To: Mayor and Assembly

From: John W. Hartle, City Attorney

Subject: Ordinance 2012-11

Date: March 28, 2012

Ordinance 2012-11 would change the way the CBJ Land Use Code treats decisions by the Planning Commission to deny a request to rezone property. Presently, the Code is silent on this question; it addresses only what happens if the Commission approves a proposed rezone. To avoid an ambiguous situation arising from time to time, I recommend that the Assembly fill this gap; Ordinance 2012-11 would do so.

CBJ 49.75.130 - Procedure, provides:

A rezoning shall follow the procedure for a major development permit except for the following:

(1) The commission decision for approval shall constitute only a recommendation to the assembly.

(2) As soon as possible after the commission's recommendation, the assembly shall provide public notice and hold a public hearing on the proposed rezoning. A rezoning shall be adopted by ordinance, and any conditions thereon shall be contained in the ordinance. Upon adoption of any such ordinance, the director shall cause the official zoning map to be changed in accordance therewith.

As can readily be seen, while the Code addresses a “commission decision for approval,” it is silent on the question of what happens when the Planning Commission denies a request for a rezone: Is the denial still a recommendation to the Assembly? Is the proposed rezone dead, with no appeal? Can the denial decision be appealed? Ordinance 2012-11 answers these questions by making a denial appealable.

The Ordinance proposes to make Planning Commission decisions denying a rezone appealable to the Assembly. The idea is to craft a compromise with all parties rights respected. At one end of the spectrum, the Assembly could decide to make such denials final, providing no recourse to an applicant whose proposed rezone is denied. At the other end, the Assembly could decide to make such denials a recommendation to the Assembly, on an equal footing with Commission decisions to approve a proposed rezone. That approach - recommendation - is the way the last denied rezone was handled, based on a Code interpretation.
As the entire Borough is zoned, any change to zoning designation is a “rezoning.” The zoning designation sets the parameters on what development can occur on a parcel through application of the Table of Permissible Uses. Accordingly, rezones are one of the most important land use decisions to be made. Based on the importance of rezones, the Code provides a process requiring action by both the Planning Commission and the Assembly, unlike development permit applications which require action only by the Commission (unless the permit decision is appealed to the Assembly). Rezoning decisions are made by ordinance, and the Commission reviews all zoning ordinances prior to their consideration by the Assembly.

The ordinance proposes a middle course; rather than making the Commission decision final, or a recommendation forwarded to the Assembly, the ordinance would make the Commission decision to deny an appealable decision. The applicant for a rezone denied by the Commission could choose to bring the question forward to the Assembly as an appeal. This would provide due process for the applicant and a check against error in the Commission’s decision, without putting the decision on an equal footing with a decision that a proposed rezone is approved consistent with law and the Comprehensive Plan.

Under the CBJ Appeals Code, of course, some deference is allowed to the Commission, in recognition of the Commission’s planning expertise and the role of the Commission under the CBJ Land Use Code.

I recommend that the Assembly take action to fill the gap in the Land Use Code; this proposed ordinance is one way, a middle course, to fill that gap.