

Theresa Rice

From: Roz Lassoff on behalf of Council
Sent: Wednesday, February 06, 2013 11:22 AM
To: Theresa Rice
Subject: FW: The Nonconforming Issue

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From: Robert Dashiell [mailto:rgdimages@aol.com]
Sent: Tuesday, February 05, 2013 8:45 PM
To: Council
Cc: CityAdmin
Subject: SMP: The Nonconforming Issue

Members of the City Council,

Don't envy the decision you have to make on the conforming/nonconforming issue.

My concern is a legal one ... and there are lawyers on the City Council that are far more qualified than I to consider the following:

If Shoreline properties are granted a conforming status in the final SMP, does that not establish a class of property that is being treated legally different than other (non-waterfront) properties?

And would that class differentiation stand up to a litigation challenge? Or would the City of Bainbridge Island simply eliminate the legal concept of non-conforming on all properties so that all parcels are subject to the same basic legal conditions?

I hope the City Council seeks legal advice on this concern ... I have not attempted to review any Washington State court decisions related to different classes of property and whether a municipality can exempt one class from a long standing legal definition. I am aware Kitsap County apparently did so in their very recently Commissioner approved SMP, and I didn't read any legalese on that decision, so I don't know how the County lawyer logic worked in what is a similar circumstance.

As a non-waterfront residential property owner, I think I would feel somewhat litigious if something on my parcel was classified non-conforming and all waterfront residential properties were exempted from nonconforming status.

I tend to support all properties on Bainbridge Island being treated the same under the police powers of the state for zoning legal status, and therefore I support nonconforming status for ALL properties meeting that legal condition. For shoreline property owners, I would advocate for SMP conditions that

would allow more liberal reconstruction should a property be destroyed, and a reasonable avenue for a variance for situations like a aged cabin to be replaced by some newer structure that is appropriate to the site with shoreline setbacks and site specific reasonable footprint expansion.

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From a legal dictionary ... non-conforming definition:

Continuing use of real property, permitted by [Zoning](#) ordinances, in a manner in which other similar plots of land in the same area cannot ordinarily be used.

Most municipal governments have enacted zoning ordinances that regulate the development of real estate within the municipality. The municipality is divided into zoning districts that permit a particular use of property: residence, business, or industry. Within these three main types of zoning districts, population density and building height may also be restricted. Zoning attempts to conserve the value of property and to encourage the most appropriate use of land throughout a particular locality.

When zoning is established, however, the ordinance cannot eliminate structures already in existence. Thus, if a district is zoned residential, the corner grocery store and neighborhood service station become nonconforming use sites. These businesses may remain even though they do not fit the predominant classification of real property in the zoning district.

As long as the property having nonconforming use status does not change, its status is protected. Problems arise, however, when change occurs. In general, substantial alterations in the nature of the business, new equipment that is not a replacement but a subterfuge to expand the use of the property, or a new structure amount to illegal expansion or extension. These types of actions will result in the loss of the nonconforming use status and the closing of the business. For example, if the corner grocery builds an addition to house a restaurant, that would be a significant change. If, however, the grocery updates its refrigeration equipment, that would not be an illegal change.

If a nonconforming use structure is destroyed or partially destroyed by fire or similar occurrences, zoning ordinances generally provide that if it is destroyed beyond a certain percentage, it cannot be rebuilt. Usually the owner loses the right to rebuild if 50 percent or more of the structure is damaged.

If a business stops operating at the nonconforming use site, zoning ordinances generally classify this as a discontinuance and revoke the nonconforming use status. The owner of the business must intend to abandon the use. Discontinuance due to repairs, acts of war or nature, government controls, foreclosure, condemnation, or injunctions are not regarded as manifesting intent to abandon the nonconforming use status if the situation is beyond the business owner's control.

Another tool to end nonconforming use situations is amortization, where the nonconforming use of a structure must cease within a zoning district at the end of the structure's estimated useful economic life. This device often is used in connection with billboards and junkyards.

Though municipalities may seek to end nonconforming use status through these various approaches, landowners usually retain this status until it becomes economically undesirable.

Respectfully,

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