



PLANNING COMMISSION AGENDA

REMOTE ACCESS ONLY – VIA ZOOM

Wednesday, June 2, 2021

Join Zoom Meeting: <https://us02web.zoom.us/j/84309688282>

Call in: (253) 215-8782 Meeting ID: 843 0968 8282

Planning Commission Meeting: First Wednesday of every month at 6:00pm | Municipal code available online: <https://www.codepublishing.com/WA/LakeStevens/>

- **CALL TO ORDER 6:00pm**
Pledge of Allegiance
- **ROLL CALL**
- **GUEST BUSINESS**
- **ACTION ITEMS**
 1. Approve minutes for 05-19-2021

DISCUSSION ITEMS

1. Briefing: Proposed Amendments to Nonconforming Code
2. Briefing: Comp Plan-Parks and Capital Facilities Elements

Sr Planner Place
Planning Manager Levitan

- **COMMISSIONER REPORTS**
- **PLANNING DIRECTOR'S REPORT**
- **FUTURE AGENDA ITEMS**
- **ADJOURN**

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PLANNING COMMISSION MEETING MINUTES



REMOTE PARTICIPATION May 9, 2021

CALL TO ORDER: 6:00 pm by Chair John Cronin

MEMBERS PRESENT: Mike Duerr, Janice Huxford, Vicki Oslund, and Todd Welch

MEMBERS ABSENT: Linda Hoult and Jennifer Davis

STAFF PRESENT: Community Development Director Russ Wright, Planning Manager Levitan and Jennie Fenrich, Clerk

OTHERS PRESENT: Councilmember Steve Ewing

Chair Cronin called the meeting to order at 7:00 p.m. and led the Pledge of Allegiance.

Roll Call: All present, except Commissioners Hoult and Davis. Motion made by Commissioner Welch and Seconded by Commissioner Duerr to excuse (5-0-0-2)

Guest business: None.

Approval of Minutes: Motion by Commission Cronin, seconded by Commissioner Welch, to approve the minutes of the May 5th meeting as amended. The motion carried (5-0-0-2).

Discussion Items:

Chair Cronin opened the public hearing for LUA2020-0189, a land use code amendment to the city's marijuana regulations, which had been continued from the Commission's May 5, 2021 meeting. Staff outlined the changes that had been made to the code amendment in response to comments and direction provided by commissioners on May 5. Staff clarified that it had raised the citywide limit on standalone marijuana processing facilities to 17,000 sf to avoid the creation of a nonconforming situation, and that it also removed the sunset date on the

citywide processing limit based on Commission feedback. The Commission took additional public testimony before deliberating on the revised proposal. Several commissioners expressed their desire to see a greater diversity of land uses in the Hartford and Machias Industrial areas as well as their support for stricter regulations for marijuana facilities.

Following discussion and deliberation, Commissioner Huxford made a motion to adopt only the 1,000-foot buffer between processing facilities and family day care providers. Director Wright responded that taking action on that motion would result in none of the additional changes to code language in Attachment 1 being included as part of the Commission's recommendation to City Council. Chair Cronin made a separate motion to adopt the amendments identified in Attachment 1, which was seconded. Commissioner Welch subsequently proposed an amendment to Chair Cronin's motion to also include a revised citywide limit of 54,000 sf for marijuana production, a reduction from the current citywide limit of 70,000 sf. The amendment to Chair Cronin's motion was approved by commissioners, and Commissioner Duerr seconded the amended motion. The motion passed 5-0-0 (Davis and Hoult absent), and the City Council will consider the Commission's recommendation at their June 8, 2021 meeting.

Commissioner Reports: Chair Cronin thank Planning Manager Levitan for the SEPA presentation.

Planning Director's Report: Community and Planning Director Wright announced that Senior Planner Levitan has been promoted to Planning Manager. Staff has been working with Snohomish County Tomorrow with the focus on countywide growth targets.

Adjourn: Moved by Commissioner Welch, seconded by Commissioner Huxford to adjourn the meeting at 7:13 p.m. On vote the motion carried (5-0-0-2).

Jennie Fenrich, Planning Commission Clerk



One Community Around the Lake

Staff Report Lake Stevens Planning Commission

Planning Commission Briefing

Date: **June 2, 2021**

Subject: Introduction to Proposed Amendments to the Nonconforming Code (LSMC 14.32)

Contact Person/Department: Melissa Place, *Senior Planner*

SUMMARY:

Staff will introduce a city-initiated land use code amendment to the city's nonconforming code regulations (LSMC 14.32 plus other related code sections as detailed below), which aim to update and streamline these sections of code.

ACTION REQUESTED OF PLANNING COMMISSION:

This is an informational briefing and no action is requested at this time.

INTRODUCTION:

The purpose of this briefing is to introduce and discuss proposed amendments to the city's nonconforming regulations ([Chapter 14.32 LSMC](#)), which aim to provide a more traditional approach and terminology to the code. The code is currently rather liberal in its treatment of the continuation, expansion, reconstruction, and alteration of nonconformities. This contrasts with the city's [Shoreline Master Program](#) (SMP) regulations (Section 7.H), which follow a more traditional framework. The city's code and SMP should be consistent, rather than be conflicting; staff will make needed changes to the SMP as part of the 2021 SMP Update previously discussed with commissioners. Additionally, staff have fielded numerous nonconforming questions/situations over the last several years which have identified the need for more clarity for both staff and property owners regarding nonconformities within the city.

With this amendment staff hopes to address the following concerns:

- Update the code to follow more traditional nonconforming zoning law
- Revise the terminology (i.e. definitions) for nonconformities to provide greater clarity
- Streamline and simplify the nonconforming process for staff and property owners
- Dovetail the municipal code with the SMP nonconforming regulations
- Consider different zoning approaches to manage nonconformities

BACKGROUND / DISCUSSION:

In zoning, a nonconformity is an existing lot, structure, or use that fails to comply with existing standards. There is a distinction between legal and illegal nonconforming uses. Legal nonconformities are those that either predate zoning or were in conformity with the zoning standards in effect at the time of their establishment. Illegal nonconformities were not compliant

when established. For this discussion, we are focusing exclusively on legal nonconformities as illegal nonconformities have no protection in zoning code and zoning law.

Zoning changes can result in an increase in nonconformities. Typically, new standards only apply to new development and existing nonconformities can continue under new zoning standards (often called “grandfathering”), but this status comes with limitations. These limitations include when applicants want to modify, expand, or rebuild the nonconforming use or structure; when a certain threshold is crossed, an owner must bring the property into compliance with current zoning standards. The purpose of this is to encourage development or redevelopment in line with the community’s vision for the zoning district. In the most traditional sense, a nonconforming ordinance exists to encourage eventual elimination of the nonconformities and require new development to conform to existing zoning regulations.

The City of Lake Steven’s Comprehensive Plan and subarea plans do not specifically address nonconformities. Washington State law does not regulate nonconformities (aside from that of shoreline plans per WAC 173-27-80) leaving it up to local jurisdictions to establish their own standards. While this update will not result in changes to the SMP’s nonconforming regulations (that will occur under the separate SMP update), Commission feedback and recommendations will feed into the work on the SMP.

While LSCM 14.32 (**Attachment 1**) is the main code section regulating nonconformities in the city’s code, staff has also identified that the following sections may also need to be revised:

- [14.04.050](#) - Relationship to Existing Zoning, Subdivision and Flood Control Ordinances
- [14.04.070](#) - No Use or Sale of Land or Buildings Except in Conformity with Title Provisions
- [14.08.010](#) - Definitions of Basic Terms
- [14.18.200](#) - Boundary Line Adjustments
- [14.38.017](#) - Nonconforming Situations (subareas)
- [14.68.150](#) - Nonconforming Signs
- [14.88.330](#) - Nonconforming Activities (critical areas)

Staff research shows that Ordinances No. [811](#) and No. [876](#) were the last to update these code sections with very minor changes proposed. However, Ordinance No. [676](#) in 2003 was the last time there was a major overhaul of the city’s nonconforming code.

APPROACHES FOR CONSIDERATION:

Managing zoning nonconformities in the city requires the consideration of several approaches which aim to control, accommodate, or eliminate the nonconformities. Some of these approaches are stricter (when a community desires to prohibit or eliminate nonconformities) while others are more liberal (allowing the nonconformity to continue or expand). Some communities opt for a blend, choosing to be stricter on certain nonconformities and more flexible on others. Bulleted below are the approaches that should be considered when updating a nonconforming code and that city staff would like the Planning Commission’s feedback on. In lieu of detailing each approach in this briefing, staff has attached several articles that provide perspective on these approaches (**Attachments 2-4**).

- Abandonment
- Reconstruction and Restoration
- Enlargement, Alteration, or Expansion
- Termination and Amortization
- Variances and Conditional Use Permits
- Takings and Vested Rights

- Benign vs Detrimental
- Possible Distinction by Zoning District

EXAMPLES:

As stated in the introduction, city staff have fielded numerous nonconforming questions/situations over the last several years and want to provide some specific examples of these for the Planning Commission's consideration.

- Annexation of prior county properties have resulted in some nonconforming lots or structures (lots smaller than that required by city code or setbacks that are smaller than current city standards) which have resulted in owners not being able to build additions or rear yard porches onto their homes.
- Some single-family homes exist in commercially zoned areas where businesses propose to utilize them for uses permitted by the zoning district, but the lot or structure is nonconforming and makes it especially difficult for reuse (i.e. along 20th St SE and other subareas)
- Recent changes to the city's zoning code increasing setbacks in certain zones, (i.e. going from 5 feet rear setback to 10 feet) has resulted in property owners not being able to construct what they want and not realizing the change until speaking with staff.
- A property in the southern part of the city wanted to rebuild a home that was old, small, and in disrepair and expand it (build a 2nd story) per the city's regulations. While the city would allow this, the septic system was failing, and the health district would not allow expansion of the use unless a new system was installed, or the property hooked up to city sewer. Due to existing critical areas on the site, neither option is overly feasible, thus the property continues to sit as is and is not remedied to the satisfaction of the city, health district, or property owner.

Other Jurisdictions:

As part of the research for this code amendment introduction, staff looked at examples of nonconforming ordinances from other jurisdictions in Washington and Oregon (hyperlinks provided under **Attachment 5**). Several of the cities do not allow expansion of nonconforming uses but do allow expansion of nonconforming structures, while others set forth a review process if a nonconforming use wants to expand. Some jurisdictions provide amortization provisions and certification processes for nonconforming uses.

Below are examples of code from the following cities:

- [Monroe, WA](#)
- [Everett, WA](#)
- [Bellingham, WA](#)
- [Marysville, WA](#)
- [Seattle, WA](#)
- [Milwaukie, OR](#)

NEXT STEPS

Commissioners are asked to provide input on the proposed amendments to the nonconforming regulations given the examples provided and the attached articles. At a future Commission meeting, staff will be providing a more detailed discussion and possibly draft code language, which will be influenced by the Commission's direction on whether to be more restrictive and aggressive on nonconformities, whether to continue being fairly liberal, or a blend of both.

Attachments

Attachment 1: Existing City Code [LSMC 14.32](#)

Attachment 2: [MRSC Article - Nonconforming Uses, Structures, and Lots](#)

Attachment 3: Planning Law - Nonconforming Uses: Part One and Part Two

Attachment 4: APA Quicknotes – Managing Zoning Nonconformities

Attachment 5: Examples from Other Jurisdictions (*Hyperlinks only*)

[Monroe](#)

[Everett](#)

[Bellingham](#)

[Marysville](#)

[Seattle](#)

[Milwaukie, OR](#)



One Community Around the Lake

Staff Report City of Lake Stevens Planning Commission

2021 Comprehensive Plan Update
Date: June 2, 2021

Subject: Proposed Amendments to Parks and Capital Facilities Elements as part of 2021 Comp Plan Docket

Contact Person/Department: David Levitan, Planning Manager

ACTION REQUESTED: No formal action is required. Staff will introduce proposed amendments to the Parks and Capital Facilities elements as part of the 2021 Comprehensive Plan docket, which was ratified by City Council on February 23, 2021. Staff is proposing to use one Planning Commission meeting per month to review text amendments to various Comprehensive Plan chapters, before public hearings are held later in 2021 to adopt the docket. Commissioners are encouraged to review the proposed amendments and identify any additional changes or topics that should be added.

BACKGROUND / HISTORY

Comprehensive Plans are the primary land use document for guiding growth and development in Washington jurisdictions. They are required by and must be consistent with the Growth Management Act (GMA), with [RCW 36.70A.070](#) identifying a number of mandatory “elements”, or chapters, that must be included in local plans. Under the GMA, the city can amend its Comprehensive Plan and Future Land Use Map once per year, with a few exceptions, through an annual docket process. On February 17, 2021, Planning Commission held a public hearing on the proposed 2021 Comprehensive Plan docket and made a unanimous recommendation to City Council to ratify the docket. On February 23, 2021, the City Council approved the docket via [Resolution 2021-04](#).

Under the GMA, cities must also prepare more complete “periodic updates” to their comprehensive plan, with the next deadline being June 30, 2024. The most recent periodic update was adopted in September 2015 via [Ordinance 937](#) and established the twenty-year planning horizon for the plan (2015-2035), which coincides with the timelines established by countywide growth targets for housing and employment. The process to establish new countywide growth targets for 2044 is just beginning and will be incorporated into the city’s next periodic update.

The scope of the city’s annual Comprehensive Plan docket has varied in recent years, but has generally been limited to minor changes to reflect new capital projects (primarily transportation and parks), updated demographic information, and land use map amendments, including the predesignations for the city’s Urban Growth Area (UGA) which were adopted as part of the 2019 docket. The 2021 docket is also fairly limited in scope, with more detailed and expansive amendments expected in future years following the countywide growth target process as well as infrastructure planning in the city’s Hartford and Machias industrial areas.

The Parks and Capital Facilities Element are being reviewed concurrently as the majority of the amendments to each are focused on capital improvements, and RCW 36.70A.070(3) requires that park and recreation facilities be included in the capital facilities element.

PARKS, RECREATION AND OPEN SPACE ELEMENT

The [Parks, Recreation and Open Space Element](#) (Chapter 5, or Parks Element) is identified as a mandatory element under RCW 36.70A.070, although it is technically an optional amendment given it is not supported by state funding. The Parks Element was developed based on the criteria established by the [Washington State Recreation and Conservation Office](#) (RCO), which must review and certify park elements before cities can be eligible for RCO recreation and conservation grant programs. The city's Parks Element is currently certified by RCO through December 2025, and as such the city does not expect to make any major changes to the structure of the element until the 2024 periodic update.

The city has identified the following amendments to the existing [Parks Element](#):

- Updates to the acreages in the Inventory of Facilities (page 4)
- Update Figure 5.1 to reflect acquisition of Sunset Park and Cedarwood Recreation Center
- Updates to park descriptions and associated figures/tables (pages 7-18) and list of planning projects (pages 27-34) to reflect recent acquisitions as well as recent and planned capital improvements, including:
 - Relocation of the rowing club boathouse
 - Completion of Phase 1 Frontier Heights Park improvements
 - Updated description of North Cove Park to reflect the completion of Phase II and the work on Phase III, including the Mill Spur festival street, the relocation of the Grimm House, and work on the remaining park plaza
 - 20th Street Ballfields and Westside Trail improvements
 - Surveying/planning to continue the South Lake Stevens Trail (Phase 3) along Machias Cutoff Road to the city limits at 123rd Ave SE
 - Proposed addition of Centennial Woods pump track, walking path and other improvements
 - Eagle Ridge Park mountain bike trails, amphitheater, playground and restroom improvements
 - Replacement of Davies Beach docks
- Review goals and policies (pages 36-43) for any outdated or redundant language

CAPITAL FACILITIES ELEMENT

The [Capital Facilities Element](#) (Chapter 9) is identified as a mandatory element under RCW 36.70A.070, and must include the following components:

- An inventory of existing capital facilities, showing the locations and capacities
- A forecast of future needs for such capital facilities
- The proposed locations and capacities of expanded or new facilities
- At least a six-year plan to finance such capital facilities within project funding capacities, with sources of public money identified
- A requirement to reassess the land use element if probably funding falls short of meeting existing needs identified in the land use element

The city updates the Capital Facilities Element annually through the Comp Plan docket to ensure that the 20-year Capital Facilities Program, or CFP (Table 9-1; page CF-30) and 6-Year Capital Improvement Plan, or CIP (Table 9.2; page CF-36) are kept current and consistent with the existing adopted city budget and CIP. As the city further assesses the needed capital improvements within the Southeast Interlocal and Machias Industrial annexation areas, identified improvements will be incorporated into these tables.

In April 2021, the City Engineer updated the 6-year CIP (2022-2027) and 20-year CFP in advance of the Council's adoption of the 6-year CIP ([Resolution 2021-05](#)). Table 9.1 and 9.2 will be updated to reflect the adopted CIP and corresponding CFP. The Public Facilities Map (Figure 9.1) will also be updated to reflect the acquisition of Sunset Park and Cedarwood Recreation Center and to reflect current city boundaries.

NEXT STEPS

Staff plans to discuss proposed amendments to the Public Services and Utilities Element (Chapter 7) at the Commission's July 7 meeting. Topics and proposed amendments to be discussed include:

- an expanded description of police services in Lake Stevens, including response times, that was prepared by Chief Dyer
- adoption of the Snohomish School District Capital Facilities Plan by referenced, once the Southeast Interlocal Annexation becomes effective (identified as July 16 in the ILA)
- A summary of the proposed infrastructure analysis for the Hartford and Machias Industrial areas (to be rebranded as the Lake Stevens Industrial Area)

Proposed amendments to the Land Use Element will be discussed later this summer, in advance of a Fall 2021 public hearing.

Chapter 14.32 NONCONFORMING SITUATIONS

Sections:

- 14.32.010 Continuation of Nonconforming Situations and Completion of Nonconforming Projects**
- 14.32.020 Nonconforming Lots**
- 14.32.030 Extension or Enlargement of Nonconforming Situations**
- 14.32.040 Repair, Maintenance and Reconstruction**
- 14.32.050 Change in Use of Property Where a Nonconforming Situation Exists**
- 14.32.060 Abandonment and Discontinuance of Nonconforming Uses**

14.32.010 Continuation of Nonconforming Situations and Completion of Nonconforming Projects.

Nonconforming situations that were otherwise lawful on the effective date of this chapter may be continued subject to the restrictions and qualifications of this chapter and, if applicable, of an adopted subarea plan. (Ord. 876, Sec. 15, 2012)

14.32.020 Nonconforming Lots.

- (a) This section applies only to legal nonconforming lots which have no substantial structures upon it.
- (b) A lot that is nonconforming by virtue of not meeting the minimum lot area required for the zone in which it is located may be used the same as if it were conforming, except that any use that requires a greater lot size than the established minimum lot size for a particular zone (e.g., a two-family residence) is prohibited.

14.32.030 Extension or Enlargement of Nonconforming Situations.

- (a) No person may engage in any activity that causes an increase in the extent of a nonconformity, except as specified below. In particular, physical alteration of structures or the placement of new structures on open land is unlawful if such activity results in:
 - (1) An increase in the total amount of space devoted to a nonconforming use, or
 - (2) Greater nonconformity with respect to dimensional restrictions such as setback requirements, height limitations, parking or density requirements.
- (b) A legal nonconforming use may be extended throughout any portion of a completed building that was manifestly designed or arranged to accommodate such use. However, a nonconforming use may not be extended to additional buildings or to land outside the original building.
- (c) A nonconforming use of open land may not be extended to cover more land than was occupied by that use when it became nonconforming, except that a use that involves the removal of natural materials from the lot (e.g., a sand pit) may be expanded to the boundaries of the lot where the use was established at the time it became nonconforming if 10 percent or more of the earth products had already been removed on the date on which it became nonconforming and where the proposed expansion conforms to all applicable Federal, State, and local regulations concerning the use.
- (d) The volume, intensity, or frequency of use of property where a nonconforming situation exists may be increased and the equipment or processes used at a location where a nonconforming situation exists may

be changed if these or similar changes amount only to changes in the degree of activity rather than changes in kind and no violations of other subsections of this section occur. 12

(e) Any structure used for single-family residential purposes and maintained as a nonconforming use may be enlarged or replaced with a similar structure of a larger size, so long as the enlargement or replacement does not create new nonconformities or increase the extent of existing nonconformities with respect to such matters as setback and parking requirements.

(f) Whenever: (1) there exists a lot with one or more structures on it, and (2) a change in use that does not involve any enlargement of a structure is proposed for such lot, and (3) the additional parking or loading spaces required by Chapter [14.72](#) cannot be satisfied because there is not sufficient area available on the lot, then the proposed use shall not be regarded as resulting in an impermissible extension or enlargement of a nonconforming situation. However, the applicant shall be required to comply with all applicable parking and loading requirements that can be satisfied without acquiring additional land. (Ord. 676, Sec. 21, 2003; Ord. 468, 1995)

14.32.040 Repair, Maintenance and Reconstruction.

(a) Minor repairs to and routine maintenance of property where nonconforming situations exist are allowed. Major renovation and repairs, i.e., work valued at more than 25 percent of the appraised valuation of the structure, may be done only in accordance with required permits issued pursuant to this section.

(b) If a structure housing a nonconforming use is damaged by fire, accident or natural disaster to an extent that the value of repair or replacement would exceed 50 percent of the appraised valuation of the structure prior to the fire, accident or natural disaster, then the nonconforming use shall not be re-established. This subsection does not apply to structures used for single-family residential purposes, which structures may be reconstructed pursuant to a building permit.

(c) For purposes of subsections (a) and (b) of this section:

(1) The "value" of renovation or repair or replacement shall mean the fair market value of the materials and services necessary to accomplish such renovation, repair, or replacement.

(2) No person may seek to avoid the intent of subsections (a) or (b) of this section by doing such work incrementally.

(3) The "appraised valuation" shall mean either the appraised valuation for property tax purposes, updated as necessary by the increase in the consumer price index since the date of the last valuation, or the valuation determined by a professionally recognized property appraiser.

(d) The Planning Director shall issue a permit authorized by subsection (a) of this section if it is found that, in completing the renovation, repair or replacement work:

(1) This proposal meets the requirements of this chapter; and

(2) The permittee will comply to the extent reasonably possible with all provisions of this title applicable to the proposal.

Compliance with a requirement of this title is not reasonably possible if it cannot be achieved without adding land to the lot where the nonconforming situation is maintained or moving a substantial structure that is on a permanent foundation. That an applicant is facing financial hardship caused by the cost of meeting such requirements as paved parking does not constitute grounds for finding that compliance is not reasonably possible. (Ord. 811, Sec. 23, 2010)

14.32.050 Change in Use of Property Where a Nonconforming Situation Exists.

(a) A change in use of property (where a nonconforming situation exists) that requires a new Planning Director approval, administrative conditional use, or conditional use permit in accordance with Section 14.16C.030 may not be made except in accordance with subsections (b) through (d) of this section.

(b) If the intended change in use is to a principal use that is permissible in the district where the property is located, and all of the other requirements of this title applicable to that use can be complied with, permission to make the change must be obtained in the same manner as permission to make the initial use of a vacant lot. Once conformity with this title is achieved, the property may not revert to its nonconforming status.

(c) If the intended change in use is to a principal use that is permissible in the district where the property is located, but all of the requirements of this title applicable to that use cannot reasonably be complied with, then the change is permissible if the permitting entity issues a permit authorizing the change. This permit may be issued if it is found that:

- (1) The proposal meets the requirements of this chapter; and
- (2) All of the applicable requirements of this title that can reasonably be complied with will be complied with. Compliance with a requirement of this title is not reasonably possible if compliance cannot be achieved without adding additional land to the lot where the nonconforming situation is maintained or moving a substantial structure that is on a permanent foundation. That an applicant is facing financial hardship caused by the cost of meeting such requirements as paved parking does not constitute grounds for finding that compliance is not reasonably possible. In no case may an applicant be given permission pursuant to this subsection to construct a building or add to an existing building if additional nonconformities would thereby be created.

(d) No change in use to another use that is not permissible in the district in which it is located shall be allowed. (Ord. 811, Sec. 24, 2010)

14.32.060 Abandonment and Discontinuance of Nonconforming Uses.

(a) When a nonconforming use is discontinued for a consecutive period of 180 days, subsequent uses on the property must be permitted in the zone in which the property is located. (Ord. 676, Sec. 21, 2003; Ord. 590, 1998; Ord. 468, 1995)

[Mobile Version](#)

Nonconforming Uses, Structures, and Lots

This page provides information on local government regulation of nonconforming uses in Washington State, including relevant court decisions and examples of local ordinances.

Overview

A nonconforming use is a use of property that was allowed under the zoning regulations at the time the use was established but which, because of subsequent changes in those regulations, is no longer a permitted use. A nonconforming structure is a structure that complied with zoning and development regulations at the time it was built but which, because of subsequent changes to the zoning and/or development regulations, no longer fully complies with those regulations. A nonconforming lot is one that, at the time of its establishment, met the minimum lots size requirements for the zone in which it is located but which, because of subsequent changes to the minimum lot size applicable to that zone, is now smaller than that minimum lot size.

State law does not regulate nonconforming uses, structures, or lots. So, local jurisdictions are free, within certain constitutional limits, to establish their own standards for regulation of these nonconforming situations.

Nonconforming uses and structures are not illegal uses and structures; they are generally allowed to continue as is, subject to local restrictions. In *Rhod-A-Zalea v. Snohomish County*, 136 Wn.2d 1, 7 (1998), the state supreme court explained the basis for this treatment of nonconforming uses:

The theory of the zoning ordinance is that the nonconforming use is detrimental to some of those public interests (health, safety, morals or welfare) which justify the invoking of the police power. Although found to be detrimental to important public interests, nonconforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use.

Local restrictions typically prohibit expansion of nonconforming uses and structures. Nonconforming uses usually lose their legal status under local regulations if they are discontinued for a particular period of time, such as six months or a year. Nonconforming structures typically lose their legal status if they are destroyed, such as by fire, in whole or in part.

Uses that become nonconforming as a result of changes in zoning regulations are still subject to reasonable regulations under a city or county's police power to protect the public health, safety, and welfare that are enacted subsequent to the use being established. *Rhod-A-Zalea v. Snohomish County*, 136 Wn. 2d at 8-9. In that decision, the court held that a company that had the right to mine peat as a nonconforming use was subject to a later-enacted local building regulation that required a grading permit excavate or fill the property.

Zoning ordinances may provide for the termination of nonconforming uses by reasonable amortization provisions. Such amortization provisions, which allow for the continued operation of the use for a period of time deemed sufficient to recoup the investment put into the use, are commonly applied to restrictions or prohibitions imposed on billboards.

Property owners are generally allowed to build on their nonconforming lots, although they typically must meet setbacks applicable to that zone, unless a variance from such setbacks is applied for and can be granted under the adopted criteria for variance approval. Denial of the ability to build on a nonconforming lot could, in some cases, constitute a "taking" under the federal and state constitutions. Where a property owner owns two adjacent and undeveloped nonconforming lots, some jurisdictions treat the two lots as one, conforming lot.

Selected Court Decisions

- McMilian v. King County, 161 Wn. App. 581 (2011) - trespasser cannot establish nonconforming use

The court held that a trespasser onto land cannot lawfully establish a valid nonconforming use, which use in this case was an auto wrecking yard that spilled over from adjacent property. The court remanded the case back to the superior court for a determination of whether the use of the property at issue was permissive, such that there had been no trespass.

- City of University Place v. McGuire, 144 Wn.2d 640 (2001) - doctrine of diminishing asset

The state supreme court adopted the doctrine of diminishing asset and determined that the previous owner's legal nonconforming mining use extended to the boundaries of the 80-acre parcel of land, and vested in the developer, the successor in interest. The court explained that this doctrine "can be seen as either an exception to the general principle that a nonconforming use will be restricted to its original site or as a substantive adaptation of the nonconforming use doctrine to recognize the realities of extractive industries." The court concluded that the city had not established an act or omission that would prove that that nonconforming use had been abandoned. That the parcel had not yet been mined and was sold without mention of mining was not conclusive.

- Open Door Baptist Church v. Clark County, 140 Wn.2d 143 (2000) - change to another kind of use

Where a nonconforming use is in existence at the time that a zoning ordinance is enacted and is thus allowed to continue, it "cannot be changed into some other kind of a nonconforming use." So, even though the property in question in this case was originally used as a church, it had been an art school for 12 years prior to church's purchase of it in 1990. Whatever original nonconforming use status it may have once enjoyed could not be passed along to the church.

- Rhod-A-Zalea v. Snohomish County, 136 Wn.2d 1 (1998) - subject to later enacted police power regulation

Mining operation's valid existing nonconforming use was subject to county's later enacted police power regulation that imposed a requirement that the operation obtain a grading permit before conducting its ongoing excavation and fill activities.

- Christianson v. Snohomish Health Dist., 133 Wn.2d 647 (1997) - compliance with health code regulations

The county health district denied construction clearance to increase the size of a cabin, on the basis that the cabin's onsite septic system was inadequate to handle any additional use. The onsite septic system had recently been renovated and had been approved by the health district as an acceptable substandard system for the existing, unimproved cabin, but a district resolution prohibited the construction of additions to buildings with substandard septic systems. The court held that requiring the plaintiffs to comply with minimum health code regulations when building an addition is a reasonable means to protect public health and water quality.

- Sumner v. First Baptist Church, 97 Wn.2d 1 (1982) - grandfathering under building code

A church-operated school is entitled to the benefit of the "grandfather clause" of the building code and the "nonconforming use" provision of the zoning ordinance. The Uniform Building Code provided that "Buildings in existence at the time of the passage of this Code may have their existing use or occupancy continued, if such use or occupancy was legal at the time of the passage of this Code, provided such continued use is not dangerous to life." There was no attempt to show, nor any finding, that continued use of the building as a church would be dangerous to life.

- Keller v. Bellingham, 92 Wn.2d 726 (1979) - no enlargement of nonconforming use

The court held that a corporation's improvements to its plant that increased production did not enlarge a nonconforming use in violation of a city's ordinance. The city's nonconforming use ordinance did not specifically proscribe intensification of nonconforming uses.

- Northend Cinema v. Seattle, 90 Wn.2d 709 (1978) - termination period

Theater owners challenged the validity of ordinances that prohibited them from showing adult movies in their present locations and that terminated all nonconforming uses within 90 days. A balancing test was adopted to determine the reasonableness of the termination period, that is, whether the harm or hardship to the user outweighs the benefit to the public to be gained from termination of the use. This test is applied on a case-by-case basis, looking to the circumstances of each nonconforming user. The court in this case found that the period for termination of the nonconforming uses was reasonable.

- Anderson v. Island County, 81 Wn.2d 312 (1972) - establishment of use

The use of property must be established prior to the adoption of the zoning ordinance to qualify as a nonconforming use thereafter. The mere purchase of property and the occupying of it are not sufficient factors to establish an existing nonconforming use.

- Bartz v. Bd. of Adjustment, 80 Wn.2d 209 (1972) - expansion of nonconforming use

A board of adjustment had authority to approve an application to construct a building at an auto wrecking yard even though the application sought an extension of a pre-existing non-conforming use, because there was no prohibition in the zoning ordinance against the extension or expansion of a nonconforming use and because the expansion would improve the unsightly conditions at the yard.

- *First Pioneer Trading Co. v. Pierce County*, 146 Wn. App. 606 (2008), *review denied*, 165 Wn.2d 1053 (2009) - evidence supporting decision

The court upheld a hearing officer's decision denying a property owner's claim of a legal, nonconforming use of its property, because the decision was supported by substantial evidence, including aerial photographs provided by a county and testimony from neighbors verifying that the owner's business was not located on the property prior to the change in zoning laws.

- *City of Des Moines v. Gray Businesses*, 130 Wn. App. 600 (2005), *review denied*, 158 Wn.2d 1024 (2006) - procedure to continue nonconforming use

The owner of a mobile home park did not comply with an ordinance requiring that the owners of nonconforming uses file a site plan to legally continue their nonconforming uses, and the city notified the owner that the use was no longer allowable. The court of appeals held that the city's ordinance was a valid regulation, not a taking, because the "right" to use the property for a particular use is not a fundamental attribute of ownership. Rather, it is a contingent right that is dependent upon state law and local regulations such as business license requirements and zoning.

Examples of Local Regulations

- [Bainbridge Island Municipal Code Ch. 18.30](#) - Nonconforming Lots, Uses, and Structures
- [Benton City Municipal Code Ch. 20.45](#) - Uses, Buildings, Structures, and Lots
- [Blaine Municipal Code Ch. 17.94](#) - Nonconforming Uses
- [Clallam County Code Ch. 33.43](#) - Status of Nonconforming Use, Parcels, and Pre-Existing Uses
- [Friday Harbor Municipal Code Ch. 17.60](#) - Nonconformity
- [Kent Municipal Code Sec. 15.08.100](#) - Nonconforming Development
- [Mukilteo Municipal Code Ch. 17.68](#) - Nonconforming Buildings, Uses, and Lots
- [Spokane Municipal Code Ch. 17C.210](#) - Nonconforming Situations
- [Sumner Municipal Code Ch. 18.46](#) - Nonconforming Lots, Structures, and Uses

Recommended Resources

- [Pigs in the Parlor or Diamonds in the Rough? - A New Vision for Nonconformity Regulation](#), by Arthur Lentilucci, *Zoning News*, American Planning Association (APA), April 2003

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Nonconforming Uses: Part One

Deborah M. Rosenthal, AICP



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onconforming uses, the natural by-products of zoning, are created when zoning rules change over time and the old uses are grandfathered in under the original approvals.

How the grandfathered uses are treated, how long they survive, and how much they are allowed to change are all decided, in the first instance, by the planning commission. This article and part two (coming in Winter 2011) discusses the governing rules.

Know the Basics

The goal of most nonconforming use ordinances is to prevent expansion and encourage eventual termination of the use while, at the same time, protecting investments made in reliance on the original zoning. Nonconformities come in two types: activities on the property and the physical condition of the lot or structures. Both are referred to as nonconforming uses; the rules governing the two types often differ, and they pose different planning problems.

A nonconforming use is not listed as permitted in the applicable zone under the local zoning ordinance. A nonconforming lot or structure fails to meet one or more of the design requirements of the ordinance, such as setbacks, height, access, parking, width, and depth. The types may be combined when, for instance, a nonconforming industrial building is only suitable for industrial use in a newly created commercial zone. In contrast, the nonconformity may be as minor as a 4.5-foot side yard where five feet is required. To qualify as a legal nonconforming use, the use must have been legal when established. If it was not lawful at inception, it remains illegal, regardless of longevity and extent of agency knowledge.

Know Your Ordinance

The fate of nonconforming uses is controlled by the precise language of the local ordinance with, in some states, an overlay of state law. Two neighboring cities, identical in most respects, may have very different ordinances. For example, some cities allow moderate expansion of nonconforming uses; others prohibit it. Application of a nonconforming use ordinance depends on its specific language, even if interpretation is challenging. It is crucial that these ordinances be clearly drafted to express the public agency's intent, and be fully understood by administrators and officials.

Creation of Nonconforming Uses

Nonconformities are created when a new zoning ordinance is adopted that disallows the existing activity or structure in a given zone. The use is then considered legal if it met the relevant local zoning criteria when it was built or if it commenced before the first zoning ordinance was adopted. Some ordinances also require that the use met other legal requirements when it was established, such as state law or business licensing. A use not legally allowed on the date of the zone change, or that starts afterward, is an illegal nonconforming use. Such uses can be abated and are not subject to the special rules discussed here.

Nonconforming uses always involve either the use or physical configuration of the land or structure, and arise in unlimited variety, ranging from lot sizes to the details of sophisticated business operations. The extent of potential nonconformity is as broad as the scope of the zoning. Every inconsistency with the ordinance can be

considered a nonconformity. As zoning ordinances and uses become more complex, so does the law.

Abandonment

Most ordinances provide that the right to continue a nonconforming activity terminates if it ceases for a period of time. The abandonment time varies widely. Instead of or in addition to a time period, some ordinances look at whether the owner intended to cease nonconforming operations.

Once the right to continue a nonconforming use is abandoned through nonuse, legal status cannot be regarded by resuming the use, regardless of how long the use then continues. Nonuse typically is not considered abandonment if the owner is prevented from using the property by operation of law, such as a lawsuit, or if he is actively trying to resume the use. Nonconforming buildings generally do not lose status unless the offending portion of the structure is demolished. Rarely do local ordinances require demolition due to abandonment unless the building is a vacant nuisance.

Expansion and Reconstruction

Expansion of nonconforming uses is another common issue. Decisions are controlled by the language of the ordinance. Ordinances usually establish a percentage by which the structure can be expanded; 15 percent is typical provided that the nonconformity is not thereby increased. Expansion, therefore, cannot decrease an already inadequate setback. However, square footage can be increased within the current allowed zoning envelope.

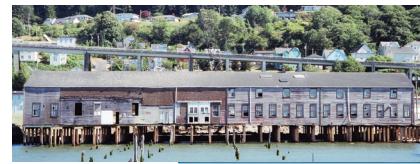
Questions may arise when a lawful second story is proposed on a nonconforming footprint. Usually the addition needs to be set back to current standards, or is prohibited. Cities can elect to allow a new structure if a troublesome nonconformity is terminated or mitigated as a result. Most ordinances allow maintenance but not full replacement. Some of these situations can be handled with variances, as will be discussed in part two in the next issue.

More challenging is the decision whether new activities constitute prohibited expansion of an existing nonconforming use. Example: an owner applies for a business license or building permit and is rejected on zoning grounds. Nonconforming use ordinances are not intended to freeze uses at a point in time, and the "natural development" of a business is allowed. New products can be sold, new equipment installed, and interiors updated.

The difference between "natural development" and "expansion" is not always clear. For example, many buildings now have ground-floor coffee shops, regarded as standard amenities. In a different context, mining may only affect a small portion of the property at a time, but eventually affect the entire parcel. Whether these types of use are allowed depends on the ordinance's language, local custom, and, sometimes, state law. Be prepared with substantial evidence to justify your decision. Remember that allowing uses to change is often essential to the financial health of the nonconforming use but can be equally aggravating to neighbors.

Nonconforming Uses: Part Two

Deborah M. Rosenthal, AICP



Carolyn Torma

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onconforming use ordinances seek to encourage replacement of nonconforming buildings and uses over time, preferably through natural market forces.

This continues the article that appeared in the Fall 2010 issue.

Termination and Amortization

Nonconforming use ordinances seek to encourage replacement of nonconforming buildings and uses over time, preferably through natural market forces. Most ordinances prohibit reconstruction of structures that are destroyed or damaged by more than a specified percentage, usually 50 percent. This rule can be unpopular and hard to enforce, especially after natural disasters. However, it serves an important public purpose, such as making sure homes are rebuilt to current safety standards after a major flood event. Local governments should assist owners in meeting the new rules; many owners may have been unaware that their homes were nonconforming before the disaster. Destruction or replacement is commonly used to terminate nonconforming structures. Nonconforming lots are almost impossible to correct, unless the same owner acquires an adjacent parcel. If allowed by state law, many communities provide for automatic merger of substandard lots when they come into common ownership as a solution.

In contrast to structures, nonconforming uses are generally permitted to continue indefinitely unless abandoned. However, in most states, local governments are allowed—not required—to set a time limit for termination of nonconforming activities. Known as the amortization period, it is short or long, depending on the size of the owner's investment and the harm caused by the use. The

legal test is generally whether the length of the time imposes a substantial and unfair loss on the landowner when compared to the public benefit, including the need to avoid physical harm to neighbors.

The most common short amortization period is for terminating billboards, where investment is relatively small and profits high. Consequently, Congress and some state legislatures adopted prohibitions on amortizing certain billboards and other uses. Other ordinances may give high-investment uses, like manufacturing plants, up to 10 or 20 years before the use must end. Legal in most states, amortization periods, if of appropriate duration, are often controversial because they can require profitable businesses to cease operations. Typically, amortization ordinances immediately depress the property value because of the impact on the owner's expectation of continued use.

Variances and Conditional Use Permits

A legal, nonconforming structure requires no variance to be lawful under changed zoning. However, a structure that was illegal when built can become legal retroactively through a variance. This is a simple way to address uncertainties, while assuring the local agency that it complies with current rules. However, in most jurisdictions, variances cannot legitimize disallowed activities as opposed to structures. In some places, a conditional use permit would serve the purpose, unless the use is completely excluded in the zone. Variances and conditional use permits can allow expansion of nonconforming uses where there are no adverse public effects.

Takings and Vested Rights

Owners whose property is made nonconforming often file a takings complaint under the Fifth Amendment to the U.S. Constitution or their state constitution. However, as long as the property owner retains some legal use of the property and the financial loss is not disproportionate, adopting a new zoning ordinance is unlikely to be a taking.

There are circumstances where takings law, and the related concept of vested rights, come into play. To qualify as legal, the activity or structure must have existed on the date of the zone change. In most states, the owner must have vested the right to continued use by obtaining a permit and making substantial expenditures. Rules vary from state to state; generally, the preliminary activities, even coupled with intent, are not enough to vest a nonconforming use. However, if the right to continued use is vested under state law, the local government must comply with its own ordinances and state law when applying a zone change to an existing use, or face liability.

Due Process

The right to continue existing uses is protected by state and federal law. While the local government can change zoning and declare a use or structure nonconforming, it must follow due process. An owner who abandons a nonconforming use or structure, or who was denied a permit, should be allowed to appeal administratively to the planning commission and final decision makers. Where appropriate, the owner should be able to apply for an after-the-fact variance or conditional use permit.

Even if not required, it is prudent to notify owners individually when proposed zone changes will make their property nonconforming, especially with amortization periods.

Plan Carefully

Consider zone change impacts carefully. Often the change affects a few structures in minor ways. However, nonconforming use ordinances could prevent necessary, normal building function change. With amortization periods, owners may decide not to invest in maintenance because they will not recoup costs. Property insurance is harder to get when reconstruction is not permitted after catastrophic loss; business operations may cease. Without an amortization period, nonconforming uses function as a monopoly, increasing property value due to exclusive use in the area and delaying use conversion anticipated by the zone change.

Depending on the percentage of nonconforming uses and structures, the planning commission may consider mixed use zones that incorporate, rather than exclude, compatible existing uses. Conditional uses can be designed to encourage mixed supportive uses customized to the neighborhood. Finally, the planning commission must explain its reasons for new directions, without leaving the existing uses behind. Legal tools are available for aggressive action to change the future of an area, or for gentle encouragement of the market to act.

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QUICKNOTES

Managing Zoning Nonconformities

In zoning, a nonconformity is an existing lot, structure, or use that fails to comply with existing standards. Legal nonconformities are lots, structures, or uses that either predate zoning or were in conformity with the zoning standards in effect at the time of their establishment, while illegal nonconformities were noncompliant when established.

Most discussions of zoning nonconformities focus exclusively on legally nonconforming lots, structures, or uses. This is because legal nonconformities may remain a part of the community fabric indefinitely, but illegal nonconformities have no protection from code enforcement actions to bring them into compliance. Consequently, in the sections below the term nonconformity refers only to a legal nonconformity.

Zoning changes often result in a net increase in nonconformities. Some common nonconformities in older communities include building setbacks or lots that are too small and corner stores in areas zoned for exclusive residential use. While it makes sense to assume that all nonconformities are undesirable and should be brought into compliance, in reality community members often don't mind if some nonconformities continue or even expand.

Background

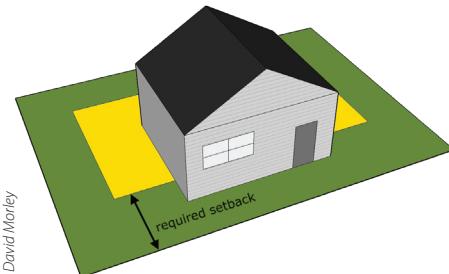
Communities have typically applied zoning standards prospectively. In other words, new standards only apply to new development. Existing nonconforming lots, structures, and uses can continue under new zoning standards. The early framers of zoning law did this on purpose to take the sting out of new regulation. In fact, it's unlikely that zoning would have caught on if all property owners were required to immediately extinguish nonconformities. However, this grandfathered status comes with limitations.

These limitations are most relevant in situations where owners want to modify or expand a structure or use or rebuild after a fire, flood, or storm. Generally, property changes that cross a certain threshold, whether physical or monetary, trigger a requirement that an owner must bring the property into compliance with the current zoning standards. The purpose of these triggers is to encourage redevelopment that is in line with the community's vision for the zoning district. But, as a side effect, these building and use limitations can actually slow the pace of change. Owners may be reluctant to make costly conforming improvements, and banks are typically hesitant to make loans on nonconforming properties. Because nonconforming status creates a barrier to reinvestment, it is important for communities to carefully consider how new zoning standards will affect the types and location of nonconformities.

Not all nonconformities have negative effects on adjacent properties or the larger community. In fact, in some instances, continuance or expansion of a nonconformity does not threaten public health or safety and may even be preferable to the alternative of disinvestment. For this reason, it makes sense for communities to treat nonconformities that are relatively benign differently than those likely to have significant detrimental effects. The following sections contain three broad recommendations for managing nonconformities through zoning.

Recommendation 1: Rezone to Minimize Nonconformities

When communities map new zoning districts, multiple contiguous blocks or even entire neighborhoods may be rendered nonconforming. If the intended goal is to facilitate dramatic redevelopment of these areas, this may make sense. But, if the structures and uses in these neighborhoods are generally viewed as desirable, widespread nonconformities may be a sign that the new districts are a poor fit for older areas of the community.



The home in this illustration would be a nonconforming structure, since it does not comply with the minimum front setback.



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In these instances it makes sense to change the zoning to minimize nonconformities. This can be accomplished by remapping mature neighborhoods to a more appropriate zoning district, adjusting the use permissions or dimensional standards of the current district to better match existing conditions, or creating a new zoning district that fits the character of these areas. All of these approaches have the net effect of reducing inadvertent nonconformities and decreasing the likelihood of hardships for property owners.

Recommendation 2: Sanction Benign Nonconformities

For nonconformities that are not geographically concentrated, it often makes sense to distinguish between those that pose a significant potential threat to public health or safety and those that are largely benign. Examples of benign nonconformities may include small deviations from required setbacks or lot area requirements, unlisted uses that are similar to explicitly permitted uses, and minor shortfalls in off-street parking spaces.

While each community will need to establish its own criteria for what constitutes a benign nonconformity, the most effective way to sanction the continuance or expansion of these lots, structures, or uses is to state this tolerance clearly in the zoning ordinance. This may be as simple as adding a provision to a new set of zoning standards that authorizes the expansion or rebuilding of any existing development, subject to the standards in effect when the lot, structure, or use was established. Or communities may want to create a special permit process that allows local officials to grant conforming status on a case-by-case basis. Both of these approaches remove the stigma associated with nonconformance, which is especially important to lenders.

Recommendation 3: Phase Out Detrimental Nonconformities

In contrast to a benign nonconformity, a detrimental nonconformity has a high probability of eventually harming public health or safety. Consequently, zoning should encourage the elimination of detrimental nonconformities. Examples of detrimental nonconformities may include a bar or restaurant with late-night hours in a quiet residential district or a heavy industrial use in a floodplain.

As communities try to phase out potentially harmful nonconformities, they usually focus on limiting expansion and preventing rebuilding or reoccupancy. Typically, this means prohibiting any building expansions or site modifications that do not reduce or eliminate the nonconformity, changing one nonconforming use for another, reestablishing a nonconforming use or structure after a period of vacancy, or reconstructing a severely damaged or demolished nonconforming structure.

In instances where continuance of a nonconformity poses an especially acute risk to public health and safety, communities may take more drastic measures. These measures include nuisance abatement actions, amortization schemes that require conformance after a specified period of time, or public buy-outs for willing sellers. Because these options carry significant legal risks for local governments, local officials should always engage competent legal counsel before taking action.

Summary

Nonconforming lots, structures, and uses are a natural byproduct of new zoning standards. While most zoning ordinances encourage phasing out nonconformities, not all nonconformities pose risks to public health and safety. Instead of treating all nonconformities the same, it makes more sense to distinguish between benign and detrimental nonconformities. Communities can transform benign nonconformities into conforming lots, structures, or uses through rezoning, explicit exemptions from new standards, or special permit processes. And they can expedite the elimination of detrimental nonconformities through strict limits on expansion, rebuilding, or reoccupancy.

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RECOMMENDED READING

1. Published by the American Planning Association

Easley, V. Gail. 2009. "Distinguishing Between Detrimental and Benign Nonconformities." *Zoning Practice*, November. Available at www.planning.org/zoningpractice.

Rosenthal, Deborah. 2010. "Nonconforming Uses: Part 1." *The Commissioner*, Fall. Available at www.planning.org/thecommissioner.

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2. Other Resources

Elliott, Donald L. 2008. *A Better Way to Zone: Ten Principles to Create More Livable Cities*. Washington, D.C.: Island Press. Available at <http://islandpress.org/ip/books/book/islandpress/B/bo7003715.html>.

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