nonconforming density there is no time limit.

Ms. McKibben said currently nonconforming structures have a one-year time limit. She asked Mr. Miller if he wanted the nonconforming structure for nonresidential uses to have a one-year time limit to reconstruct.

Mr. Dye said it may be very difficult for businesses to come back within a year if they may have to confront insurance and legal issues.

Mr. Dye said he would be more comfortable with a three-year time span.

Mr. Miller concurred with Mr. Dye.

Mr. Dye said perhaps they could file a letter of intent to be constructed within a year and then have several years for completion.

Ms. McKibben said she would work on some language to reflect these ideas.

The law department will be notified of the revisions suggested this evening, said Ms. Maclean.

Chairman Haight said he would like to see this draft ordinance come once again before the Committee of the Whole so that new Commission members can be brought up to speed.

A presentation will be made to the real estate and finance community about this draft ordinance so that it can provide its input at the public hearing of this ordinance, said Ms. McKibben.

**III. OTHER BUSINESS - None**

**IV. ADJOURNMENT**

***The meeting was adjourned at 6:50 p.m.***



## AME 2018 0009

A text amendment to revise Title 49, Land Use Code, to repeal and replace 49.30 Nonconforming Development

**Planning Commission Meeting  
September 17, 2019**



## Ad Hoc Committee

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- August 30
- September 3
- September 10, 2019



## Nonconforming residential uses in Industrial and Waterfront Industrial zoning districts

- Residential uses are not permissible in these zoning districts
- Only caretaker units are permissible as an accessory use
- Caretaker units must be associated with a primary use and are not counted as density
- Reconstruction of nonconforming residential uses in these zoning districts is treated more strictly than those where residential uses are permitted.



## Takings

- T49 already distinguishes between residential uses in industrial zoning districts and residential/commercial zoning districts
- Property owners in these industrial zoning districts are able to redevelop their property for other uses that are permissible in the district.



## Nonconforming Situations in General

- Clarifies that a “certificate of nonconforming status” is not necessarily required before *any* work on a nonconforming situation can take place.
- Clarifies that the Building Official makes the official determination of the extent and cause of damage or destruction. (accidental or intentional & whether damage has reached threshold to be deemed destroyed).
- Clarifies that when a situation fails to be certified or cannot be certified it is noncompliant and subject to enforcement.



## Nonconforming Situations in General

- Creates two statuses of abandonment:
  - When all nonconforming rights are lost
  - When nonconforming rights are “presumed” to be abandoned and may be overcome
- Clarifies how Director determines abandonment
- Refines process for rebutting Director’s determination of abandonment



## Nonconforming Uses

- Clarifies to what is considered acceptable modification
- Clarifies reconstruction of nonconforming residential uses in Industrial and Waterfront Industrial zoning districts.



## Nonconforming Residential Density

- Revised definition of “nonconforming residential density”
- Discussed adding subscript to Table of Permissible Uses - Note AC, which would state “Refer to 49.30.240”.

Staff recommends the following instead:

49.25.300 – Determining Uses

(5) Nonconforming uses. Nonconforming uses, including nonconforming residential densities in residential districts that allow residential development, are subject to chapter 49.30.



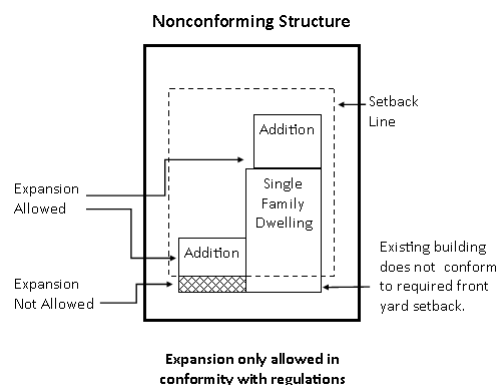
## Nonconforming Structures

- Clarifies that nonconforming structures can be modified, enlarged, or altered if the modification does not aggravate the nonconformity.
- Adds reference to 49.25.430(4) Projections into required yards – includes opportunity to add stories with an approved conditional use permit.
- Clarifies that all nonconforming structures can be modified in compliance with existing code.



## Nonconforming Structures

- Revised figure 1



## Nonconforming Parking

- Provides for the governmental entity controlling the ROW accessing the parking must *find* the reconstruction or replacement of nonconforming parking does not endanger the public health, safety and welfare.
- Includes both the number of off-street parking spaces and back out parking.
- Clarification provided for a nonconforming parking situation that becomes more conforming.



## Nonconforming Status Review (Director Approval)

- Review required to establish whether a situation is nonconforming or noncompliant.
- When nonconforming – determines if a nonconforming situation will be aggravated by the permit being sought.
- This provides a distinction between the “review” and the “certification”.
- Certification is required (before or concurrently) as a component of Nonconforming Situation Review.
- Certification can be requested at any time and separate from any permits.



## Nonconforming Situation Review (BOA Approval)

- Process revised to more closely follow the Alternative Development Overlay District process.
- Director's review procedure added.
  - Includes requirement to solicit input from other agencies.



## Defintions

- Refined definition of “nonconforming residential density”
- Expanded definition of “nonconforming parking” to include type of parking and not only number of off-street parking spaces.
- New definition of “nonconforming rights”
  - Two options provided – PC to decide if definition is needed and if so which one



## Options

Choose one of the following or delete both:

Nonconforming rights means the rights provided in 49.30 applicable to situations that are certified or qualify to be certified as nonconforming situations.

OR

Nonconforming rights means the rights provided in 49.30 applicable to situations that are certified or qualify to be certified as nonconforming situations, including rights relating to the perpetuation, maintenance, modification and reconstruction of nonconforming situations.



## Fees

- Nonconforming Situation Review - \$400
- Certification of nonconforming situation(s) \$150
  - For Certification ONLY
  - Fee is waived when in conjunction with a development permit





## Additional Amendments to T49

- *CBJ 49.25.430(4)(M)* provides the opportunity for nonconforming structures to add stories with an approved Conditional Use Permit. The section now includes the term “lawfully nonconforming”. To be consistent with the revised nonconforming chapter the word “lawfully” will be deleted.
- *CBJ 49.25.430(5)* replacement and reconstruction of certain nonconforming buildings will be amended to refer to 49.30, rather than 49.30.500(b).
- *CBJ 49.25.510(f)* replacement and reconstruction of certain nonconforming buildings will be amended to refer to 49.30, rather than 49.30.500(b).



Reconstruction. A nonconforming structure or portion of a structure which the building official has deemed destroyed shall not be reconstructed except

1) If the primary use, is residential, the structure may be reconstructed in the existing footprint, except for encroachments into rights-of-way or adjacent property, providing the structure is in a zoning district that allows residential development.

2) If the primary use of which is non-residential may be reconstructed in conformity with the provisions of this chapter



## Background

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 (current) zoning regulations.

Commonly referred to as “grandfathered”.



## Background continued...

- When we revise and update land use policies and zoning regulations we are faced with questions regarding the continued use, replacement, or expansion of nonconformities.
- In current code the various non-conforming situations are blended into single paragraphs and the reconstruction section is poorly written, which makes it challenging to understand.
- Certain nonconforming situations can create financing challenges.



## Options

Zoning ordinances vary considerably in how they treat nonconforming situations. 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.



## Approach

- 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, benign nonconformities are treated differently than those likely to have significant detrimental effects.
- The conceptual approach 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.



## Overview

The proposed ordinance mixes the phasing out of detrimental nonconformities and recommends maintaining the status quo or allowing limited modification and expansion to benign nonconformities. The proposed ordinance repeals and replaces all of 49.30 and clarifies and defines the following nonconforming situations:

- Nonconforming use;
- Nonconforming residential density;
- Nonconforming structure;
- Nonconforming lot; and
- Nonconforming number of on-site parking spaces.



## Purpose & Intent

This chapter provides:

- Standards for the review and development of legally nonconforming property;
- A process for obtaining certification of legal nonconforming status by the Director;
- A process for obtaining a nonconforming situation review by the Board of Adjustment.

The intent is to:

- Reduce the negative or less desirable impacts of nonconforming situations;
- Promote public health, safety and general welfare;
- Avoid unnecessary and unreasonable burdens to the use and development of property impacted by zoning changes.

Alteration of nonconforming nonresidential situations in residential zones may be reviewed more strictly than nonconforming nonresidential situations in commercial or industrial zones, to protect the livability and character of residential neighborhoods.

Nonconforming residential situations in residential zones may be reviewed more leniently to the extent they are less likely to present a major disruption to the neighborhood and may provide desirable housing opportunities.



## In General

- Except as otherwise provided in this chapter, nonconforming situations may continue.
- Any nonconforming situation may be changed to a conforming situation by right. Once a nonconforming situation becomes conforming, the nonconforming rights of that specific situation are lost and the nonconforming situation may not be re-established.
- Nonconforming situations run with the land. A change in ownership does not affect the status of a nonconforming situation.
- Nothing in this chapter prohibits normal maintenance and routine repairs. Examples of routine maintenance include, but are not limited to: roofing repair or replacement, window replacement, and structural repairs.
- Except as otherwise provided in this chapter, the discontinuation of, or failure to maintain, a nonconforming situation for 365 consecutive days creates a presumption of abandonment.



## In General continued...

- A property owner or agent may seek a certification of legal nonconforming status review and determination at any time.
- Prior to the issuance of a permit for work or development on the site where a nonconforming situation exists, certification of legal nonconforming status is required.
- Certification of legal nonconforming status is required to request a nonconforming situation review.
- A nonconforming structure or structure containing a nonconforming use shall be deemed destroyed when the structure is damaged by any means to an extent of more than 75 percent of the cost of the replacement of the entire structure, exclusive of foundations, using new materials. The extent of the damage shall be determined by the Building Official.
- All nonconforming development rights provided by this chapter are lost when a nonconforming situation is intentionally damaged, destroyed or demolished by any means within the control of the owner or agent of the owner.



## Nonconforming Use

Example – gas station (automotive fuel station 49.25.3009.200) in a D-5 zoning district.

Documentation exists showing it was legally permitted in accordance with zoning regulations in the past ...



## 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.

- Nonconforming uses may continue to operate;
- Changes are allowed in the operation so long as the external impacts of the changes harmonize with the neighborhood;
- Could be changed to another nonconforming use through a nonconforming situation review (discussed later);
- In 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;



## Nonconforming Use continued...

- May change to a conditional use allowed in the zoning district with an approved Conditional Use Permit;
- May be expanded within the existing original building but may not be expanded to other buildings or take up a greater area of land;
- 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 deemed destroyed (is accidentally destroyed and the cost of repair is more than 75% of the cost of replacement) then the nonconforming use cannot be reestablished.
- Operational modifications to a nonconforming use are allowed and not considered a change or expansion of the nonconforming use, as long as the external impacts of such modification are nominal and do not impose a significant, new impact that is out of harmony with the neighborhood as determined by the Director.



## Nonconforming residential uses in Industrial and Waterfront Industrial Zoning Districts.

When there is nonconforming residential use in the Industrial and Waterfront Industrial Zoning districts, and the structure containing the dwelling unit(s) is damaged by fire or other causes beyond the control of the owner the following applies:

- Nonconforming residential use rights are maintained and the structure may be rebuilt within 3 years if:
  - Nonconforming residential use is accepted as legally nonconforming with a certification of legal nonconforming status
  - Written notice of intent to reconstruct is provided to the department within 365 days.
  - The structure is not deemed destroyed by the Building Official.
  - The reconstruction complies with existing associated district-specific dimensional, development and design standards such as setbacks, parking, landscaping etc. that would apply to new development.
- If a temporary certificate of occupancy has not been obtained for the structure within 3 years, the nonconforming residential use rights are lost, and all existing and future development on the site must comply with current CBJ Code.
- The Director, with the concurrence of the Building Official, may approve one 18 month extension for the reconstruction of the nonconforming residential use upon written request showing good cause.



## Nonconforming Residential Density

### New Concept

- Example – Existing 4-plex in D-5 zoning district
  - Use is residential
  - Density exceeds what current zoning allows
- Problem – if building burns only 1 or 2 units could be rebuilt (depending on lot size)



## Nonconforming Residential Density

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.*

- Maybe modified or improved if:
  - Nonconforming residential density accepted legally nonconforming with a certificate of legal nonconforming status.
  - Dimensional requirements, such as setbacks and on-site parking are met except as otherwise provided in the code.





## Nonconforming Residential Density continued....

- If the building is accidentally destroyed or damaged, as long as it is reconstructed regardless of the cost of replacement (no 75% threshold) subject to:
  - Nonconforming residential density accepted legally nonconforming with a certificate of legal nonconforming status.
  - Written notice of intent to reconstruct is provided to the department within 365 days.
  - The total number of dwelling units established by the certificate of legal nonconforming status may not be increased.
  - Reconstruction may be in the existing footprint, with the exception of encroachments into public rights-of-way or adjacent property.
  - If a temporary certificate of occupancy has not been obtained for the structure within three years, the nonconforming residential use rights are lost, and all existing and future development on the site must comply with all provisions of current CBJ Code.
  - The director, with the concurrence of the building official, may approve one 18-month extension for the reconstruction of the nonconforming residential use upon written request showing good cause.
- Nonconforming residential density rights continue even if a building is unoccupied for any amount of time (no abandonment);
- Nonconforming residential density rights are lost when the structure is intentionally destroyed.



## Nonconforming Residential Density continued....

When a nonconforming use will become a nonconforming residential density it will have no net increase in overall detrimental impacts on the surrounding area taking into consideration factors such as:

- Vehicle trips and impact on surrounding on street parking
- Lot coverage, vegetative cover,

And..

It cannot not exceed 1.5 times the base density permissible for the underlying zoning district in RR, D1, D3, D5, and D10SF zoning districts, and 1.25 times the base density permissible for the underlying zoning district in the D10, D15 and D18 zoning districts, rounded to the nearest whole number



## Nonconforming Structures

Nonconforming structures are those that do not meet one or more of the dimensional standards such as height, setbacks, or lot coverage.

- Can be continued and maintained;
- May be expanded, but only if the change does not increase the nonconformity;
- 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;
- A nonconforming structure with nonconforming density may be reconstructed on the original location. However, the reconstructed building cannot encroach into rights-of ways or across property lines;

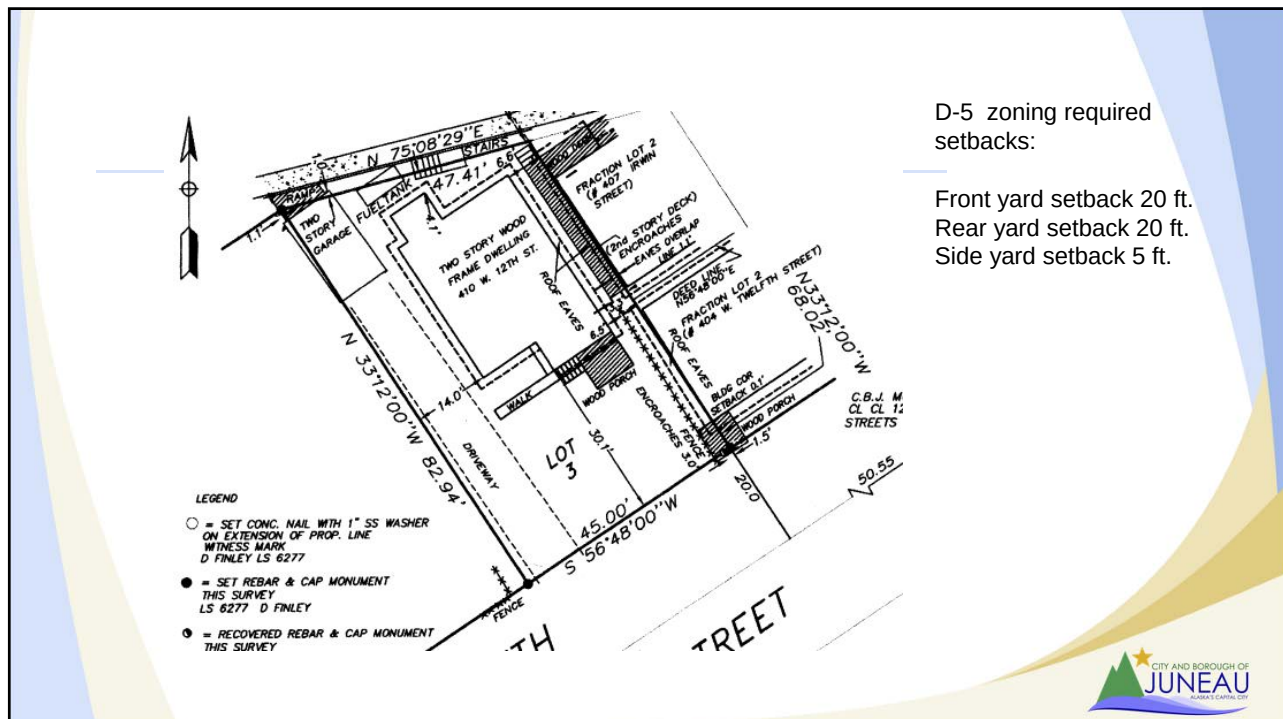
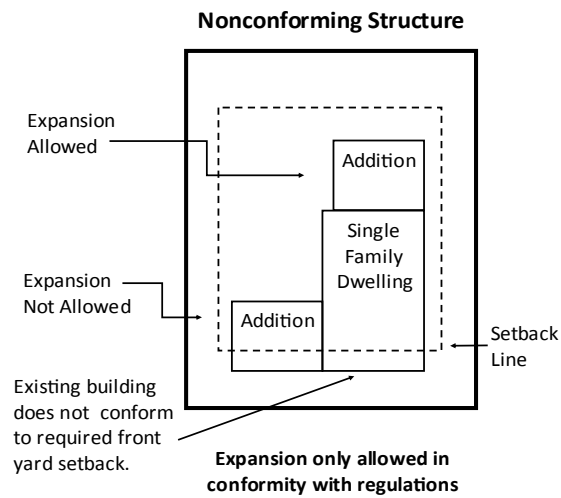


## Nonconforming Structures continued....

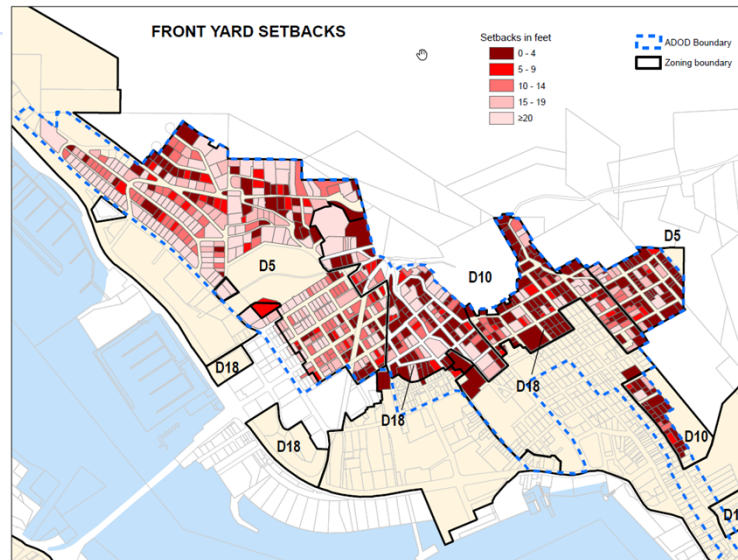
- All other nonconforming structures must be reconstructed in compliance with current regulations when they deemed destroyed;
- If a nonconforming structure is intentionally destroyed, it may only be reconstructed in accordance with current codes.
- When a nonconforming structure is abandoned or brought into conformity, the nonconforming status is lost;
- Nonconforming rights may be lost when the damage is intentional.



## Expansion of nonconforming structure



## Nonconforming front yard setbacks – downtown Juneau



## 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.

- May 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;
- 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 (except in Industrial and Waterfront Industrial zones).





## Nonconforming lots – downtown Juneau



D5 minimum lot  
size 7,000 sq. ft.

Existing lot size  
1,600 sq. ft.



## 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 number of on-site parking spaces and later becomes more conforming for number of on-site parking spaces, it may not revert back to the less conforming parking.



## Overcoming the presumption of abandonment

Ordinance creates 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 appealed to the Planning Commission.



## Nonconforming Status

- Creates a new process called “certification 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 appealed to the Planning Commission;
- New language lists examples of standard evidence to prove the nonconforming situation, as well as examples for proving the situation was maintained over time;
- Runs with the land.



## Examples of “standard evidence” for proving nonconforming status

- Building, land use, or development permits;
- Zoning codes or maps;
- Recorded plats;
- Sanborn Maps.
- Utility bills;
- Income tax records;
- Business licenses;
- Listings in telephone (record? books?), business;
- Advertisements in dated publications;
- Building, land use, or development permits;
- Insurance policies;
- Leases;
- Dated aerial photos or other photos;
- Insurance maps that identify use or development, such as the Sanborn Maps; or
- Land use and development inventories prepared by a government agency.



## 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:

- The change of a nonconforming use to a different use, which is also prohibited by the base zone;
- 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;



## Nonconforming Situation Review

- Public Hearing
- Public Notice
- Decision may include special restrictions or conditions
- Will consider
  - Effects on neighboring property values
  - Public services
  - Effects on neighborhood character
  - Public health and safety





## NCSR Approval Criteria

### additional findings for nonconforming use

- More appropriate to the district than the existing nonconforming use;
- Does not significantly jeopardize future development of the area in compliance with the intent of the zoning district;
- Any characteristics of use that are out of compliance with this title are not changed to become less compliant with the requirements of this title;
- Will not result in the creation of additional nonconformities or the need for any variances;
- With mitigation measures, there will be no net increase in overall detrimental impacts (over the impacts of the last legal use or development) on the surrounding area taking into account factors such as:
  - The hours of operation;
  - Vehicle trips to the site and impact on surrounding on-street parking;
  - Noise, vibration, dust, odor, fumes, glare, and smoke;
  - Screening, public safety, neighborhood harmony;
  - The amount, location, and nature of any outside displays, storage, or activities.
- In a single-family or multi-family residential zone the exterior appearance of the new use or development will not lessen the residential character of the area taking into account factors such as:
  - Building scale, placement, and facade;
  - Parking area placement;
  - Buffering or screening and the potential loss of privacy to abutting residential uses; and
  - Lighting and signs.
- Any characteristics of use that are out of compliance with this title are not changed to become less compliant with the requirements of this title.



## NCSR Approval Criteria

### additional findings for nonconforming residential density

- When a nonconforming use will become a nonconforming residential density it will have no net increase in overall detrimental impacts on the surrounding area taking into consideration factors such as:
  - Vehicle trips and impact on surrounding on street parking;
  - Lot coverage, vegetative cover;
- Nonconforming residential density shall not exceed 1.5 times the base density permissible for the underlying zoning district in RR, D1, D3, D5, and D10SF zoning districts, and 1.25 times the base density permissible for the underlying zoning district in the D10, D15, D18, and LC zoning districts, rounded to the nearest whole number.



## Definitions

- *Nonconforming parking* means the provision of less than the number of on-site spaces required under this title but met the number of on-site spaces required at the time the use was established.
- *Nonconforming residential density* means a residential use that is an allowed use in the zoning district and that was constructed at a lawful density, but which subsequently, due to adoption, revision or amendment of a zoning ordinance, now has greater density than is allowed in the current zoning district.
- *Nonconforming situation* means a situation that 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 present requirements. A nonconforming lot, use, number of on-site parking spaces, structure or density, or any combination thereof.
- *Nonconforming use* means a use that was allowed by right when established or a use that obtained a required land use approval when established, but that subsequently, due to a change in the zoning district or zoning regulations, the use, or the amount of area devoted to the use, is now not permitted under the current zoning designation.
- *Abandon* includes the following:
  - (a) with respect to a use, the cessation of such use for any length of time, combined with intent to indefinitely cease such use, or;
  - (b) with respect to a structure, the cessation of occupancy of such structure for any length of time, combined with intent to indefinitely cease occupancy of such structure.
- *Change* means, with respect to a nonconforming use, that the nonconforming use has been converted to a different use for any period of time, regardless of intent.
- *Discontinued* means that a nonconforming use has ceased, and has not substantially resumed, for a period of 365 consecutive days regardless of intent.
- *Occupy or occupancy* means actual physical occupancy of a structure or lot, regardless of intent.
- *Primary use* means the primary activity actually conducted in a serious, substantial, and ongoing manner on a lot or in a structure, and for which the lot or structure is actually and primarily occupied and maintained, regardless of intent.
- *Use* means activity actually conducted on a lot or in a structure, and for which the lot or structure is actually occupied and maintained, regardless of intent.



## Fees

- Nonconforming situation review – to Planning Commission  
\$400.00 (same as non-administrative variance)
- Certification of legal nonconforming status – staff review  
\$150.00 (same as letter of zoning compliance)



## Comprehensive Plan Policies

- **A safe place to raise a family.** Maintain safe neighborhoods and circulation systems; provide public spaces and facilities that foster community interaction and cohesiveness.
- **Quality education from Pre-school to University levels.** Promote quality educational programs and experiences in the schools and lifelong learning for our residents as well as a healthy lifestyle with adequate recreational facilities, resources and programs. Support a vital arts community, celebrating our diverse cultural heritage and unique historic resources.
- **A balanced economy.** Ensure a balanced, sustainable, and diverse economy, actively encouraging employment opportunities for residents of all levels and ages that provide a livable wage and a dependable municipal tax base.
- **Natural resources.** Highlight and protect our scenic beauty, protect our streams and fish and wildlife habitat and foster the sustainable use of our natural resources.
- **A balanced community.** Ensure a balance between natural resource protection and the built environment, the efficient provision of infrastructure and goods and services, and housing affordable to all income levels.
- **Neighborhood livability and housing.** Maintain the identity and vitality of our neighborhoods, actively pursuing affordable housing for a diversity of households while promoting compatible livability and high quality design in new buildings.
- **Mobility.** Provide an accessible, convenient and affordable transportation system that integrates vehicle, vessel, rail and aircraft transport with sustainable and innovative transportation options— including convenient and fast public transit service, particularly for commuters to work, and bicycle and pedestrian networks throughout the community.
- **Involved citizenry.** Solicit resident participation and leadership in implementing the Plan policies and actions from all sectors of the community, encouraging mutual understanding and cooperation among all.



## Comprehensive Plan Policies

### CHAPTER 2 - SUSTAINABILITY:

#### POLICY 2.1

To build a sustainable community that endures over generations and is sufficiently far-seeing and flexible to maintain the vital and robust nature of its economic, social, and environmental support systems.



## Comprehensive Plan Policies

### CHAPTER 4 – HOUSING:

#### POLICY 4.2.

To facilitate the provision of an adequate supply of various housing types and sizes to accommodate present and future housing needs for all economic groups.

#### POLICY 4.4.

To facilitate the preservation and rehabilitation of existing housing, particularly housing affordable to low-income residents.

#### POLICY 4.7.

To encourage preservation of residential structures that are architecturally and/or historically significant to the CBJ and which contribute to the historic and visual character and identity of the neighborhood.



## Comprehensive Plan Policies

### CHAPTER 10 – LAND USE:

#### POLICY 10.2.

To allow flexibility and a wide range of creative solutions in residential and mixed use land development within the urban service area.

#### POLICY 10.3.

To facilitate residential developments of various types and densities that are appropriately located in relation to site conditions, surrounding land uses, and capacity of public facilities and transportation systems.

#### POLICY 10.7

To designate on land use and zoning maps, and to provide services to, sufficient vacant land within the urban service area appropriately located to accommodate future commercial and industrial uses.



## Comprehensive Plan Policies

### 2015 Juneau Economic Development Plan

One of ten initiatives -“Promote Housing Affordability and Availability”.

The Juneau Economic Development Plan further strengthened the case for the critical need of housing for all ages and income groups in order to obtain and maintain a strong and stable economy.



## Comprehensive Plan Policies

### 2016 Housing Action Plan

The Housing Action Plan (HAP) was adopted by Resolution 2780 in 2016. HAP is not adopted as an element of the Comprehensive Plan, and therefore Title 49 amendments are not required to be in conformance with this plan.

However, the HAP represents official policy in regard to housing in Juneau.

- The HAP indicates that for Juneau's housing market to become “unstuck” more units of all types must be added.
- One of the plan's recommendations is the preservation of existing affordable housing.

Creating the nonconforming residential density situation, and allowing those units to be reconstructed, implements this recommendation.



## Compliance with Title 49

The proposed amendment to Title 49 will not create any internal inconsistencies within the Code. As stated in CBJ 49.05.100, the purposes and intent of Title 49 are as follows:

1. *To achieve the goals and objectives, and implement the policies of the Juneau comprehensive plan, and coastal management program;*
2. *To ensure that future growth and development in the City and Borough is in accord with the values of its residents;*
3. *To identify and secure, for present and future residents, the beneficial impacts of growth while minimizing the negative impacts;*
4. *To ensure that future growth is of the appropriate type, design and location, and is served by a proper range of public services and facilities such as water, sewage, and electrical distribution systems, transportation, schools, parks and other public requirements, and in general to promote public health, safety and general welfare;*
5. *To provide adequate open space for light and air; and*
6. *To recognize the economic value of land and encourage its proper and beneficial use.*

The proposed amendment was drafted with the purpose and intent of Title 49 taken into account. If it is approved as drafted, then it will be found to be consistent with the above purposes.



## Findings

Based upon the above analysis the proposed text amendment to Title 49 is consistent with the goals and policies in the Comprehensive Plan.

Additionally, this amendment would not create internal inconsistencies with adopted plans or codes.



## Recommendation

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Staff recommends that the Planning Commission review and consider the proposed ordinance and forward a recommendation to adopt this ordinance to the Assembly.

