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 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.

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 <u>abandoned</u> according to (b), or whether something is <u>presumed to be abandoned</u> 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.

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.

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.

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.