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.

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,*

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.

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.

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 subdivision 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.

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.

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 the 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.