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TO: Planning Commission Committee of the Whole

FROM: Teri Camery, Senior Planner
Community Development Department

SUBJECT: AME2016 0019
Proposed Revisions to CBJ Code 49.70.310(a)(2 and 3), Eagle Nest buffers

A handwritten signature in black ink, appearing to be "Teri Camery", is written over the "FROM:" line of the memo.

Introduction and Background

Revision of the CBJ Code, Eagle Nest Setbacks, Section 49.70.310(a)(2 and 3), has been on the Assembly and Planning Commission's priority list for several years.

The Planning Commission's Title 49 Committee reviewed the proposed draft eagle nest buffer ordinance at the August 3, 2016 and September 21, 2016 regular meetings. Review included consultation with Mr. Steve Lewis, raptor biologist with the U.S. Fish and Wildlife Service (USFWS). Community Development Department (CDD) staff followed these meetings with extensive consultation with the CBJ Law Department, additional meetings with USFWS, and research on past variance applications.

Revision is needed to improve and simplify departmental implementation of the ordinance, which has been problematic because CDD has always relied heavily on the USFWS to determine the location of nests and also if a nest has actively nesting eagles, a key component of the existing ordinance. In addition, CDD research shows that of 42 eagle nest buffer variances noted in the CBJ database, all 42 were approved. The current ordinance also uses the code definition of development, which has many elements that are irrelevant to impacts to eagle nests and are unnecessarily restrictive.

Revision is needed to provide flexibility in the code, rather than through the variance process, for benign activities. Lastly, discussions with the USFWS indicate that the same uniform degree of protection for eagles throughout the borough, as required in the existing ordinance, is not necessary. USFWS has explained that eagles are highly habituated in urban areas of Juneau, meaning that noise and construction activities do not appear to significantly disrupt their behaviors.

Finally, the USFWS has an optional federal permit, titled an Eagle Take Permit, which allows applicants to disturb an eagle and avoid violating the Federal Bald Eagle Protection Act, often with mitigation conditions attached to minimize harm. In other words, the federal permit is a liability shield. Project Managers for all large-scale developments, especially the Alaska Department of Transportation, have applied for and received this permit, and this permit has often been used as justification for approval of CBJ variances.

Regulation Revision Challenges

The current ordinance regulates eagle disturbances based on the precautionary principle and balancing public policies by imposing less restriction to development when eagle nests are on private property. Since those eagle prohibitions were enacted in 1987, evidence suggests that the CBJ can liberalize the eagle prohibitions because eagle populations in Alaska, especially in urban areas like Juneau, do not appear to be adversely affected by most development.

As noted earlier, CDD staff has had many meetings with the USFWS and with the CBJ Law Department to determine options for revising the ordinance, versus deleting it. Any draft ordinance must have a rational basis for all requirements and be internally consistent. CDD has provided several different versions for consideration; however each version has had unresolvable problems with these two components.

At a basic level, CDD staff has struggled with identifying the location of eagle nests and, as required in current ordinance, determining whether a nest has actively nesting eagles. Thus, CDD has considered simply regulating eagle nests, whether those nests are active or not. This can be justified because empty nests are frequently used again and signify an important part of an eagle's territory. However, CDD does not have the capacity to identify and track eagle nest locations. USFWS filled this important role for CDD for many years, but USFWS staffing was reduced several years ago and USFWS has not been able to consistently provide CDD within this information since then.

In addition, CDD has considered applying regulations only to non-urbanized eagles (outside of the Urban Service Boundary) during the nesting season. However defining the key activities that are most disruptive and require regulation has been difficult.

For example, CDD initially considered prohibiting activity that requires a grading permit. However grading permits are issued for small activities that do not generate noise and disruption—such as altering drainage patterns by digging a ditch with a hand shovel—as well as significant earth moving activities that utilize heavy equipment. Presumably, the heavy equipment activities would cause more impact than hand tools, but CDD has not found evidence to support prohibiting use of heavy equipment, or grading permit development more generally, because of adverse impacts to eagle nests.

The essential question is why is the regulation needed? In other words, what is the rational basis for the regulation/prohibition? Is the issue noise? Is the issue the mere activity or disturbance? Or is it something else? Nothing in federal regulation or available scientific studies has indicated a specific noise threshold causes eagle disturbance. Based on this, CDD has not been able to develop a defensible noise threshold. Similarly, CDD has not been able to develop a defensible activity threshold because the USFWS has not been able to provide us with a specific as to which activities are disruptive and why.

CDD has struggled with these questions and others regarding building activities, and we have not been able to come up with language with an adequate rationale and language without legal inconsistencies.

Ordinance deletion

As noted earlier, the USFWS has a federal permit process to address severely disruptive activities. In addition, bald eagles have never been endangered in the State of Alaska and the population within CBJ appears to be increasing. The USFWS does not maintain a current database of nest sites, and CDD does not have the resources to track nest locations. Even if CDD is able to find a legally-justified option for amending the current ordinance, implementation may still be problematic and incomplete. Thus, because the eagle population around Juneau appears healthy and implementation and enforcement of a revised eagle ordinance would likely be more burdensome than beneficial, deletion of the ordinance may be justified and prudent.

Planning Commission Action

Staff requests direction from the Planning Commission on whether to continue evaluating revision options for the ordinance or to delete the ordinance. If the Commission chooses a revision option, the Commission will, at some point, need to make a determination on whether eagle nest buffers should be eligible for a variance. CDD's understanding is that both revision of the ordinance and deletion of the ordinance would comply with the 2013 Juneau Comprehensive Plan. The Comprehensive Plan explicitly says that the existing eagle ordinance may need to be amended due to changes to federal law (i.e., availability of eagle take permits).

Attachments

Attachment A: Current Ordinance and 2013 Comprehensive Plan policies

Current ordinance and Comprehensive Plan policies for reference

CBJ Code 49.70.310(a)(2 and 3) states:

- (a) *Development in the following areas is prohibited:*
- (2) *Within 330 feet of an eagle nest on public land;*
 - (3) *Within 50 feet of an eagle nest on private land, provided that there shall be no construction within 330 feet of such nest between March 1 and August 31 if it contains actively nesting eagles;*

The Code definition of development (49.80.120) states:

Development means any of the following:

- (1) *Construction, reconstruction or enlargement of a structure involving more than 120 square feet;*
- (2) *A subdivision;*
- (3) *Conduct of a home occupation;*
- (4) *Change in use of a lot, including any structure thereon;*
- (5) *Installation or emplacement of a mobile or modular home;*
- (6) *Removal of substantial vegetative cover;*
- (7) *Excavation, dredge or fill activity;*
- (8) *Installation of a sign;*
- (9) *For the purposes of [chapter 49.65](#), article I, the work performed in relation to a deposit, subsequent to exploration but prior to extraction of commercial quantities of a mineral commodity, aimed at, but not limited to, preparing the site for mining, defining an ore deposit, conducting pilot plant operations, and construction of roads or ancillary facilities;*
- (10) *Any site work in preparation or anticipation of the above.*

The 2013 CBJ Comprehensive Plan states the following:

POLICY 7.14. TO PROTECT AREAS SURROUNDING IDENTIFIED EAGLE NESTS FROM CONFLICTING LAND USES.

Standard Operating Procedures

7.14 - SOP1 *Mature trees that, typically, are suitable for eagle nests should be retained within 1/8th of a mile of the coast.*

7.14 - SOP2 *In situations where lands are proposed for private platting next to CBJ-owned lands, and if the private party is willing, the CBJ government will consider exchanging land of equal value for those lands within 330 feet of the eagle nest tree and retain it as an eagle management area.*

7.14 - SOP3 *Prohibit the cutting of trees near shoreline areas for the purpose of eradicating nesting eagles or of preventing eagles from nesting therein.*

Development Guideline

7.14 - DG1 *Private land within the eagle management radius should be left undeveloped or subdivided into large lots, the largest of which should contain the nest tree. Roads should be located as far from the*

nest as possible, preferably landward from the nest tree. Low density residential or open space/natural areas uses should be located within the eagle management radius.

Implementing Actions

7.14 - IA1 Amend the Land Use Code to include variance criteria that apply specifically to requests to allow development within the buffer area around a bald eagle nest. Developing these criteria is of crucial importance in order to allow responsible development within 330 feet of eagle nests, especially those nests that post-date adjacent development. It may be appropriate to adopt regulations for development near eagle nests based on the level of tolerance of the subject eagles to human activity.

7.14 - IA2 Work with the United States Fish and Wildlife Service (USFWS) on an as-needed basis to identify eagle nest locations and best practices.

7.14 - IA3 Consider designating as Natural Areas or other low impact land use categories areas where eagles tend to nest in concentrations.

7.14 - IA4 Request that the USFWS evaluate the Bald Eagle in the Urban Service Area in terms of population, behavior and tolerance of human presence and activity. Consider any new suggestions from the USFWS for enhancing the presence and health of eagles in the urban area.

7.14 - IA5 Support the efforts of a local non-profit eagle rehabilitation facility to rescue, heal and return to the wild, injured or vulnerable eagles and to educate the public as to the health and well-being of the species.