Municipality of Anchorage

Community Development Department
Planning Division

MEMORANDUM

Date: June 19, 2012

To: Planning and Zoning Commission

From: Jerry T. Weaver, Jr., Director

Subject: Case 2011-104 – Proposed Amendments to Provisionally Adopted Title 21: Follow-up / Unfinished Issue-Response Items

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This memorandum provides follow up responses and recommendations as to several remaining issues raised by the public about the provisionally adopted title 21 and proposed amendments. Issues were raised by the public at the March 12 and 19, 2012 public hearings and in written public comments. An item in this memo also provides information requested by the Commission.

This memorandum covers most of the remaining items raised by the public for this case. It does not cover the residential and commercial building design standards sections in chapter 7.

The issue-responses in this memorandum also reference the following:

- Provisionally Adopted Title 21 with Technical Edits, dated 12-12-2011;
- Consolidated Table of Proposed Amendments, dated 3-12-2012;
- The applicable public comments in **Exhibit D**, Comments Received for PZC Case 2011-104. References to public comments in this memorandum use the page number(s) on which the comment appears in Exhibit D.

All Exhibits A through M to the issue-response memoranda are available at http://www.muni.org/Departments/OCPD/Planning/Projects/t21/Pages/Title21Rewrite.aspx .

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Follow-up / Unfinished Issue-Response Items

Table of Contents:

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1. Off-site Improvements Associated with Land Use Permits

- ► Section 21.03.100E., Page 50 of Provisionally Adopted Title 21
- ► Proposed Amendment 10 in Consolidated Table

Issue: How can the code language more clearly specify the relationship and connection of required dedications and improvements to the proposed development? Should there be limitations or constraints on required off-site improvements?

Public Comment: This is a follow-up to the Planning and Zoning Commission discussion of this issue at its April 23, 2012 worksession, and to issue-response #10 in the Department's Issue-Response Memorandum for Chapters 1-3 which was provided to the Commission on April 19.

Commissioners were considering whether the MOA should have an open-ended ability to require off-site improvements that have a rational nexus connection with the external impacts related to a development, or, if there should be a specific limit in dollars, or another limit on how much it can impose as a proportion of the project's value.

Commissioners requested that staff should work on proposing language that specifies the relationship and connection of the dedications and improvements to the proposed development. Additionally, they requested research as to increasing the specificity as to when this section can be applied and parameters for appropriately requiring dedications or improvements.

Response: An explanation of the provisionally adopted section and proposed amendment 10, including its purpose, basis, and scope of applicability, is discussed on pages 21-22 of the April 19 Issue-Response Memorandum. The issue-response recommendation by the Department was to explore further clarification of the rational nexus connection between the project's impacts and the required improvements.

The Administration has supported requirements for off-site improvements that are clearly co-related to the external impacts (negative externalities) of a proposed development. Proposed amendment 10 is consistent with prevailing practice in zoning and land use law requiring a "rational nexus" between the anticipated externalities of a proposed project and the levy for public improvements or mitigation levied on the proposed project by the public.

However, it is evident that the wording of proposed amendment 10 remains vague as it states that a required improvement shall be reasonably related to "and directly correlated to" the proposed development. "Directly correlated to" may not provide a clear enough standard compared to state and national legal standards. Following is the two part legal test applied nationally for determining whether or not exactions are in compliance with the Federal Constitution:

1. There must be a rational nexus, or essential nexus, connection between an exaction and a legitimate public purpose; and

2. There must be "rough proportionality" between the exaction and the impact of the development project.

Given this legal test, the objectives of this section of the code, and the Administration's intent for its proposed amendment 10, the extent of off-site public infrastructure improvements necessitated by a proposed project should form the best rational basis for what improvements ("rational nexus") and how much ("rough proportionality") to require. The extent of off-site impacts do not necessarily co-relate to the overall size or value of a development project or its property value. Some facility costs or property values are high compared to external impacts. External impacts vary based on each situation.

Therefore, a limitation on required off-site improvements based on the value of the proposed facility or its property value would not meet the rational test – it could be arbitrary, unfair, and ineffective relative to achieving the objectives of the section. It could also be illegal. A development with greater impacts on capital infrastructure needs serving the development could in some cases be required to provide fewer improvements than a more expensive facility that has fewer impacts. Higher value projects would in general benefit while smaller projects would pay a higher exaction relative to the value of the proposed development and its property.

According to the APA Legislative Guidebook, exactions for off-site improvements work as a proper internalizer of externalities (i.e., costs that would otherwise be borne by the Municipality and its taxpayers) only if the exaction is proportional to the public expense it is supposed to cover. If the exaction is significantly lower than the cost to the public, then it is less effective in internalizing the infrastructure cost. A development with a net negative impact—more cost to the community than a benefit—would occur. On the other hand, an exaction that is significantly higher than the cost to the public could have the deleterious effect of discouraging appropriate development. Therefore, the language of the section should tie the amount of the exaction to the off-site impacts and avoid limits based on non-factors.

Recommendation: Clarify proposed amendment #10 from the consolidated table of proposed amendments, by adding language using the two-part test established by the legal system, and providing a purpose statement. Newly additional language appears in bright yellow highlights.

E. Improvements Associated with Land Use Permits

1. Purpose

The purpose of this section is to determine what off-site public infrastructure improvements are reasonably necessary to serve a development, determine the portion of the demand for off-site public infrastructure improvements which is created by a development, and to provide for dedications or improvements which are directly proportional to the development's demand for the public infrastructure improvements.

2.[1.] **Improvements Required**

The issuance of a land use permit under this section for the construction of a residential, commercial, or industrial structure on a lot, shall be subject to the permit applicant providing the easements, dedications, and improvements required for a subdivision in the same improvement area under chapter 21.08, *Subdivision Standards*. In applying the

provisions of chapter 21.08, *Subdivision Standards,* under this section, the term "lot" shall be substituted for the term "subdivision," the term "permit applicant" shall be substituted for the term "subdivider," and the term "building official [MUNICIPAL ENGINEER]" shall be substituted for the term "platting authority."

3.[2.] **Exceptions**
The requirements in subsection E.1. above shall not apply to a land use permit to the extent that:

a. All construction associated with a single dwelling unit is located on a single lot, tract, or parcel, regardless of zoning district;

b. The traffic engineer determines that a street dedication or improvement is not required for traffic circulation;

c. A dedication or improvement has been provided to the applicable standard of [IN] chapter 21.08, *Subdivision Standards*;

d. A dedication or improvement will be provided under a subdivision agreement that has been entered into under section 21.08.060, *Subdivision Agreements*, or under an established assessment district;

e. The municipality has already appropriated funds to construct an improvement; or

f. The permit is for repairs, maintenance, emergencies, electrical, mechanical, or plumbing.

4.[3.] **Standards for Requiring Dedications and Improvements**
Where chapter 21.08, *Subdivision Standards,* grants discretion to determine whether a dedication or improvement will be required, or to determine the design standards for a dedication or improvement, the building official [MUNICIPAL ENGINEER] shall determine the requirement or standard that applies to a land use permit under this section by applying the following standards:

a. The dedication or improvement shall be reasonably related to and directly correlated to the [ANTICIPATED IMPACT ON PUBLIC FACILITIES AND ADJACENT AREAS THAT WILL RESULT FROM THE USE AND] occupancy of the structure that is the subject of the building or land use permit. The required dedication or improvement shall bear a rational nexus to the public facility improvement needs created by the development. The extent of a requirement shall be no greater than what is proportional to the impact of the development. Any required public use easement shall be removed when calculating density or lot coverage per the applicable zoning district. The building official [MUNICIPAL ENGINEER] may require the permit applicant to provide information or analyses to determine impacts as set out in the comprehensive plan's policies for transportation, transportation design and maintenance, and water resources on public facilities and adjacent areas, including without limitation the following:
…

…Forward the remainder of proposed amendment 10 as proposed by the Administration.

2. Exempting Interior Remodeling, Renovation, and Repair from Site Plan Review

► Section 21.03.180B.1. and 21.03.180C.1., of Provisionally Adopted Title 21

Issue: Does title 21 need to clarify that projects that are solely interior remodeling, renovation, and repair are exempt from review processes such as site plan review?

Public Comment: Re-institute the current code's approach of not adding a surcharge to the cost of interior work to pay for compliance with the new code, in part by adding the following wording to subsections 21.03.180B.1. and 21.03.180C.1. of the site plan review procedure:

> "This section shall not apply to the interior remodeling, renovation, or repair to interior portions of structures that are subject to site plan review under this title except those interior areas that are proposed for meeting any design requirements of Chapter 21.07."

This proposed language works together with another proposed amendment by the commenter which is covered below under issue 4 (Carr Gottstein Properties, pages 105 and 107).

Response: The commenter's suggested amendment reflects current practice to exempt interior work from becoming subject to site plan reviews and conditional uses. The Department has no objection to the amendment and believes it could also be applied to conditional use procedure as there may be similarities in the situation.

Recommendation: Amend Site Plan Review subsections 21.03.180B.1. and 21.03.180C.1., adding a new subsection "a." in each, which reads as follows:

> **a.** This section shall not apply to the interior remodeling, renovation, or repair to interior portions of structures that are subject to site plan review under this title except those interior areas that affect conformity to development and design requirements of this title.

Also amend the Conditional Use section in 21.03.080., adding a new subsection "B" as follows, and renumber subsequent subsections:

> **B. Applicability**
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> Land uses requiring conditional use review are identified in section 21.05.010, *Tables of Allowed Uses*, section 21.05.070C., *Tables of Allowed Accessory Uses*, and subsection 21.09.050A., *Table of Allowed Uses (Girdwood).*
>
> **a.** This section shall not apply to the interior remodeling, renovation, or repair to interior portions of structures that are subject to conditional use review under this title except those interior areas that affect conformity to the approval criteria for the conditional use review or the development and design requirements of this title.

3. Maintenance and Repair of Nonconforming Premises

► Section 21.12.010F.1., Page 50 of Provisionally Adopted Title 21

Issue: What repairs and maintenance should be allowed under the grandfathering protections?

Public Comment: The new code allows five specific categories of maintenance and repair on an existing nonconformity only if the work is "required to keep structures or sites in a safe condition". Limiting the allowed purpose to only safety related maintenance and repair does not allow routine maintenance such as roof coatings. The existing code allows "ordinary repairs". The change will cause owners of existing developed real estate to suffer adverse economic impacts. Add a new subsection "a." with language from current title 21 that allows "ordinary maintenance or repairs". Language is suggested. (Carr Gottstein Properties, pages 104 and 108).

Response: The intent of the section is in fact to allow for ordinary maintenance and repair to keep the premises in a state of good repair. Subsections a. through f. significantly expand the definition of "maintenance and repair" from current title 21 to include a greater scope of allowed work. The one year time limit has been removed and the 10 percent limit has been increased to 50 percent. Also, the allowed activities for example include repairs necessary to maintain and correct deterioration to the structural soundness or appearance of a building.

If the concern were only to avoid a literal, narrow reading of the reference to "a safe condition" in subsection 1 for the allowed purpose for maintenance and repairs, then a wording clarification there would suffice. However, the problem of a literal, narrow reading may also extend to the specific listing of six categories of what maintenance and repair may include. A specific list of what is "in" creates more likelihood the authors may unintentionally leave "out" an appropriate activity. For example, a new roof coating does not seem to fall under subsections a. through f.

A review of several contemporary ordinances and advisory literature suggests a simpler definition of allowable maintenance for keeping the structure and site in a state of good repair.

Recommendation: Amend subsection 21.12.010F.1. as follows:

F. Maintenance and Repair

1. Ordinary maintenance and repair of nonconformities shall be permitted, and a nonconforming use, structure, lot, or site may be occupied, operated, and maintained in a state of good repair and in a safe condition, provided that no nonconformity is increased. Repair and maintenance of nonconforming signs is set forth in section 21.12.070.[REPAIRS OR MAINTENANCE OF NONCONFORMITIES THAT ARE REQUIRED TO KEEP STRUCTURES OR SITES IN A SAFE CONDITION ARE PERMITTED, PROVIDED THAT THE REPAIR OR MAINTENANCE DOES NOT INCREASE THE EXTENT OF NONCONFORMITY. FOR PURPOSES OF THIS SECTION, "MAINTENANCE OR REPAIR" SHALL MEAN:]

…Delete all subsections a. through f.

4. Excluding Interior Renovations / Repairs from the Requirements to Bring Nonconforming Characteristics Towards Conformity in a Manner Proportionate to the Extent (Cost) of a Proposed Development

► Section 21.12.060C.2., Pages 568-69 of Provisionally Adopted Title 21

Issue: Shall improvements that are interior to a building be subject to the requirement to invest an amount equal to 10 percent of the cost of improvements toward bringing nonconforming site characteristics towards conformity?

Public Comment: The new code establishes a surcharge on improvements to a site with non-conforming characteristics of use. It is similar to the surcharge that current code applies only to large retail establishments. For large retail establishments, the current code levies its surcharge on the cost of exterior improvements only. But the new code levies the surcharge as a proportion to all improvements, interior and exterior, because it does not specifically exempt the interior improvements. This makes the new code far more economically onerous. Add language to reinstate the current code's approach of not adding to the cost of interior work to pay for bringing non-conforming characteristics of use up to compliance with the new code. (Carr Gottstein Properties, pages 105 and 108).

Response: Substantial interior renovations, the value of which may be in the range of 25-50 percent of the replacement value of the improvements on the lot, often coincide with a reuse of an existing structure. For example, a former Pay 'N' Save store on C Street between Benson and Northern Lights was gutted and completely renovated to a new chain store, Barnes & Noble, in the 1990s. In this case, there was substantial investment in the property amounting to the scale of reuse and redevelopment. The corporation selected to make few if any improvements to outside, except some improvement to the front façade and façade walkway. As a result, there was little improvement in landscaping, parking circulation, pedestrian access, or exterior lighting. Where the interior renovation becomes such that it amounts to completely replacing or reusing the building, it should be considered a rationale for expecting investment in the site bringing it up toward conformity.

However, the Department has no objection to the commenter's suggestion that typical interior renovations such as tenant improvements in an office building or retail mall be exempted from the Requirements to bring nonconforming characteristics towards conformity in a manner proportionate to the extent (cost) of a proposed development.

Recommendation: Amend subsection 21.12.060C.2.a. as follows:

f. For the purposes of this section, "total project costs" shall be determined by the building official pursuant to municipal code, and shall be exclusive of all costs of improvements that move the development in the direction of conformity to the requirements of this title. The costs of remodeling, renovation or repair that are interior to a structure not subject to site plan review shall also be excluded where the value of those interior improvements are less than 50 percent of the replacement value of the structure.

5. Landscaping Section

- ► Section 21.07.080, Pages 324 – 339 of Provisionally Adopted Title 21
- ► Amendments #65.1 – 65.5, #66 - 69 of the Consolidated Table

Issue: Should the provisionally adopted title 21 landscaping section (21.07.080) be replaced by an alternate section?

Public comments: One community council, the Anchorage Citizens Coalition, and two citizens provided comments which generally oppose the Administration's proposed amendments to the provisionally adopted title 21 landscaping section (21.07.080). These comments generally state:

- Recommend against language that would decrease landscaping standards when the Mayor's proposal to rewrite that section is implemented.
- The provisionally adopted landscaping section is the result of hundreds of hours of citizens' time, staff research and review, and response to comments received from the public, including the American Society of Landscape Architects, and review and changes to the section made by the Urban Design Commission, Planning & Zoning Commission, and the Municipal Assembly.
- Building design standards were decreased over the years in exchange for increased landscaping. The balance of the compromises will be destroyed if both landscaping and design standards are reduced.
- A new landscape ordinance is a key Comprehensive Plan strategy to improve our city.

  (Rogers Park Community Council – page 7, Anchorage Citizens Coalition – page 28, Johanna Eurich – page 50, Joan Diamond – page 283)

The Anchorage Citizens Coalition and the Turnagain Community Council are opposed to reducing the requirements for parking lot interior landscaping (in proposed Amendment #65.4). The ACC states that the proposed changes almost cut in half the amount of interior landscaping required. This is clearly against the goals of the comprehensive plan. The cost of the landscaping is far outweighed by the new code's decrease in required parking. That is part of the balance that has been found over the years of the rewrite. To now cut in half the minimal landscaping throws off that careful balance. The TCC states that it opposes reducing the requirements for parking lot interior landscaping. This city is filled with large, unattractive, sea-of-asphalt parking areas; stronger requirements are severely needed.

(Anchorage Citizens Coalition – page 29; and Turnagain Community Council – page 55)

One commenter indicates that the landscaping requirements in the provisionally adopted code have increased significantly from current title 21. He recommends that the standards should be

reverted to the current code levels. He provides a listing of items in the provisionally adopted landscaping section which he thinks will take more land and cost significantly more.

(Dwiggins, pages 92-95)

The Cook Inlet Housing Authority commented that the requirement for a two year warranty bond on landscaping should be removed. They noted that it adds cost and the MOA currently has the means to enforce the zoning code as it is. Such a bond on a recent Loussac project could cost an additional $10,000. They also ask why the MOA is requiring private developers to obtain a bond when the MOA at times does not enforce its own landscaping responsibilities. This is a double standard that simply adds cost to a development.

Cook Inlet also commented on parking lot landscaping standards and asked why a multi-family use in a multi-family zoning district would have to provide a 15-foot wide buffer landscaping on the edge of its parking lot when an adjacent single family home owner could redevelop his site and not have to meet a buffer landscaping standard.

(Cook Inlet Housing Authority, pages 307 and 309)

The Anchorage School District provided a comment which indicated that its issue regarding buffer landscaping on the perimeter of school sites has been resolved, essentially since the buffer landscaping standard would apply to new schools and existing schools not in compliance with this requirement would be grandfathered. However, the District indicated that issues of concern regarding isolation of schools from serving as centers of community, safety, security, and reduced availability of site usage for tight urban sites will need to be addressed by both design professionals and municipal code authorities.

(Anchorage School District, page 285)

Several commenters provided alternate landscaping sections to replace the provisionally adopted landscaping section (including the Administration's amendments). The first commenter (Coffey) indicated that a major problem with the new proposed code is that it presents an entirely new methodology for determining how much landscaping is required in a specific circumstance. He indicated that the "landscaping units" calculations used in the provisionally adopted draft are very bureaucratic, which makes it confusing and costly. He recommends adoption of an alternate landscaping section in his "Exhibit P" which was developed by a licensed, practicing landscape architect. The alternate landscaping section does not use a "landscape units" system.

(Coffey, pages 184-186, pages 193-200)

The second commenter (Schoenthal) indicated in his comments the following issues with the provisionally adopted landscaping section:

- unnecessary text and complexity;
- assumptions about a greater level of expertise or personnel within the Municipality to implement the changes;

- legally binding requirements of title 21 should be kept in the Title and not in the Title 21 User's Guide;
- surety requirements should be less than 100% of the value of the landscape plants, and items such as topsoil that don't have to be replaced should be excluded; and,
- the change in buffer landscaping requirements for industrial zoned property has a significant cost (e.g., 15 foot wide bed from a 10-foot wide landscaping bed in the current code).

He also provided an alternate landscaping section which is an updated version of the section provided in the Coffey comments.

(Schoenthal, pages 316-327)

Response: The landscaping section in the title 21 rewrite was developed based on a strategy in the *Anchorage 2020 – Anchorage Bowl Comprehensive Plan* to revise the landscape ordinance to implement various land use and design policies in the Plan. The strategy calls for a revised ordinance to provide the following: a clear definition of landscaping requirements, maintenance requirements, incentives for retaining existing vegetation, wider planting beds, incentives for using native species, tips for avoiding wildlife conflicts, and flexible requirements.

The provisionally adopted landscaping section (21.07.080) is the result of hundreds of hours of public citizens' time spent reviewing and commenting on the section, staff research and review of drafts with a committee of landscape architects, response to comments received from the public, including comments from the American Society of Landscape Architects (Alaska Chapter), and review and changes to the section made by the Urban Design Commission, Planning & Zoning Commission, and the Municipal Assembly.

In the summer of 2011, a consultant to the Mayor recommended deleting most of the provisionally adopted landscaping section and replacing it with landscaping standards which were similar to standards in the current Title 21. Some standards proposed by the consultant were actually a step backwards from the current landscaping standards, e.g., proposed deletion of screening landscaping standards. The Department recommended to the Administration to not accept the consultant's recommendations, but to retain the provisionally adopted landscaping standards and forward for adoption.

In the fall of 2011, the Administration directed the Planning Division to hold several meetings with the landscape architects who advised the consultant in the proposed rewrite of the landscaping section and to then review and recommend possible revisions to the provisionally adopted section. Division staff held several meetings with landscape architects and also conducted several site tests using the provisionally adopted standards. Based on these efforts, staff prepared proposed amendments to the provisionally adopted title 21 which were included in the package of amendments submitted to the public for review in January 2012 as part of the Planning and Zoning Commission public hearing process.

In April 2012, Planning Division staff met with a committee of the American Society of Landscape Architects (ASLA), Alaska Chapter. It was at this meeting that Planning Division staff learned that the ASLA Chapter did not support the landscape units system in the provisionally adopted draft but would be in favor of a system more similar to the current code. The committee indicated that they would draft a proposed alternate landscaping ordinance which will draw elements from both the provisionally adopted landscaping section and the draft produced by Terry Schoenthal, who had developed an alternate landscaping section and testified to the Planning and Zoning Commission in March 2012. As of the date of this issue/response narrative, the ASLA committee has not submitted an alternate draft landscaping section to the Planning Division.

The latest Schoenthal draft landscaping section, which is one of the documents being used by the ASLA committee to draft an alternate landscaping section, contains elements that begin to address items listed for a landscape ordinance in the Anchorage 2020 implementation strategy. These include: additional credit and incentives to keep existing trees on a site, and a surety requirement (maintenance) which varies based on the size of a site. However, this draft section could also result in potential setbacks to the provisionally adopted code and in some cases the current code, such as:

- Allows other design professionals to prepare a landscape plan. Amendment #65.1 to the provisionally adopted code requires a landscape architect to prepare these plans – this was recommended by ASLA.
- Screening landscaping is deleted as a standard except along freeways. For residential properties abutting certain industrial uses, the perimeter landscaping standard would be less than current title 21.
- Visual enhancement landscaping is similar to current code except that certain improvements could receive credit which offset the required number of trees or shrubs. In that sense, the visual enhancement landscaping standard in terms of trees and shrubs could potentially be less than current code.

These types of issues will be further vetted by the ASLA committee and reflected in the draft landscaping section that will be prepared by that organization.

Recommendation: Given the wide range of comments on this particular section, the proposals to significantly change it, and the forthcoming alternate draft from the ASLA Alaska Chapter, the Department recommends that the provisionally adopted landscaping section and its proposed amendments should be forwarded to the Assembly. Once the alternate draft landscaping section is received from the ASLA Alaska Chapter, the Planning Division will review it as a proposed amendment to the provisionally adopted section. This will include:

1) a review to what extent the alternate draft meets the criteria of the comprehensive plan strategy;
2) a review to what extent the alternate draft would improve standards in the current code, and,

3) a comparison of standards in the proposed alternate section against standards in the provisionally adopted landscaping section.

This analysis would be included in the staff report which transmits the alternate draft as a proposed amendment to the provisionally adopted landscaping section. The public could have the opportunity to review and comment on the proposed new landscaping section as a new case before the Planning and Zoning Commission.