MEMORANDUM

CITY/BOROUGH OF JUNEAU 155 South Seward Street, Juneau, Alaska 99801

DATE:

December 14, 2011

TO:

Planning Commission

FROM:

Dale Pernula, Director

Community Development Department

FILE NO.:

VAR20110011

SUBJECT:

Revised recommendation & analysis of VAR20110011 - A Variance to widen and straighten the roadway between the North Eagle Beach Kayak Launch and Bessie Creek within 330 feet of 10 eagle nests, including

potential damage to 7 nests by fly rock from blasting.

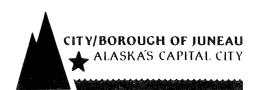
This memo is a supplement to the original staff report for VAR20110011, dated September 22, 2011, and a supplemental memorandum dated November 1, 2011. The project was previously scheduled for the September 27, 2011 and November 8, 2011, Planning Commission meetings but was pulled from the agenda at the applicant's request.

NEW INFORMATION

After receipt of the November 1, 2011, staff memorandum a member of the Planning Commission requested an analysis from the CBJ Law Department regarding DOT's request to modify the second condition regarding eagle monitors. The CBJ Law Memorandum is included as Attachment A.

REVISED ANALYSIS

Upon further analysis, the Community Development Department (CDD) has determined that the conditions of the final U.S. Fish and Wildlife Service (USFWS) eagle permit adequately address the requirements of CBJ Code. The eagle permit was included in the November 1, 2011, staff memorandum and is attached again as Attachment B. The federal permit requires that the applicant minimize the project footprint, minimize construction time within the 330 feet zone of eagle nests, install guardrails outside of the breeding season, and conduct eagle monitoring and nest surveys. CDD intends to initiate a code change to address issues with the eagle ordinance for future variances.



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Past eagle variance reviews have deferred to USFWS. In the absence of a staff eagle biologist, CDD must continue to defer to the primary regulating agency. Accordingly, the supporting analysis with the variance criteria has been amended to eliminate reference to the previously recommended conditions, and instead to reference the USFWS permit.

Variance Requirements

1. That the relaxation applied for or a lesser relaxation specified by the Board of Adjustment would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.

The relaxation applied for would provide substantial relief to the property owner, DOT/PF, to widen, straighten, and rehabilitate Glacier Highway consistent with current safety standards. This would be consistent with justice to other property owners who have been allowed to develop with approval of a final USFWS federal permit.

This criterion is met.

2. That relief can be granted in such a fashion that the intent of this title will be observed and the public safety and welfare be preserved.

The intent of Title 49 is established in Section 49.05.100 Purpose and Intent. Those sections, which are applicable to the requested variance, are as follows:

- 1) To achieve the goals and objectives and implement the policies of the Juneau Comprehensive Plan and the 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 residences, 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.

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A grant of the Variance would allow construction to proceed within the proposed

timeline while reducing the disturbance to eagles under the conditions of the USFWS final eagle permit, in accordance with intent numbers 2, 3, 4, and 6.

This criterion is met.

3. That the authorization of the Variance will not injure nearby property.

No evidence indicates that development within the 330-foot eagle tree setback would injure nearby property. All work would be within the right-of-way.

This criterion is met.

4. That the Variance does not authorize uses not allowed in the district involved.

Road construction is allowed in all zoning districts; therefore the Variance does not authorize uses not allowed in the district involved.

This criterion is met.

- 5. That compliance with the existing standards would:
 - (A) Unreasonably prevent the owner from using the property for a permissible principal use;

Compliance with the standard would unreasonably prevent the owner, DOT, from widening and straightening Glacier Highway to current safety standards. However highway maintenance is not technically considered a permissible principal use in any zoning district; it is an accessory use.

This sub-criterion is not met.

(B) Unreasonably prevent the owner from using the property in a manner which is consistent as to scale, amenities, appearance or features, with existing development in the neighborhood of the subject property;

Compliance with the standard would unreasonably prevent the owner, DOT, from widening and straightening Glacier Highway to meet current safety standards. If DOT was held to complete compliance with no construction activity within 330-feet of the eleven eagle nests, the work could not be completed. Comparing the Glacier Highway right-of-way to other residential properties in the neighborhood adjacent to the right-of-way is not a relevant comparison.

This sub-criterion is met.

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(C) Be unnecessarily burdensome because unique physical features of the property render compliance with the standards unreasonably expensive;

The roadway sections with eagle nests do not have physical features unique to CBJ or to the Glacier Highway area.

This sub-criterion is not met.

or

(D) Because of preexisting nonconforming conditions on the subject parcel the grant of the Variance would not result in a net decrease in overall compliance with the Land Use Code, CBJ Title 49, or the building code, CBJ Title 19, or both.

There are no pre-existing non-conforming conditions within the Glacier Highway right-of-way.

This sub-criterion is not met.

Criterion 5 is met because sub-criterion 5(B) is met.

6. That a grant of the Variance would result in more benefits than detriments to the neighborhood.

A grant of the Variance would allow DOT/PF to widen and straighten Glacier Highway to meet current safety standards, which would provide benefit to the neighborhood. Detriments to eagle nests have been addressed in the USFWS final eagle permit. Therefore a grant of the Variance would result in more benefits than detriments to the neighborhood.

This criterion is met.

FINDINGS

1. Is the application for the requested Variance complete?

Yes. We find the application contains the information necessary to conduct full review of the proposed operations. The application submittal by the applicant, including the appropriate fees, substantially conforms to the requirements of CBJ Chapter 49.15.

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Per CBJ §49.70.900 (b)(3), General Provisions, the Director makes the following Juneau Coastal Management Program consistency determination:

2. Will the proposed development comply with the Juneau Coastal Management Programs?

Not applicable. Code section 49.70.310(a)(2), which prohibits development within 330-feet of an eagle nest on public land, is not part of the Juneau Coastal Management Program.

3. Does the variance as requested meet the criteria of Section 49.20.250, Grounds for Variance?

Yes. The Variance meets criteria 1, 2, 3, 4, 5B, and 6.

RECOMMENDATION

The Director recommends that the Board of Adjustment adopt the Director's analysis and findings and grant the requested Variance, which would allow road construction activity within 330-feet of 10 eagle nests on Glacier Highway between approximately mile 29.5 and mile 33.6.

NOTICE OF PUBLIC HEARING BESSIE CREEK Eagle Nest 1 Miles 500' Road Buffer BENJAMIN ISLAND

A Variance to widen and straighten the roadway between North Eagle Beach Kayak Launch and PROPOSAL: Bessie Creek within 330 feet of 10 eagle nests, including potential damage to 7 nests by fly rock

NORTH EAGLE BEACH

from blasting.

State of Alaska DOT/PF **APPLICANT:** VAR20110011 **FILE NO.:**

All Adjacent Property Owners PROPERTY OWNER: State of Alaska DOT/PF TO:

N. Eagle Beach Kayak **PROPERTY ADDRESS:** December 20, 2011 **HEARING DATE:** Launch to Bessie Creek

3.88 miles (20,462 ft) SITE SIZE: 7:00 PM **HEARING TIME:**

Glacier Hwy **ASSEMBLY CHAMBERS** ACCESS: PLACE:

Municipal Building 155 South Seward Street

Juneau, Alaska 99801

PROPERTY OWNERS PLEASE NOTE:

You are invited to attend this Public Hearing and present oral testimony. The Planning Commission will also consider written testimony. You are encouraged to submit written material to the Community Development Department no later than 8:30 A.M. on the Wednesday preceding the Public Hearing. Materials received by this deadline are included in the information packet given to the Planning Commission a few days before the Public Hearing. Written material received after the deadline will be provided to the Planning Commission at the Public Hearing.

If you have questions, please contact Teri Camery at 586-0755, or e-mail: teri_camery@ci.juneau.ak.us



To: Teri Camery, Senior Planner

From: Amy Mead, Assistant City Attorney

Date: November 9, 2011

RE: VAR 20110011

Dear Teri

You asked me to give you my opinion regarding DOT's requested language change to Staff Recommendation #2. According to the information I received, the recommendation and requested change are as follows:

Staff Recommendation:

The applicant will employ a qualified monitor during the time period June 1st through August 31st for purposes of monitoring active eagle nests. Eagle Monitor qualifications are included in Attachment 12 under the attached Monitoring Protocol.

DOT Requested Amendment:

The applicant will employ an Eagle Monitor during the time period June 1st through August 31st and during blasting activities for the entire project. The eagle Monitor will be in responsible charge of a qualified Eagle Monitor. Qualifications are included in Attachment 12 under the Eagle Monitoring Protocol. The purpose of the monitor is given in items F. v. and G. of the Federal Fish and Wildlife Permit MB53155A-0"

There are basically two changes being requested. One is a modification to the "Eagle Monitor" language and the second is a request that the purpose of the monitoring, as articulated by DOT, be referenced.

As to the first request concerning the Eagle Monitor, I do not believe the language being recommended by DOT is necessary. As I understand the issue after speaking to Jim Scholl, DOT Environmental Analyst, DOT intends on hiring an "eagle monitor" to do the actual monitoring, and that person will then report to a "Qualified Eagle Monitor," who carries the necessary qualifications referenced in the Staff Recommendation.



It is possible to read the Staff Recommendation as allowing a Qualified Eagle Monitor to accomplish the required monitoring via whatever methodology the Qualified Eagle Monitor chooses. "Monitor" simply means to "be aware of the state of something." As the written Staff Recommendation can be interpreted as being silent as to how the required monitoring is accomplished, if DOT's Qualified Eagle Monitor decides to utilize an "eagle monitor" to be physically present when necessary to watch the nests, I do not see our recommendation as precluding that methodology. On the other hand, if the intention is to have the Qualified Eagle Monitor physically do the monitoring, that should be made clearer in any final documentation issued to DOT.

The second piece of DOT's request is that DOT would like to amend the recommendation to include this language: "The purpose of the monitor is given in items F. v. and G. of the Federal Fish and Wildlife Permit MB53155A-0."

As I understood from Mr. Scholl, takings and disturbances of eagle nests are now allowed under the Federal Fish and Wildlife Permit held by D.O.T. He would like to make it clear that DOT is allowed to proceed as long as it does not violate the terms of the Federal permit cited above. Mr. Scholl also told me that there is a provision in the Fish and Wildlife permit requiring that the permittee (DOT) comply with all State and local laws.

The applicable local law is CBJ Ordinance 49.70.310(a)(2), which provides that development is prohibited within 330 feet of an eagle nest on public land.

For purposes of the Staff Recommendation, it is irrelevant what the Federal permit allows, and there is no reason to include a reference to it. The Staff Recommendation is designed to ensure compliance with CBJ Code, not to ensure compliance with DOT's Federal permit.¹

If you have any follow up questions, please let me know.

¹ For what it's worth, 49.70.310 is more limited than I understand the Federal permit to be (as described by Mr. Scholl.) Mr. Scholl stated that under the Federal permit, DOT has the authority to disturb (and take?) eagles during breeding season (March – August). Our ordinance, on the other hand, is not as permissive, providing simply that no development can occur within 330 feet of an eagle nest on public land – regardless of the time of year (note that DOT has asked that the monitoring requirement be limited to between March 1 and August 31 or during blasting. Presumably, this specification complies with DOT's federal permit; it has no relevance to the CBJ Code.) Unless the ordinance is amended, or unless DOT is envisioning that it will comply with BOTH the monitoring purposes outlined in its permit and CBJ 49.70.310(a)(2), I do not see how the requested language can be reconciled with the prohibition outlined in the ordinance.

FISH A WILDLIFE SERVICE

DEPARTMENT OF THE INTERIOR U.S. FISH AND WILDLIFE SERVICE

FEDERAL FISH AND WILDLIFE PERMIT

1. PERMITTEE

ALASKA DEPT. OF TRANSPORTATION PO BOX 112506 ATTN: JANE GENDRON JUNEAU, AK 99811-2506 U.S.A.

2. AUTHORITY-STATUTES 16 USC 668a	
REGULATIONS 50 CFR 13 50 CFR 22.26 50 CFR 22.27	
3. NUMBER MB53155A-0	enderentaggeriste de de
4. RENEWABLE	5. MAY COPY
YES	YES
NO	NO
6. EFFECTIVE	7 EXPIRES
10/21/2011	09/15/2013

8 NAME AND TITLE OF PRINCIPAL OFFICER (If #1 is a business)
GARY L DAVIS
REGIONAL DIRECTOR

9. TYPE OF PERMIT
EAGLE TAKE ASSOCIATED WITH BUT NOT THE PURPOSE OF AN ACTIVITY / NEST TAKE

10. LOCATION WHERE AUTHORIZED ACTIVITY MAY BE CONDUCTED

Milepost 29.5 - 33.6 of Glacier Highway, Juneau, AK

11. CONDITIONS AND AUTHORIZATIONS:

- A. GENERAL CONDITIONS SET OUT IN SUBPART D OF 50 CFR 13, AND SPECIFIC CONDITIONS CONTAINED IN FEDERAL REGULATIONS CITED IN BLOCK #2 ABOVE, ARE HEREBY MADE A PART OF THIS PERMIT. ALL ACTIVITIES AUTHORIZED HEREIN MUST BE CARRIED OUT IN ACCORD WITH AND FOR THE PURPOSES DESCRIBED IN THE APPLICATION SUBMITTED. CONTINUED VALIDITY, OR RENEWAL, OF THIS PERMIT IS SUBJECT TO COMPLETE AND TIMELY COMPLIANCE WITH ALL APPLICABLE CONDITIONS, INCLUDING THE FILING OF ALL REQUIRED INFORMATION AND REPORTS.
- B. THE VALIDITY OF THIS PERMIT IS ALSO CONDITIONED UPON STRICT OBSERVANCE OF ALL APPLICABLE FOREIGN, STATE, LOCAL, TRIBAL, OR OTHER FEDERAL LAW.
- C. VALID FOR USE BY PERMITTEE NAMED ABOVE.
- D. This permit is only valid with authorization from Alaska Department of Fish and Game. Contact:

Alaska Department of Fish and Game Division of Wildlife Conservation PO Box 115526 Juneau, AK 99811-5526 (907) 465-4148 Dfg.dwc.permits@alaska.gov

- **E.** (50 CFR 22.26) You are authorized to disturb bald eagles nesting among eleven nests (coordinates provided below) for purpose of rehabilitating the Glacier Highway between mileposts 29.5 and 33.6 in Juneau, Alaska from October 21, 2011 September 15, 2013. Potential impacts to bald eagles include loss of two year's productivity for up to eleven breeding pairs. Authorized construction activities include:
 - i. Clearing and grubbing

vi. Haul and placing fill

ADDITIONAL CONDITIONS AND AUTHORIZATIONS ALSO APPLY

12. REPORTING REQUIREMENTS

See conditions G and H

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ii. Drilling for blasting

Ditch reconditioning

iii. Blasting

viii. Grind and milling

iv. Excavating and loading material

ix. Place and grade of surface

v. Replacing culverts

x. Pave and compacting surface

E. (50 CFR 22.27) - Incidental take of seven inactive bald eagle nests (see coordinates below) is also authorized for the purpose of rehabilitating milepost 29.5 - 33.6 of the Glacier Highway in Juneau, Alaska from October 21, 2011 - September 15, 2013. This permit does NOT authorize take of active nests. A nest is determined to be inactive by the continuing absence of any adult, egg, or dependent young at the nest for at least 10 consecutive days immediately prior to, and including, at present.

vii.

- F. You must comply with the following avoidance, minimization, or other mitigation measures:
 - i. ADOT shall minimize the footprint of the proposed improvements to the minimum necessary to bring the highway to current safety standards.
 - ii. ADOT shall make the minimum shifts necessary to realign curvature of the road to meet current safety standards.
 - iii. The Contractor shall work with the Project Engineer to limit time necessary within the 330' primary zone of nests only to that required for completion of the project.
 - iv, Guardrails shall be installed outside the bald eagle breeding season (March 1 August 31).
 - v. To avoid unauthorized take, blasting within 330 feet of any eagle nesting tree must be conducted using an ADOT employee to monitor:
 - a. for eagles in danger of flying debris. This employee will shut down blasting activity if any adult eagles are in the area and could be injured by flying debris;
 - b. for chicks prematurely fledging from active eagle nests within 330 feet of blasting activities. This employee will immediately deliver said chicks to the Juneau Raptor Center; and
 - c. for damage, or other take, of eagle nests resulting from flyrock or other blasting activities.
 - vi. The Alaska Department of Transportation shall donate \$15,000 to The Conservation Fund for the incidental take of (including damage to) each high quality inactive bald eagle nest (nests # 14, 103, 15, and 57) identified for take under this permit. Funds shall be donated by December 31, of the year in which the take occurred.
 - vii. The Alaska Department of Transportation shall donate \$5,000 to The Conservation Fund for the incidental take of (including damage to) each medium quality inactive bald eagle nest (nests # 79, 14A, and 77) identified for take under this permit. Funds shall be donated by December 31, of the year in which the take occurred. Contact:

The Conservation Fund Brad A. Meiklejohn Alaska Representative 2727 Hiland Road Eagle River, AK 99577 (907) 694-9060

- **G.** You are required to conduct annual monitoring of nests identified in Condition D until September 15, 2014. Monitoring must consist of:
 - i) April 15 May 1, 2012 and 2013, conduct nest surveys to determine status (active vs. inactive) and occupancy (presence or absence of eggs and chicks) of each nest. To avoid disturbing eagles during the clutch initiation period, this survey may be conducted by boat and occupancy determined by adult behavior (e.g., incubating posture, food delivery, etc).
 - ii) July 15 July 31, 2012 and 2013, conduct nest surveys to determine status (active or inactive), and occupancy

(presence or absence of eggs and chicks) of each nest identified as active in part i above.

iii) July 2014, conduct nest surveys to determine status (active vs. inactive) and occupancy (presence or absence of eggs or chicks) of each nest.

You must submit an annual report summarizing the information you obtained through monitoring to the Migratory Bird Permit Office by December 31, 2011-2014. Reports shall be submitted to:

U.S. Fish and Wildlife Service Migratory Bird Management ATTN: Jordan Muir 1011 E Tudor Road MS-201 Anchorage, AK 99503, 907-786-3503

- H. You must submit a nest take report to the Migratory Bird Permit Office within 10 days following the take of any eagle nest or of the expiration of this permit whichever occurs first. Form 3-202-16 (Eagle Nest Take Report) can be found online at www.fws.gov/forms/3-202-16.pdf
- I. This permit does not authorize intentional lethal take or injury of eagles or eggs, nor does it authorize take of the nest in the event an eagle occupies the nest prior to nest destruction.
- **J.** You must contact the Migratory Bird Permit Office (907-786-3503 or 907-786-3693) immediately upon discovery of unanticipated take.
- K. You must immediately notify the Migratory Bird Permit Office (907-786-3503 or 907-786-3693) regarding any apparent injury or death occurring to any eagle, including viable eggs, during project activities. You must immediately transport any injured eagle to the Juneau Raptor Center (907-790-5424 or 907-586-8393 or by emergency pager at 907-790-5424).
- L. If a nest is destroyed you are authorized to salvage any eagle carcasses, feathers and parts including nonviable eggs found in or around the nest. All eagle carcasses must be immediately frozen and shipped along with molted feathers and parts within 10 days of salvage to the National Eagle Repository. All eagle carcasses, molted feathers and parts should be shipped overnight shipping and shipped only on Monday Wednesday. Contact: U.S. Fish and Wildlife Service National Eagle and Wildlife Repository, 5650 Havana St., Building 128, RMA, Commerce City, Colorado, 80022, (303) 287-2110.

Nonviable eagle eggs must be delivered to the Migratory Bird Management Office of the U.S. Fish and Wildlife Service. Contact: Stephen B. Lewis, Migratory Bird Management, U.S. Fish and Wildlife Service, 3000 Vintage Boulevard, Suite 201, Juneau, Alaska 99801, (907) 780-1163.

- M. You may delegate the authority granted in this permit to the following subpermittee(s): any other person who is (1) employed by or under contract to you for the activities specified in this permit, or (2) otherwise designated a subpermittee by you in writing. Any subpermittee who has been delegated this authority may not-re-delegate to another individual/business.
- N. Subpermittees must be at least 18 years of age. You are responsible for ensuring that your subpermittees are qualified to perform the work and adhere to the terms of your permit. You are also responsible for maintaining current records of designated subpermittees. As the permittee, you are ultimately legally responsible for compliance with the terms and conditions of this permit and that responsibility may not be delegated.
- **O**. You and any subpermittees must carry a legible copy of this permit and display it upon request whenever exercising its authority.
- **P**. All of the provisions and conditions of the governing regulations at 50 CFR part 13, 50 CFR 22.26 and 50 CFR 22.27 are conditions of your permit. Failure to comply with the conditions of your permit could be cause for suspension of the permit and/or citation. For copies of the regulations, visit: www.fws.gov/permits/mbpermits/birdbasics.html.
- **Q**. This permit does not authorize you to conduct activities on Federal, State, or other public or private property without additional prior written permits or permission from the agency/landowner.
- R. Permittees and subpermittees operating under this permit may not take or disturb eagles contrary to the laws or regulations of any State, Tribal, or Municipal government, and none of the privileges of this authorization are valid unless the

permittee possesses the appropriate State permits, or other authorizations, if required.

- **S.** You must maintain records as required in 50 CFR 13.46. All records relating to the permitted activities must be kept at the location indicated in writing by you to the migratory bird permit issuing office.
- T. Acceptance of this permit authorizes the U.S. Fish and Wildlife Service to inspect any wildlife held, and to audit or copy any permits, books or records required to be kept by the permit and governing regulations (50 CFR 13.46, 50 CFR 22.26, and 50 CFR 22.27).
- U. You may not conduct the activities authorized by this permit if doing so would violate the laws of the applicable State, county, municipal or tribal government or any other applicable law.
- V. The U.S. Fish and Wildlife Service is not liable for any damage or injury to any person, wildlife, or property that occurs as the result of carrying out the activities associated with this permit.
- **W**. The authorizations granted by permits issued under this section apply only to take that results from activities conducted in accordance with the description contained in the permit application and the terms of the permit. If the permitted activity changes, you must immediately contact the Service to determine whether a permit amendment is required in order to retain take authorization.
- X. The terms and conditions of this permit that are not specifically prescribed by regulations at 50 CFR parts 10, 13, and 22 should not be construed as precedent and are subject to revision for purposes of any future permit issued under this section.
- Y. You remain responsible for all outstanding monitoring requirements and mitigation measures required under the terms of the permit for take that occurs prior to cancellation, expiration, suspension, or revocation of the permit.

Nest site coordinates for 11 bald eagle nests authorized for disturbance and/or incidental take by this permit:

Nest#	_	Coordinates (NAD83)			
79*	Ν	58.54361	W	134.85682	
104	Ν	58.54964	W	134.85794	
14A*	Ν	58.55618	W	134.87063	
14*	Ν	58.5583	W	134.86732	
91	Ν	58.56129	W	134.87191	
103*	Ν	58.56733	W	134.88116	
77A	Ν	58.57376	W	134.88565	
77*	Ν	58.5764	W	134.89258	
15*	Ν	58.58264	W	134.89504	
57*	Ν	58.58435	W	134.89875	
73	Ν	58.5911	W	134.90413	

^{*} denotes the nest is also authorized for incidental take per Condition E (22.27).