

## AGENDA REPORT

Date: April 20, 2011  
To: City Council  
Thru: Ted Barkley, City Manager  
From: Mike Smith, Community Development Director  
RE: Land Development Code Update

**SUMMARY:** An initial draft of the land development code update document is anticipated to be ready for release in June for public review and comment. In order to better help staff and the consultant format that draft update and the proposed permit processing section, Council is being asked to provide some direction on how certain permitting processes and land use concepts should be handled in the code update document relating to:

- State Environmental Policy Act (SEPA) process timelines and exemptions
- quasi-judicial public hearing processes and open /closed record public hearings
- use of a Hearing Examiner in those open and closed record public hearing processes
- non-conforming uses, and
- Shoreline Management Act requirements.

**BAKCGROUND:** The City is currently undergoing a major land development code review and update project designed to address existing inconsistencies within those development codes, address inconsistencies between those development codes and the Comprehensive Plan in order to further implement that policy document, and to update the land development codes with modern best practices relating to planning, zoning, and land development regulations.

Back in 2008 staff recommended to Council that the development codes be reviewed and updated. The initial discussion was SEPA, but then it broadened into a larger land development code discussion which we have now undertaken.

Bear in mind that there will be no changes to current Code requirements by this discussion tonight and the draft code update will undergo a lengthy public review and comment period that will explore a variety of options related to permit processing prior to formal consideration for adoption.

**ANALYSIS:** Although many of the permit processing areas discussed below are in reality inter-twined for many permit application review purposes, I have broken them down into separate discussion categories in order to allow the discussion to focus just on the particular review process in question.

## State Environmental Policy Act (SEPA)

Back in 2008 Council reviewed the City's SEPA Code (Chapter 1.42) against a Model SEPA Code created by the Department of Ecology as part of the SEPA Rules adopted by Ecology in WAC 197-11. At that time a number of small changes were recommended by Council to more closely align the two Codes and those will be included in the draft Code update document. There were, however, a few larger changes that Council made that staff would like Council to revisit to determine if those changes are still in the form that Council would like to see.

It is important to remember that since 2008 the City has adopted a Critical Area Ordinance that is based on Best Available Science and a traffic impact fee. Those ordinances are supposed to handle the majority of potential adverse impacts from a project without any further SEPA review. Prior to adoption of the new CAO most of the City's SEPA reviews involved streams, wetlands and floodplain development which are now regulated through the CAO.

**Determination of Non-Significance (DNS) Comment Period.** The SEPA Rules set forth a number of DNS/MDNS process related activities as well as the timeline allowed for each. The City has specifically adopted by reference in ECC 1.42 a large number of the SEPA Rules that are found in WAC 197-11 which means that the City's SEPA Code basically mirrors the State's SEPA Rules. However, the practice followed by the City has not exactly mirrored the processes set forth in those adopted SEPA Rules. **Attachments "A" and "B"** are diagrams that show the SEPA Rules process and timelines versus the City's current SEPA process and timelines, as well as the SEPA Rules Optional DNS process.

### Comment Periods

The SEPA Rules originally allowed a "pre-threshold determination" comment period to allow for public and agency comments prior to issuance of the threshold determination (DNS, MDNS or DS) and required a "post-threshold determination" comment period after the issuance of the threshold determination. In the early 2000's the State adopted a number of land development code amendments designed to speed up and streamline the development review process. One significant change was that the SEPA Rules no longer talk about a "pre-threshold determination" comment period and have established very clear and short comment opportunities for *AFTER* the threshold determination has been issued.

The City's SEPA Code, while it adopts the State SEPA Rules by reference, has long utilized this "pre-threshold determination" comment period and continues to use it today. Prior to Council's review of SEPA in 2008, that pre-decision comment period was 35-days. In 2008 Council approved a reduction in that pre-decision comment period down to 14-days. As Attachment "A" shows, the result is that:

- under the State SEPA Rules there is no pre-decision comment period and either no post-decision comment period or a 14-day post-decision comment period
- under City Code and practice, there is a 14-day pre-decision comment period and a 14-day post-decision comment period.
- the decision timeline by the City is from 14 to 28 days longer than what is required by the State SEPA Rules

**Recommendation:** Staff has reviewed a large number of jurisdictions and has not found any that provide the pre-threshold determination comment period. The City SEPA process should mirror the

State SEPA Rules and WAC 197-11-340 should be adopted by reference without modification to the comment timelines.

#### Optional DNS Process

The SEPA Rules also provide an Optional DNS Process (**Attachment “B”**) that is designed to speed up the review process for projects which the Responsible Official has determined are not likely to have any significant adverse impact. It allows the jurisdiction to combine the SEPA review and comment period into the underlying permit review and comment period which basically means that the required SEPA post-threshold determination comment period is no longer required.

The Notice of Application that is sent out for the underlying permit must also provide Notice of the SEPA Checklist and it must :

- clearly state that the Optional DNS process is being used
- that it is expected that a DNS will be issued for the project, and
- that this may be the only opportunity to comment on the potential environmental impacts of the project.

While the City has adopted this Optional DNS process by reference, it has rarely, if ever used it due to the longstanding practice of providing a “pre-decision” comment period and a “post-decision” comment period. Most jurisdictions utilize this optional DNS method frequently and given that we now have a BAS Critical Area Ordinance in place and traffic impact fees, this optional DNS method could easily be used to speed up and streamline the permit review process.

Recommendation: The City SEPA process should mirror the State SEPA Rules and WAC 197-11-355 – Optional DNS process should be utilized as it is intended. Example language from one jurisdiction reads:

**“14.06.160 Optional DNS process.** If the responsible official has a reasonable basis for determining that significant adverse environmental impacts are unlikely, the responsible official may elect to use the single integrated comment period to obtain comments on the notice of application and the likely threshold determination for the proposal as set forth in this section. If this process is used, a second comment period will typically not be required when the DNS is issued.

### SEPA Exemptions

One area that the SEPA Rules allow the local jurisdiction some discretion is in the establishment of threshold levels used to exempt a project from SEPA review (it might still have to undergo CAO review and Landmarks/Design review in addition to the normal permit review process). The SEPA Rules provide a range of low/high threshold levels and the local jurisdiction can set it anywhere within that range. In 2008 Council reviewed the City's threshold levels and recommended they be changed as follows:

1. Projects involving residential dwelling units
  - allowable exemption threshold between 4-20 units.
  - Current Code threshold 4 – 20
  - Council recommended change 4 – 9 units
  
2. Agricultural structures (hay barns for instance)
  - allowable exemption threshold between 10,000 and 30,000 square feet.
  - Current Code threshold 10,000 square feet
  - Council recommended no change 10,000 square feet
  
3. Office, school, commercial, recreational, service or storage buildings
  - allowable exemption threshold between 4,000 - 12,000 square feet or 20 – 40 parking space
  - Current Code threshold 12,000 square feet or 40 parking spaces
  - Council recommended change 12,000 square feet (no change) 20 parking spaces
  
4. Parking lots
  - Allowable exemption threshold between 20 – 40 parking spaces
  - Current Code threshold 40 spaces
  - Council recommended change 20 spaces
  
5. Landfills and excavations
  - Allowable exemption threshold between 100 – 500 cubic yards
  - Current Code threshold 500 cubic yards
  - Council recommended change 200 cubic yards

### Recommendation

Staff has presented these because the code update needs to formally adopt these threshold exemptions. In addition, Council's makeup has changed and staff wants to check to see if these threshold levels for a project being exempt from SEPA review are still valid.

## Quasi-judicial public hearing process and open and closed record public hearings

As part of the State's effort to speed up and streamline the permit processes back in the early 2000's, a number of new land development code laws were enacted at the State level which jurisdictions must comply with:

- no more than 1 open record public hearing (testimony, evidence and rebuttal allowed to establish the official record for the decision) and 1 closed record public hearing (no new testimony or evidence is allowed and the decision must be based solely on the official record established in the open record public hearing)
- specific process timelines established
  - Determination of Complete Application must be made within 28-days of application submittal - this starts the review timeline clock
  - a Notice of Application must be issued no later than 14 days after the Determination of Complete Application has been issued – typically published in the newspaper and mailed to 300-foot property owners
  - a final decision must be issued no later than 120 days from Determination of Complete Application
  - a Notice of Decision must be issued after a final decision has been made on the permit.

In response to those new State requirements the City adopted ECC Chapter 1.68 which established administrative processes for land use permits. On the whole those City processes meet the State requirements, although they will need to be updated and clarified during the code update process. However, some of the requirements in ECC 1.68 are either no longer needed or are not clearly addressed in the established application review processes for certain Boards/Commissions.

- there are referenced appeals made to a Hearing Examiner even though we no longer use a Hearing Examiner
- the Landmarks and Design permit review and decision-making process is quasi-judicial in nature because it involves one specific property and is a mandatory decision, but as codified it does not follow the quasi-judicial processes
- there is appeal language that is confusing and inconsistent

### Landmarks and Design Commission

This Commission serves two primary permit processing roles:

- Landmark review for Landmark Register property changes (typically a building permit or a sign permit) which results in mandatory compliance
- Design review of certain size projects that are not Landmark Register properties which results in mandatory compliance.

Because those activities involve a final decision on a single permit application related to a single property they are quasi-judicial decisions and must follow a detailed process to ensure fairness in the decision-making process – notice, comment, open record public hearing with testimony and evidence and rebuttal, and written findings of fact and conclusions of law to support the decision. At this time, the Commission's codified process does not follow a quasi-judicial public hearing process and that needs to be corrected.

### Recommendation

- 1) Consideration should be given whether or not the LDC should be making final decisions or should instead be making recommendations that will then go to the final decision maker. This is particularly true in the LDC's general design review duties. The Code update will include recommendations on much clearer design review requirements which should not require interpretation and it will provide specific deviation criteria to be followed in considering a request to deviate from those design review requirements.

Most jurisdictions that I have reviewed have a recommendatory Design Review Commission that reviews the design, parking lot, landscaping, etc. and then makes recommendation to the decision maker. Typically that decision maker will be the Director who is acting as the Building Official in approving a building permit. The LDC could serve in that recommendatory capacity or a separate body could be established and the LDC could focus on its historic preservation function. Or the design review could be a simple administrative decision that could be appealed.

## Hearing Examiner

The Hearing Examiner process is an alternative decision-making process for permit review utilizing a trained Hearing Examiner (typically an attorney well-versed in land use law and administrative law) to hold the open record public hearing which establishes the official record for the permit review and, in most cases, the Hearing Examiner also makes the final decision based on that record.

Most jurisdictions use a Hearing Examiner rather than rely on appointed citizen bodies, or even elected bodies, to make final decisions on matters that are governed by both legal and process requirements, as well as heavily interpreted through court decisions. For more background SEE **Attachments "C" and "D"** (memo and article from the City's land use attorney, Carol Morris, regarding Hearing Examiners).

The City once used a Hearing Examiner to handle certain design review appeals but found that there were not sufficient appeals to warrant the process.

- Some jurisdictions use the Hearing Examiner for all open record public hearing decisions (quasi-judicial) and as the open record appeal body for decisions that do not involve a public hearing (such as a sign permit decision). The City Council can either then act as a closed record appeal body for those decisions or the appeals can go to Superior Court. **Attachment "E"**
- Some jurisdictions use the Hearing Examiner for all open record public hearings to establish the public record and to make a formal recommendation, and then provide for City Council to hold a closed record hearing to review the record and the recommendation and make a final decision based on that record established by the Hearing Examiner. **Attachment "F"**
- Most jurisdictions have opted to re-organize the Planning Commission functions to perform just long-range planning duties although they often still can make recommendations on quasi-judicial permit applications. Ellensburg still uses the Planning Commission as the final decision-maker for conditional uses and as a recommendatory body for other quasi-judicial actions.

Kittitas County has utilized a Hearing Examiner for several years now with staff, applicants and the public being generally favorable to the results. They have contracted with an attorney from the Wenatchee area who works as a Hearing Examiner for a number of eastern/central Washington jurisdictions and an hourly rate plus travel time is charged. The cost depends on the complexity of the matter being heard.

The County includes the cost of the Hearing Examiner in its fee schedule which, as you can see in **Attachment "G"** has larger fees for most quasi-judicial permit applications than the City's current fee schedule. Because use of the Hearing Examiner does not significantly reduce staff time involved in the permit process, an increase in our fee schedule would likely be warranted to meet the additional cost of a Hearing Examiner.

### Recommendation;

1. Consider whether a Hearing Examiner is something the City should utilize.
2. Provide staff direction as to how to utilize a Hearing Examiner in our system
  - does Council want to remain the open record public hearing and decision-making body or does it want to become the closed record final decision-making body or appellate body?
  - does Council want to shift quasi-judicial public hearings from the various boards/commissions over to a Hearing Examiner?
  - would Council want to consider increasing permit fees to pay for Hearing Examiner services?

## Non-Conforming Uses

Because land use regulations have traditionally been established for communities that were already to some extent developed, there are a number of lots, structures and uses that do not meet the requirements of those land use regulations and are classified as non-conforming uses. They can be:

- a non-conforming use of land such as an industrial use in a residential zoning district
- a non-conforming lot due to size (most of West Ellensburg was platted with 3,000 square foot lots which do not meet zoning lot size requirements – they are, however, allowed to be developed if they can meet the zone’s current setback and coverage requirements
- a non-conforming structure such as an old garage or house that sits within the required side or rear yard setback area.

The traditional approach to non-conforming uses is to make them go away whenever possible. Some can be enlarged and some cannot. Some can be rebuilt within the footprint if destroyed by natural causes and some cannot. Our Code is also particularly confusing in dealing with non-conforming uses.

In dealing with non-conforming uses these past few years I have begun to question the conventional wisdom of trying to get rid of all non-conforming uses as soon as we can. Some non-conforming uses such as a garage or a house in a setback are relatively benign, low-impact realities that have been there forever and that have been gotten used to by the neighbors, whereas others such as an industrial plant in a residential neighborhood are major, high-impact realities.

In a community composed of a large old housing stock, much of which was developed before our zoning, it seems like it would be better for the community to allow people to tear down that old garage/house that is close to falling down and encroaches in the setback area and to rebuild a new garage/house in the footprint that meets current fire and building codes. It may still sit inside the setback, but it will be a much nicer addition to the neighborhood than the existing old, falling down garage. It also makes no sense to have to tell a property owner that, yes if the building were to burn down it could be replaced within its footprint, but no if you choose to demolish the building.

I have attached an article (**Attachment “H”**) that explores this concept a bit. In talking with our code update consultant he is also intrigued by the concept, however in doing research he has yet to find any jurisdiction that has attempted to approach non-conforming uses in this manner. In this code update project we would like to explore options for developing a tiered approach to non-conforming uses that would allow some low-impact types to continue on and even be voluntarily replaced by new structures.

Recommendation: Provide direction on whether Council thinks this different approach to non-conforming uses should be explored or whether the traditional model of getting rid of the non-conforming use as soon as possible should be continued as our approach.

## Shoreline Management Act (SMA)

The SMA governs all “waters of the State” which includes rivers, coastlines, and lakes/streams of some certain size. For the City, the only “water of the State” is the Yakima River. The SMA requires all jurisdictions to adopt regulations for addressing development adjacent to or over “waters of the State.” A Shoreline Master Program (SMP) is the tool that is used and it identifies intensities of uses allowed adjacent to such waters, permitted and conditional uses, and permit process.

Historically, because the only “water of the State” in the City is the stretch of the Yakima River in Irene Rinehart Park, which is a natural park with very limited development activities, the City has opted to not develop a SMP and instead has utilized the County SMP to address proposed activities in that park. Cle Elum and South Cle Elum follow the same practice.

The Department of Ecology is now requiring that all jurisdictions with “waters of the State” must have a SMP that follows recently amended State Guidelines. Ellensburg must have one by the end of 2013. The process for adopting a SMP is very public involvement oriented with a number of specific public hearing requirements and it is very science oriented with a requirement that the shoreline flora and fauna and the water be analyzed to determine its current functions and values and how to improve those functions and values.

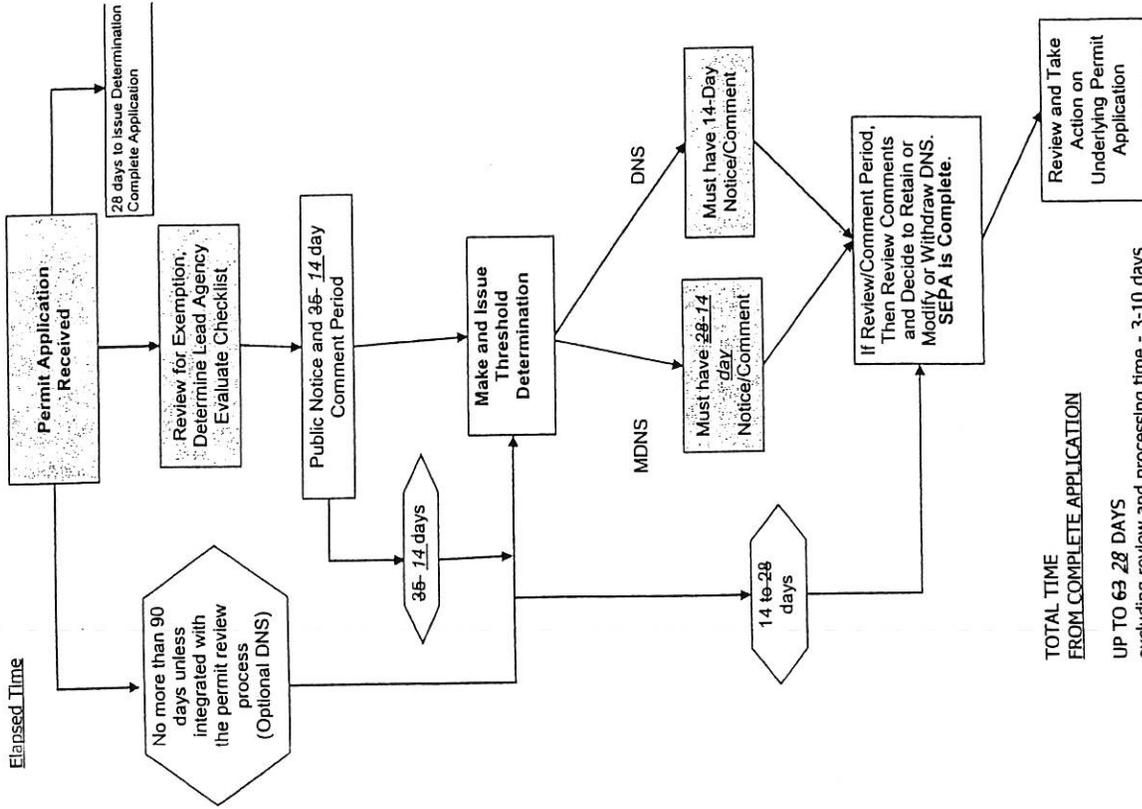
Because we have so little jurisdictional shoreline in the City (just the park) and also now very little jurisdictional shoreline in the UGA (the area extending from the park southeast to approximately level with Tjossem Road which is all either in governmental ownership or environmentally constrained to limit future use intensities, and the KOA campground property at the West Interchange) it would be overly burdensome to City finances and staff time to engage in the development of a Shoreline Master Program. I have been in contact with Ecology and with Kirk Holmes at Kittitas County in an effort to explore the option for the City being included in the County’s SMP update process, perhaps as an appendix to their SMP. The flora and fauna in our jurisdictional shoreline area (the park) is identical to the adjacent areas under County jurisdiction and the science will be the same, so why should we both go to great expense to establish that science.

At this point everyone seems to feel this can be accomplished. The County has hired a consultant to begin its process and I will be working with Kirk to formalize an agreement for the elected bodies to consider. It is unclear, though likely, that the City will need to budget some money for 2012 to offset the costs associated with our piggybacking on the County project. I will update you as things become clearer.

The current code update project will not involve the SMA regulations, but it will in the future.

No Recommendation Needed – Information Only.

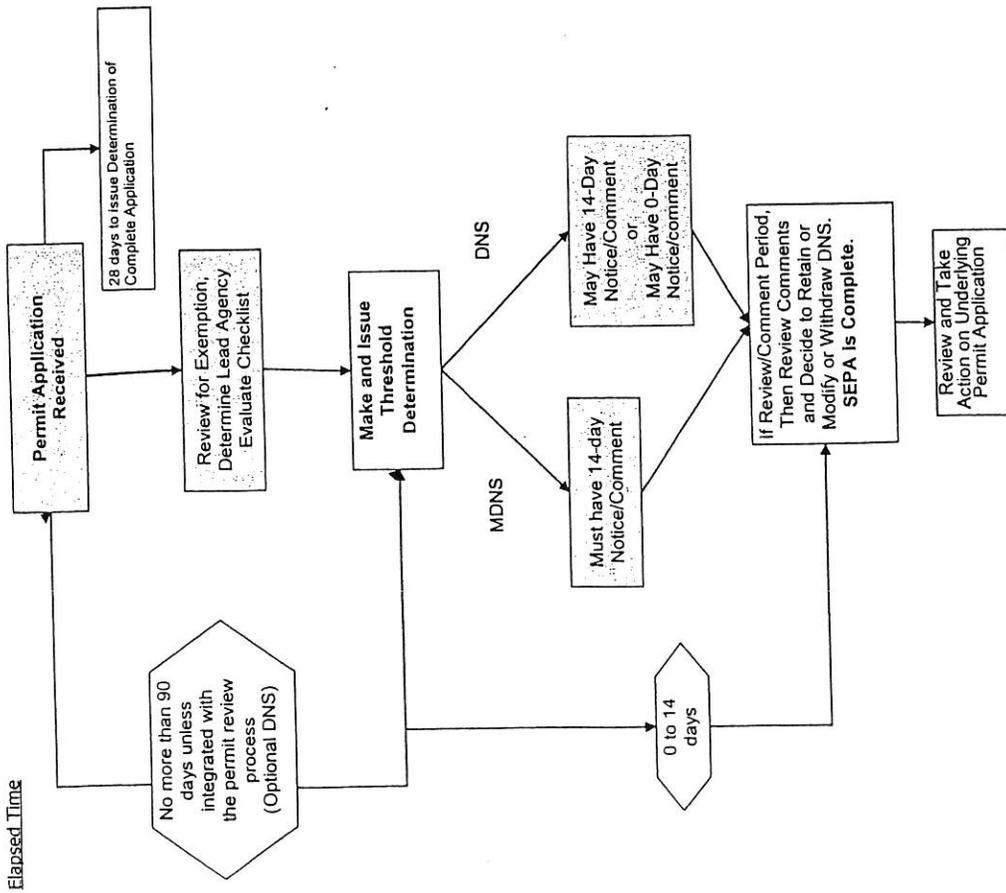
Current City SEPA Process (as changed in 2008)



TOTAL TIME FROM COMPLETE APPLICATION

UP TO 63 28 DAYS excluding review and processing time - 3-10 days excluding response to comments time or request for additional information time

State SEPA Process

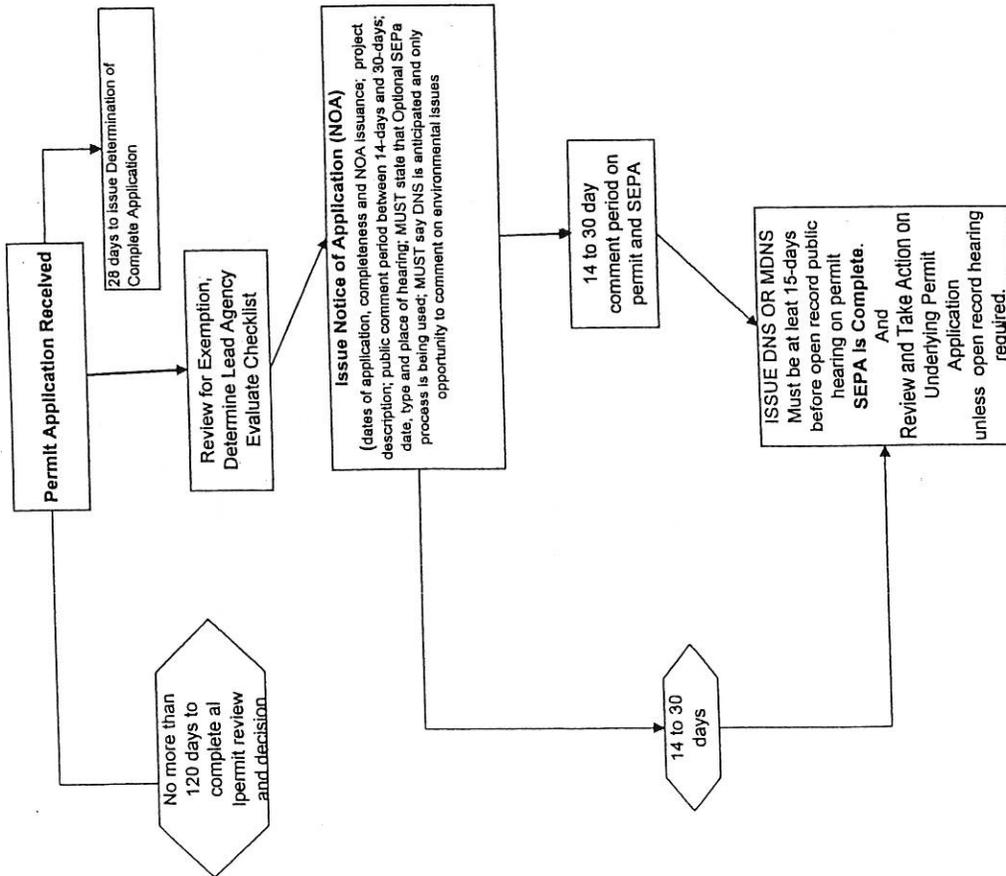


TOTAL TIME FROM COMPLETE APPLICATION

UP TO MAXIMUM OF 14 DAYS excluding review and processing time - 3-10 days excluding response to comments time or request for additional information time

A

State Optional SEPA Process



BR

# Memorandum

To:

From: Carol A. Morris, Law Office of Carol A. Morris, P.C.

Date:

Re: Hearing Examiners

You asked for more information regarding the "land use liability exposure for Hearing Examiner vs. citizen boards." I am an attorney specializing in municipal and land use law. I have worked for many cities as either the city attorney or assistant city attorney, and have been asked to attend many hearings held by hearing examiners, boards of adjustment, planning commissions and city councils. AWC has also asked me to represent a number of cities in the AWC-RMSA pool in land use litigation involving the defense of decisions made by citizen boards. Most of the larger cities have hearing examiners, and I have defended the hearing examiners' decisions in court for larger cities such as Everett and Kent.

I am the city attorney in Gig Harbor, and I recommended to the City Council that a attorney hearing examiner system be instituted for quasi-judicial land use decision-making. I do not recommend hiring an examiner who is not an attorney, because this presents many of the same issues as a citizen board. The City has had an attorney hearing examiner for at least five years now.

The City of Gig Harbor still has a citizen Design Review Board (which makes recommendations on quasi-judicial applications to the hearing examiner) and a Planning Commission (which makes recommendations on legislative decisions to the City Council). The reasons for my recommendation to the Gig Harbor City Council (and to any other cities considering the change) for a change to an attorney hearing examiner are:

1. The law is complicated. As you know, the City's processing of permit applications involves consideration of many different laws, including but not limited to the Growth Management Act (ch. 36.70A RCW), the Regulatory Reform Act (ch. 36.70B RCW), SEPA (ch. 43.21C RCW), the Shoreline Management Act (ch. 90.48 RCW), and the Subdivision Act (ch. 58.17 RCW). While these laws are reflected in the City's codes, the planners/decision-makers still must have a comprehensive understanding of how these laws interface to make correct decisions. In addition, the planners/decision-makers must also be familiar with land use case law (as it is

C

decided by the Washington courts) and constitutional law, which is continually changing. For example, planners and decisionmakers must be familiar with the vested rights doctrine and its nuances, yet it is not usually addressed in the city or county's codes.

Two additional issues that frequently arise in the review of land use applications are "takings" and substantive due process, in the context of fashioning permit conditions. I am attaching a copy of *Burton v. Clark County*, 91 Wn. App. 505 (1998), which provides a description of the tests that municipalities must use to determine whether the conditions imposed on a permit are valid. This test is lengthy and complex, so it is likely that any citizen board attempting to follow the law must rely heavily on the assistance of an attorney.

2. The courts will not apply a lesser standard of review to the land use decision, merely because it is written by a citizen board. Keep in mind that the courts have held that administrative land use decisions must meet a high standard to be upheld. "Findings of fact by an administrative agency are subject to the same requirements as finding of fact drawn by a trial court." *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 498 (1994). The reason for this is simple – the trial court reviews the administrative record compiled by the city or county, and with few exceptions, makes a decision without taking any new evidence or testimony. RCW 36.70C.120. In addition, the court is not allowed to substitute its judgment for the administrative agency on factual matters, but must "view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority." *Hilltop Terrace Homeowners' Assn. v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995).

Therefore, if there is insufficient evidence in the administrative record to support the land use decision, the trial court may reverse the decision and remand it to the city or county for further proceedings. See, *Citizens for Responsible and Organized Planning*, 105 Wn. App. 753, 21 P.3d 265 (2001) (commissioners adopted findings and conclusions prepared by planning staff which did not address the central question in dispute, nor did the findings specify any reasons for the conclusions, so the court reversed and remanded the decision.) As you know, a reversal and remand (requiring the city or county to re-hear the matter) can be very costly and time consuming.

3. Appeals of land use decisions are frequently accompanied by damage claims. The city or county has exposure to damage claims for failure to issue timely final decisions (RCW 64.40.020). I have heard more complaints about untimely processing by boards and commissions than hearing examiners. This is usually because a hearing examiner is paid, and will schedule additional hearings as needed to ensure that the decision timely issues.

The city or county has exposure to damage claims (and attorneys' fees incurred by the developer) for arbitrary, capricious, illegal or unconstitutional decision-making/acts. Most boards and commissions do not understand the tests used by courts to determine whether the board's action is arbitrary or capricious. Unless the board members are attorneys, they are not likely to know whether or not their actions are legal or constitutional. More and more land use decisions are appealed as developable land becomes scarce. Litigation becomes more frequent when the applicable law is complex. A developer may allege significant damages in a land use appeal because of construction delays, with the resulting increase in project costs. As a result, many cities hire attorney hearing examiners to reduce their liability exposure to a large damage claim and attorneys' fees.

In some instances, a developer will file a lawsuit requesting damages for the city or county's actions and sue the individual decisionmakers personally for damages. *Mission Springs v. Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998). The lawsuits against the individual decisionmakers (or city/county staff) may sometimes be filed just to place pressure on the individuals to settle the case in the developer's favor. There are several reported decisions involving damage lawsuits against individual decisionmakers and I have handled more than a few. It is rare for a developer to file a lawsuit for damages against a hearing examiner personally.

Most importantly, if the citizen decisionmakers simply do not understand the law, and render a decision inconsistent with law, their decisions can result in the imposition of large damage claims against the city/county. There is less risk that an attorney hearing examiner will issue a decision inconsistent with law.

4. With a hearing examiner, there is less likelihood that the city attorney needs to give advice on the conduct of the hearing or that the city attorney needs to "police" the administrative board. As I am sure you are aware, some board members holding a hearing on a quasi-judicial land use application may decide to simply ignore the legal advice of the city attorney. See, *Mission Springs v. Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998). For example, board members may ignore appearance of fairness challenges and advice from the city attorney that they should not participate in the appeal. While the remedy for an appearance of fairness violation is invalidation of the decision and not damages, re-hearing a complicated application involving many continued hearings can be very time consuming and costly for the city/county.

5. The City Council can still participate in local decision-making. One complaint city councils have with the hearing examiner system is that the examiner will not be as receptive to citizen concerns as the council itself. However, a hearing examiner cannot approve or deny a project based on public sentiment. The hearing examiner must analyze the facts with regard to the city's codes in making a quasi-judicial decision, and decide what weight to give witness testimony. This is done at the

open public hearing stage. The examiner may issue a recommendation to the council, which would allow the council to determine whether or not the examiner's recommendation was supported by substantial evidence on the record (or other appropriate standard of review). The council could then hear appeal argument (no new testimony) during a closed record hearing.

In the alternative, the examiner could make the final decision, and any appeals could be heard by the council in a closed record hearing. Another alternative would be for the examiner to make the final decision, and adopt a reconsideration procedure that would allow the council (or anyone else) to ask for reconsideration for minor issues without a hearing prior to a judicial appeal.

These alternatives (council final decision, council decision on appeal or council ability to request reconsideration) allow the council to be involved in the land use decision-making process by reviewing the examiner's written decision. Hopefully, the attorney hearing examiner will have identified all of the legal issues in his/her written decision, and the city attorney can provide any additional legal assistance.

I hope that the above has provided you with the necessary information. Please give me a call if you have any additional questions. Thank you.

## ABOUT LAND USE

# Should our city change to a hearing examiner system?

By Carol A. Morris of Morris & Taraday, P.C.

In many cities, quasi-judicial land use project permit applications (conditional use permits, variances, preliminary plats, site specific rezones, etc.) are first given an open record hearing before the planning commission or board of adjustment. A final decision is made by the board, and any appeals are handled by the city council in a closed record hearing. Or, if the board makes a recommendation instead of a final decision, the city council considers it in the closed record hearing and makes the final decision.

However, many cities have opted for a hearing examiner system, which allows a hearing examiner (usually an attorney) to hold the open record hearing on the quasi-judicial land use application. The hearing examiner's decision may take the form of either a recommendation to the city council or a final decision. If the examiner has made a recommendation, the city council will hold a closed record hearing and then render the final decision. Or, if the examiner has made the final decision, there may be a procedure allowing for reconsideration of the examiner's decision and/or a closed record appeal hearing before the city council.

There are many reasons to consider switching from a citizen board (like the planning commission or board of adjustment) to a hearing examiner system for quasi-judicial project permit applications.

## Understanding complicated laws

1. Most planning commissions/boards of adjustment do not understand complicated land use laws. The city's processing of permit applications involves consideration and integration of many different laws, including but not limited to the Growth Management Act (ch. 36.70A RCW), the Regulatory Reform Act (ch. 36.70B RCW), the State Environmental Policy Act (SEPA) (ch. 43.21C RCW), critical areas regulations, the Shoreline Management Act (ch. 90.48 RCW), the Subdivision Act (ch. 58.17 RCW), as well as federal/state

constitutional provisions. Not all of these are reflected in the city's codes. For example, your code may address the issue whether or not a particular application is subject to the vested rights doctrine, but most codes do not describe how the doctrine works. Codes do not describe how to fashion individual conditions on permits to address environmental impacts. Therefore, the decision-makers must have a comprehensive understanding of these laws in order to make correct decisions. To make things even more complicated, these laws are constantly changing. Many cities are able to rely upon their city attorneys to guide the process, but in too many financially strapped cities, the planning commission, board of adjustment and city council make decisions on land use applications with minimal legal advice. An attorney hearing examiner should be aware of the latest court decisions affecting land use/zoning, and be able to draft a decision that will be upheld on appeal.

## Lesser standard may not apply

2. The courts will not apply a lesser standard of review to the land use decision, merely because it is written by a citizen board. The courts have established a high standard for administrative land use decision-making. In one case, the court held that: "findings of fact by an administrative agency are subject to the same requirements as finding of fact drawn by a trial court." Statements of the positions of the parties and a summary of the evidence presented, with findings which consist of general conclusions drawn from "indefinite, uncertain undeterminative narration of general conditions and events" are not adequate." In many instances, the courts have reversed and remanded (sent back) the final decision of the municipality due to poorly written findings of fact and conclusions of law. Usually, an attorney hearing examiner will have more experience and knowledge to be able to draft findings of fact and conclusions of law that can be successfully upheld on appeal.

## Appeals and damage claims

3. Appeals of land use decisions are frequently accompanied by damage claims. While all cities must meet deadlines for SEPA threshold decisions and final decisions on subdivisions, those cities planning under GMA are also required to establish deadlines for processing other types of permits. It usually takes longer to process an application before a board because of scheduling — the board may only meet once a month, there may be a lack of a quorum for vacations, recusals, etc., or the board may simply take more time to review each application (causing a backlog). Significant exposure to liability may arise from even minor delays in permit processing. A hearing examiner may be more flexible in his/her schedule, because a hearing examiner is paid, and will usually schedule additional hearings as needed to ensure that the decision timely issues.

In addition, the city, staff and the individual decision-makers have exposure to liability for land use decision-making. There are several state and federal statutes that allow claims to be brought against the city and/or individual decision-makers for arbitrary, capricious, illegal or unconstitutional actions. Most boards and commissions do not understand the tests used by courts to determine validity or constitutionality of the board's action/decisions. Action on the least complicated permit application may result in an appeal involving enormous damages claims due to construction delays, the resulting increase in project costs and attorneys' fees. A hearing examiner who is an experienced land use attorney should be able to avoid many of the common mistakes made by boards and commissions.

Furthermore, some property owners file lawsuits against the individual decision-makers (and their spouses) just to place pressure on the individuals, believing that the city will be more likely to settle the case in the developer's favor. This tactic may or may not

succeed, but it could also have a chilling effect on the willingness of citizens to serve on the planning commission or board of adjustment. On the other hand, it is rare for a developer to file a lawsuit for damages against a hearing examiner personally.

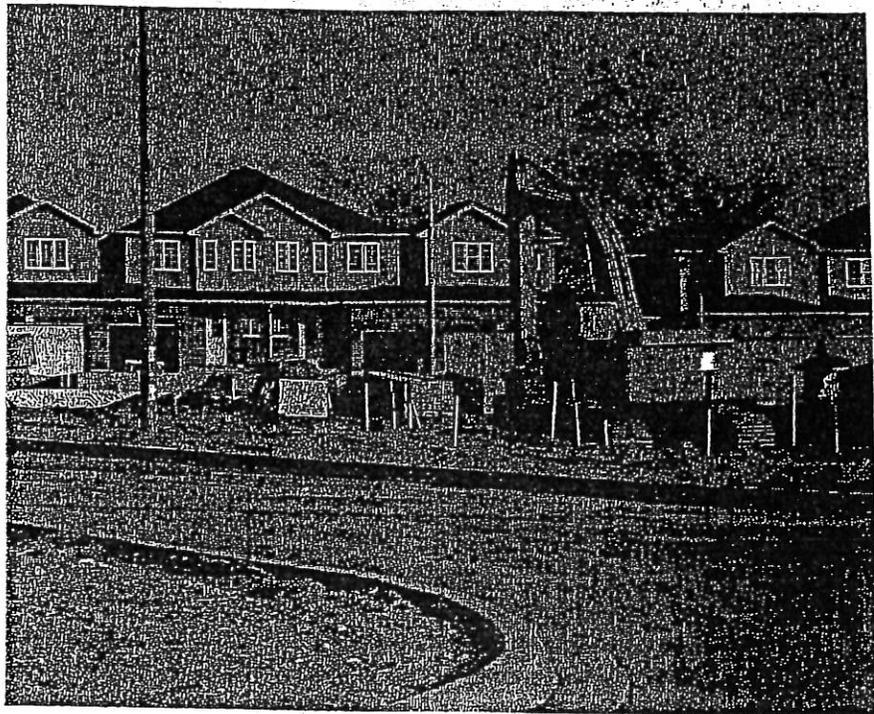
## Appearance of fairness

4. With an attorney hearing examiner, there is less likelihood of appearance of fairness problems. Most small cities have planning commissions, boards of adjustment and city councils charged with the responsibility to make decisions on permit applications submitted by their relatives, friends and business associates. Sometimes, these boards may not seek or decide to simply ignore, the legal advice of the city attorney on appearance of fairness issues that arise during the hearing. Or, due to inexperience, they may simply make procedural mistakes. While the remedy for an appearance of fairness violation is invalidation of the decision and not damages, the city may still incur significant expense with an appeal and remand - after all, the entire process must be repeated. An attorney hearing examiner usually will not encounter the types of appearance of fairness challenges that are met by a board of citizens from the community, and should have the experience and knowledge to observe the appearance of fairness doctrine and correct hearing procedure.

## City council involvement

5. Use of the hearing examiner system does not mean the city council no longer has a say in local decision-making. One reason city councils may give in opposition to the hearing examiner system is the anticipated lack of receptivity the examiner will have to citizen concerns. However, no decision-maker, whether it is a hearing examiner, planning commission, board of adjustment or city council, can approve or deny a project permit application based on public sentiment. All decision-makers must analyze the facts with regard to the city's codes when making quasi-judicial decisions, and apply the facts to the law (the criteria for approval of the permit).

Keep in mind that with the hearing examiner system, the council may still opt for



a procedure that allows them to make the final decision (on the permit or on any appeal). While the council usually doesn't accept new evidence during a closed record hearing or appeal, it may still correct the examiner's decision. However, if the examiner is an attorney, it is less likely that the examiner will make an error of law/procedure, act unconstitutionally, or issue a decision that is not based on substantial evidence in the record.

## Saving money

6. The hearing examiner system may be more expensive than a citizen board, but costs will likely be reduced because of fewer appeals and damage claims. The planning commission and board of adjustment are comprised of volunteers, and their time is donated to the city. An attorney hearing examiner is not free, and usually bills hourly. However, hiring a hearing examiner with experience usually is less expensive to the city overall, considering reduced demands on staff and the city attorney. A hearing examiner should act professionally and impartially, treating everyone with courtesy and respect - thereby reducing misunderstandings that may occur when the applicant is personally known to the citizen board. If the hearing examiner is an attorney who is knowledgeable on land use law, his/her decisions will be less likely to be appealed or to expose the city to liability.

### FOOTNOTES :

For those cities required to plan under RCW 36.70A.040 (GMA), only one open record hearing may be held on a project permit

application. No more than one closed record hearing (or appeal) may be held after the open record hearing. RCW 36.70B.060(6).

The authorization for a hearing examiner system is in RCW 35.63.130 and RCW 35A.63.170.

*Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 498 (1994).

*Id.*

*Citizens for Responsible and Organized Planning v. Chelan County*, 105 Wn.App. 753, 21 P.3d 265 (2001) (commissioners adopted findings and conclusions prepared by planning staff which did not address the central question in dispute, nor did the findings specify any reasons for the conclusions, so the court reversed and remanded the decision); *Levine v. Jefferson County*, 116 Wn.2d 575, 807 P.2d 363 (1991).

However, in the case cited for the standard to be applied to administrative decisions, the court found that the decision of the county's hearing examiner was inadequate. *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 498 (1994).

See, RCW 36.70B.080, which requires cities planning under RCW 36.70A.040(GMA) to include a deadline for issuance of a final decision in their codes (usually 120 days). Otherwise, all cities are required to follow state law in issuance final decisions for short plats, final plats and preliminary plats. RCW 58.17.140.

See, *Mission Springs v. Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998) (delay of three weeks for grading permit issuance after council

*Continued on page 12...*

# Managing Your Risk



Association of Washington Cities  
Risk Management Service Agency  
1076 Franklin Street SE  
Olympia, WA 98501-1346

## Hearing examiner Continued from page 9...

ordered traffic study to be prepared).

See, *Westmark v. Burien*, 140 Wn. App. 540, 166 P.3d 813 (2007) (over ten million dollars in damages awarded against city under several claims, including a three year delay in the issuance of a SEPA threshold decision, several city employees and city attorney sued personally in separate federal court action).

RCW 64.40.020; 42 U.S.C. Sec. 1983, 1988.

In the *Mission Springs* case, the city, individual council members and city officials were sued personally because of their decision to withhold a grading permit until a traffic study was performed.

See, *Mission Springs v. Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998).

*Maranatha Mining v. Pierce County*, 59 Wn. App. 795, 801 P.2d 985 (1990).

Usually for the reasons set forth in RCW 36.70C.130(1).

1/5/68\*\*\*\*\*AUTO\*\*5-DIGIT 98926  
JAMES PIDDUCK  
ATTORNEY  
CITY OF ELLENSBURG  
501 N. ANDERSON ST.  
ELLENSBURG WA 98926-3147

---

## The Personnel Hotline 1-800-427-6058

Personnel Questions? Call the toll-free personnel hotline: 1-800-427-6058, Eileen Lawrence at the Law Offices of Davis, Grimm, Payne and Marra.

## The Land-Use Hotline 1-877-284-9870

The Land-Use Hotline provides a legal opinion on standard, pre-litigation issues or concerns relating to land use matters. Call: 1-877-284-9870. Law Office of Morris & Taraday.

---

## Your RMSA staff

Gayla Gjertsen, Director for Insurance Services –  
Gayla provides oversight of the RMSA program.

Linda Triplett, Associate Director/Finance Manager of Insurance Services –  
Linda manages all of the financial functions of the RMSA.

Janice Howard, Program Coordinator/Claims Manager –  
Janice manages all of the claims and daily program functions. Contact Janice for inquiries regarding liability and large property claims, coverage questions, assessment rates, membership, etc.

Keziah Apuzen, Insurance Services Claims Analyst –  
Keziah handles property claims and inquiries regarding claim reporting, quotes, member handbook, new member application, and website content.

Caitlin Magee, Insurance Services Admin. Assistant –  
Caitlin assists in providing loss control services and handles inquiries regarding trainings, property additions and deletions, coverage letters, notary bonds, special events liability coverage, vehicle accident packets, and sewer loss cards.

Laura Langston, Insurance Services Admin. Assistant –  
Laura maintains the RMSA video loan library.

---

## To contact RMSA

Toll Free: 1-800-562-8981  
Phone: 360-753-4137  
Fax: 360-753-0148  
Email: (firstnamelastinitial)@awcnet.org  
Web: [www.awcnet.org](http://www.awcnet.org)

PRESORT  
STANDARD  
US POSTAGE  
PAID  
OLYMPIA, WA  
PERMIT #201

17.07.030 Project permit application framework.

ACTION TYPE

PROCEDURE PROJECT PERMIT APPLICATIONS (TYPE I - IV) LEGISLATIVE					
	TYPE I	TYPE II	TYPE III	TYPE IV	TYPE V
Final Decision made by:	Director	Director	Hearing Examiner	City Council	City Council
Recommendation made by:	N/A	N/A	N/A	N/A	Planning Commission
Notice of Application:	No	Yes	Yes	No	No
Open Record Public Hearing:	No	Only if appealed, open record hearing before Hearing Examiner	Yes, before Hearing Examiner to render final decision	No	Yes, before Plng. Comm. to make recommendation to Council
Closed Record Appeal/Final Decision:	No	No	Only if appealed, then before Council, unless site specific zoning map amendments, then before Council on ordinance adoption	Yes, before Council to render final decision	Yes, or Council could hold its own hearing
Judicial Appeal:	Yes	Yes	Yes	Yes	Yes

DECISIONS

TYPE I	TYPE II	TYPE III	TYPE IV	TYPE V
Boundary Line Adjustments Home Occupation Permits Home Industry Permits Temporary Use Permits	Short Plats Shoreline Development Permits Binding Site Plans Minor Modifications Subdivisions Administrative Interpretation Conditional Use Permit - Administrative Approval	Conditional Use Permits - Hearing Examiner Approval Shoreline CUPs Shoreline Variances Site Specific Zoning Map Amendment Subdivisions - Preliminary Special Use Permits Variances Major Modifications Subdivisions	Subdivisions Final	Zoning Code Amendments Development Regulations Amendments Area-Wide Zoning Map Amendments Comprehensive Plan Amendments Annexations Right-of-Way Vacations

(Ord. 164 § 2, 1996; Ord. 143 § 1, 1996)

E

A. Type I Project Permits. These are administrative decisions by the director who may approve, conditionally approve or deny the application. They include permits categorically exempt from SEPA review or that have had SEPA review completed in connection with another application or permit. Type I project permit processing procedures are set forth in Table 20.02.040.

**Type I Director Decisions**

	<b>Application Type</b>	<b>Determination of Completeness</b>	<b>Notice of Application</b>	<b>Hearing and Notice of Hearing</b>	<b>Notice of Decision</b>
1	Administrative determination/code interpretation	No	No	No	No
2	Field variance of setback approval	No	No	No	No
3	Building and other construction permits (no SEPA or design review required)	Yes	No	No	No
4	Demolition permit (exempt from SEPA)	No	No	No	No
5	Fill and grading permit (exempt from SEPA)	No	No	No	No
6	Landscaping or alternative landscaping plan	No	No	No	No
7	Nonconforming use determinations	No	No	No	No
8	Sign permit	No	No	No	No
9	Final short plat	No	No	No	No
10	Design review	No	No	No	Yes

F



C. Type III Project Permit. These are hearing examiner decisions. The hearing examiner may approve, conditionally approve, or deny the application. Type III project permit processing procedures are set forth in Table 20.02.040.

**Type III Hearing Examiner Decisions**

	<b>Application Type</b>	<b>Determination of Completeness</b>	<b>Notice of Application</b>	<b>Hearing and Notice of Hearing</b>	<b>Notice of Decision</b>
1	Special use permit	Yes	Yes	Yes	Yes
2	Variance	Yes	Yes	Yes	Yes

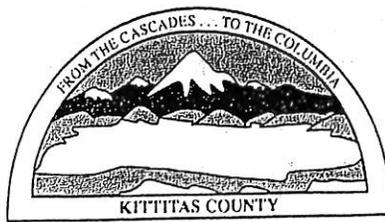
D. Type IV Project Permit. These are decisions by the city council after a closed-record hearing. The city council may approve, conditionally approve, modify and approve or deny the application. Type IV project permit processing procedures are set forth in Table 20.02.040.

**Type IV City Council Decisions**

	<b>Application Type</b>	<b>Determination of Completeness</b>	<b>Notice of Application</b>	<b>Hearing and Notice of Hearing</b>	<b>Notice of Decision</b>
1	Rezone for site-specific property*	Yes	Yes	Yes	Yes
2	Development agreement	Yes	No	No	No
3	Text or map amendment to the comprehensive plan	No	No	Yes	Yes
4	Text or map amendment to the zoning ordinance	No	No	Yes	Yes
5	Vacation of street	Yes	No	Yes	Yes
6	Vacation of subdivision	Yes	Yes	Yes	Yes
7	Preliminary binding site plan	Yes	Yes	Yes	Yes
8	Preliminary subdivision plat	Yes	Yes	Yes	Yes
9	Preliminary PUD	Yes	Yes	Yes	Yes
10	Final subdivision**	No	No	No	No
11	Final PUD**	No	No	No	No
12	Final binding site plan**	No	No	No	No
13	Major subdivision and PUD amendments	No	No	No	No

\* The planning commission holds the open-record hearing and provides a recommendation to the city council.

\*\* A final subdivision, PUD and binding site plan will be decided at an open public meeting; a public hearing was conducted during the preliminary phase and is not required for final approval.



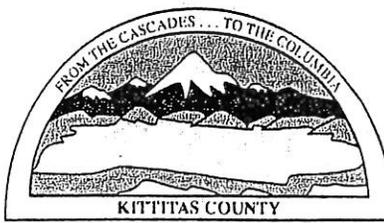
## Kittitas County Community Development Services Permit and Publication Fee Schedule As of May 19, 2010

<u>Permits</u>	<u>Base Fee<sup>1</sup></u>	
Short Plat .....	\$715.00	
Conditional Use .....	\$1565.00	
Long Plat.....	\$3335.00	
Plat Amendment .....	\$1670.00	
Plat Extension .....	\$255.00	
Binding Site Plan .....	\$3335.00	
Binding Site Plan Amendment .....	\$1670.00	
Shoreline Permits.....	\$1560.00	
Variances (hearing).....	\$1560.00	Ellensburg 500 SP 346 cup 1200 Plat-long
Administrative Variance .....	\$640.00	
Shoreline Structural Setback Variance .....	\$1520.00	
Rezoning.....	\$3335.00	500-Variance
SEPA .....	\$490.00	1200 Rezoning 800 SEPA
Administrative Segregations.....	\$660.00	
Boundary Line Adjustments .....	\$225.00	300 BLA
MPO Segregation.....	\$50.00	
Combination of Parcels.....	\$50.00	- <del>Combination</del>
Critical Area Review .....	\$50.00	- <del>CA Rev.</del>
Flood Permit .....	\$180.00	
Wind Farm Siting Pre Identified Areas .....	\$4420.00	
Large Lot.....	\$715.00	
Public Facilities .....	\$750.00	
Sign Permit .....	\$90.00	- 35, 50-elect. Sign Permit
Administrative Use .....	\$1000.00	
Parcel History .....	\$125.00	
Current Use Open Space Application.....	\$470.00	

Amendment to any land use approval is 50% of normal application fee in place at the time of amendment request.

<sup>1</sup> Listed fees represent the typical amount expended for review and processing, based on historical averages. It is the only fee charged for most applications, except those that are exceptional in scale and/or complexity. Applications that are exceptional in scale or complex will be determined at a pre-application meeting and will require a staffing/development agreement to be executed. "Base fee" and "actual expenses" include costs for staff, consultants, hearing examiner, advertising, communications, postage and public notice expenses when those costs exceed the base (minimum) fee. Time is computed in increments not less than one-half hour. Expenses are payable prior to hearing (legislative and quasi-judicial) or final action (administrative). A final billing will include advertising and hearing examiner expenses.

G



**Kittitas County Community Development Services**  
**Permit and Publication Fee Schedule**  
 As of May 19, 2010

Permits

Fee

Appeals

SEPA Appeals .....	\$500.00	
Administrative Appeals .....	\$500.00	- \$425 Admin Appeal

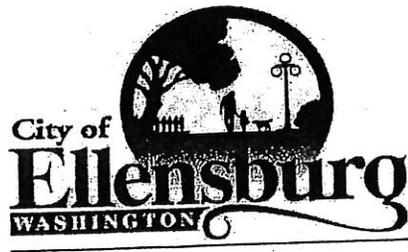
Publications and Maps

Comprehensive Plan .....	\$25.00	
Subdivision Code .....	\$4.35	
Zoning Code .....	\$10.20	- \$7 Zon. Cd
Zoning Atlas .....	\$7.35	- <del>\$5</del> "map"
KCC 15.04 (SEPA) .....	\$1.65	
KCC 15A .....	\$2.25	
KCC 15B .....	\$0.75	
County-Wide Planning Policies .....	\$4.35	
Shoreline Master Program .....	\$12.00	
KCC 14.08 (Flood) .....	\$1.50	
Critical Areas .....	\$3.50	
Comprehensive Plan & Zoning Maps .....	\$15.00	- Comp Plan \$20 Zoning Map \$5

Copies 15¢ each

Comprehensive Plan Amendments

Comprehensive Plan Text Amendment .....	\$2140.00
Comprehensive Plan / Map Amendment .....	\$2140.00



DEPARTMENT OF COMMUNITY DEVELOPMENT  
501 North Anderson Street  
Ellensburg WA 98926

FEES & CHARGES

Administrative Appeal	\$ 425
Boundary Line Adjust	\$ 300
Comprehensive Plan	\$ 20
Conditional Use	\$ 346
Copies (per sheet)	\$ .15
Design Review - Major	\$ 200
Home Occupation	\$ 65
Pre-App Review	\$ 500
PUD - Preliminary	\$ 600
PUD - Final	\$ 600
SEPA Checklist	\$ 800
Deferral Pub. Imp Req.	\$ 100
Short Plat	\$ 500
Special Use Permit	\$ 200
Subdivision - Major	\$ 1200
Variance	\$ 500
Zone Change	\$ 1200
Zoning Map	\$ 5
Zoning Ordinance	\$ 7

# ZONING PRACTICE

NOVEMBER 2009

AMERICAN PLANNING ASSOCIATION



Ⓢ ISSUE NUMBER 11

## PRACTICE NONCONFORMITIES

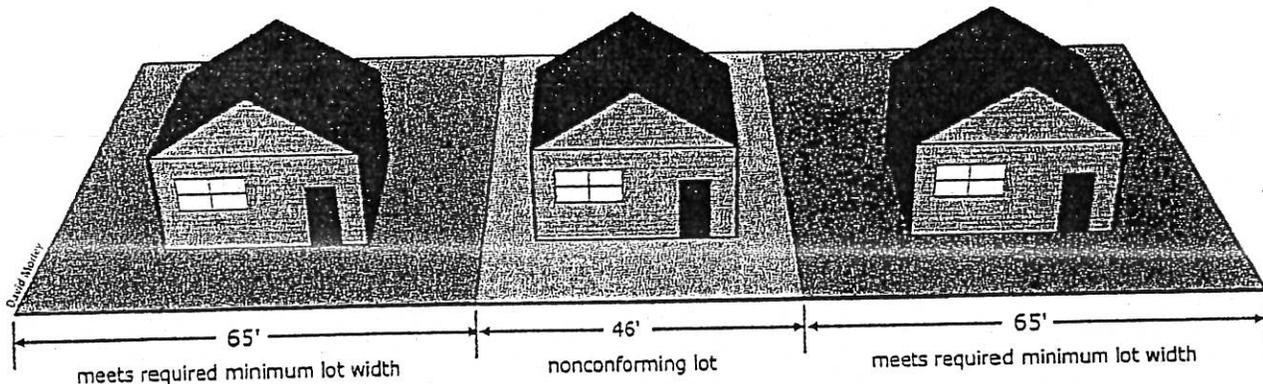


H

# Distinguishing Between Detrimental and Benign Nonconformities

By V. Gail Easley, FAICP, and David A. Theriaque

Local governments routinely adopt new or revised zoning regulations to establish minimum standards for the use of land and standards for development on the land.



⊕ A nonconforming lot does not comply with current dimensional standards such as minimum area, width, depth, or frontage.

With the adoption of new standards for use and development, many existing uses, structures, site design features, and lots may no longer meet the current standards.

The concept of nonconformities arises from adopting new codes for areas that already have some development, which is the case for almost every jurisdiction in the country. When land is used for activities that are no longer permissible under the zoning regulations, the local government typically allows the pre-existing use to continue if it was permissible when it was first established. Likewise, when development is in place and the provisions of the zoning regulations render the lot or one or more site design features out of compliance with current standards, the local government typically "grandfathers" the development if it was in compliance when first established. Grandfathering is another word used to describe nonconformities, which means the local government is granting legal status to the use or development, but with limitations.

An existing use or development that was not in compliance when a local government enacts new regulations is not eligible for grandfathered status. Indeed, each claim of grandfathered status must meet this threshold question: Was the use or development in compliance with the existing regulations? If not, such use or development is not entitled to any protection from the new regulations. Rather, it is subject to code enforcement proceedings to bring it into compliance with the newly adopted regulations.

This issue of *Zoning Practice* addresses legal nonconformities of use and development standards, but does not address signs. There are many issues pertaining to signs, including First Amendment rights, which are too complex to include in this article. Code enforcement of unlawful uses is also a topic for another issue.

## WHY DO LOCAL GOVERNMENTS GRANDFATHER USES AND STRUCTURES?

When zoning was in its infancy, planners expected that there would be few nonconformi-

ties and those that existed would naturally go away over time. Because of the nonconformities' protected status as grandfathered uses, however, they continued to prosper due to the prohibition on other such uses in that zoning district. In essence, such nonconforming uses were provided with monopolies.

Additionally, zoning was perceived as a prospective matter that would not apply to uses which were already in existence. Moreover, in light of the uncertainty regarding whether the courts would uphold zoning regulations, any attempt to apply the new zoning regulations to existing uses and development was perceived as increasing the likelihood that a court would invalidate such regulations. Allowing nonconformities to continue also reduced the amount of public opposition to the concept of zoning regulations.

These concerns hold true today. From a public policy perspective, local governments are rightfully concerned about the public outcry that would occur if grandfathered status was not applied to existing uses and development. Imagine

## ASK THE AUTHOR JOIN US ONLINE!

Go online from November 30 to December 11 to participate in our "Ask the Author" forum, an interactive feature of *Zoning Practice*. V. Gail Easley, FAICP, and David Theriaque will be available to answer questions about this article. Go to the APA website at [www.planning.org](http://www.planning.org) and follow the links to the Ask the Author section. From there, just submit your questions about the article using the e-mail link. The author will reply, and *Zoning Practice* will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of *Zoning Practice* at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA *Zoning Practice* web pages.

### About the Authors

V. Gail Easley, FAICP, is an adjunct lecturer in the urban and regional planning program at the University of Florida. In her work as a local government and consulting planner, she has provided services to local, regional, and state governments for 30 years, including growth management, comprehensive planning, and the creation of award-winning land development regulations in unified codes and individual ordinances. She frequently provides training in seminars, conferences, and publications, and is the author of previous *Zoning Practice* articles.

David Theriaque is an attorney representing private sector and governmental clients regarding land-use planning and growth management law at the state and federal levels. He has been an adjunct professor at Florida State University Department of Urban and Regional Planning and is a frequent lecturer at various conferences on planning and growth management issues. He is a charter life member of the Florida Wildlife Federation and was selected by 1000 Friends of Florida as a "Special Friend of Florida."

the uproar that would occur if all existing nonconforming uses were required to cease immediately upon the adoption of new zoning regulations.

Similarly, even though the concept of zoning is well established in the court system, the courts protect existing uses and development from immediate compliance with the adoption of new zoning regulations through various legal doctrines such as takings law, vested rights, and concepts of equity and justice.

Despite these good reasons to allow nonconformities to continue, nonconformities often undermine what a community is seeking to achieve when it establishes specific allowable uses and development standards for a zoning district. Therefore, it is important to determine the best way to eliminate, reduce, or continue nonconforming situations.

### UNDERSTANDING THE JARGON

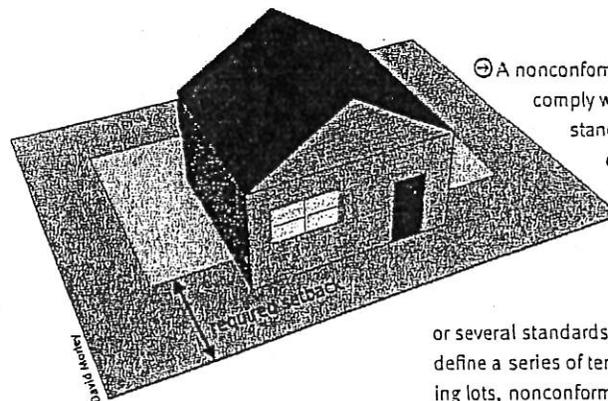
In order to be clear about the concepts, a few terms pertaining to nonconformities are explained here:

**Nonconforming use.** Use means the activity carried out on the land. When a use is nonconforming, it means that the existing use is not authorized for the zoning district in which it is located. However, even when the use is nonconforming, the structure housing the use is not necessarily nonconforming. In fact, there may be no structures involved at all. For example, a field in an agricultural zone might be used for parking although parking is not an authorized principle use.

A review of the Planning Advisory Service Report 521/522, *A Planners Dictionary*, reveals that many local governments include structures, lots, and site design features within the definition of nonconforming use. However, we make a clear distinction between use and site design or development standards when

accessory structures, such as dumpsters, pools, pool enclosures, sheds, recreational facilities, or greenhouses.

When new design standards are adopted to govern the location, height, dimensions, number, or other design requirements, existing development may no longer conform to one



applying the term *nonconformity*. We believe it is important to distinguish between the activity (use) and the design standards that apply to buildings, structures, site features, and lots.

**Nonconforming development standards.** Site development standards pertain to:

- lots, meaning the area or dimensions;
- structures, primarily the principal building(s) on a site;
- required design features, such as parking lots, loading areas, or stormwater facilities; and

or several standards. Local governments often define a series of terms, such as nonconforming lots, nonconforming parking, nonconforming dimensional requirements, and so forth. The key factor is that all such nonconformities pertain to development or design standards, as distinguished from use.

**Detrimental nonconformities.** Many people believe that nonconformities are inherently detrimental or cause harm in some way. However, based on our experiences and discussions with practitioners over the last several years, it seems clear that nonconformities may or may not be detrimental. Consequently, we believe that nonconformities should be separated into two categories—"detrimental" and "benign."

Detrimental nonconformities are those that have a negative impact on the health and safety of the public. Examples include uses involving hazardous materials, such as gasoline stations in single-family neighborhoods; uses that produce significant noise, such as body shops or paint shops; uses that have been deemed incompatible, such as adult entertainment establishments near schools; or uses that have large trip generation characteristics, such as drive-through restaurants.

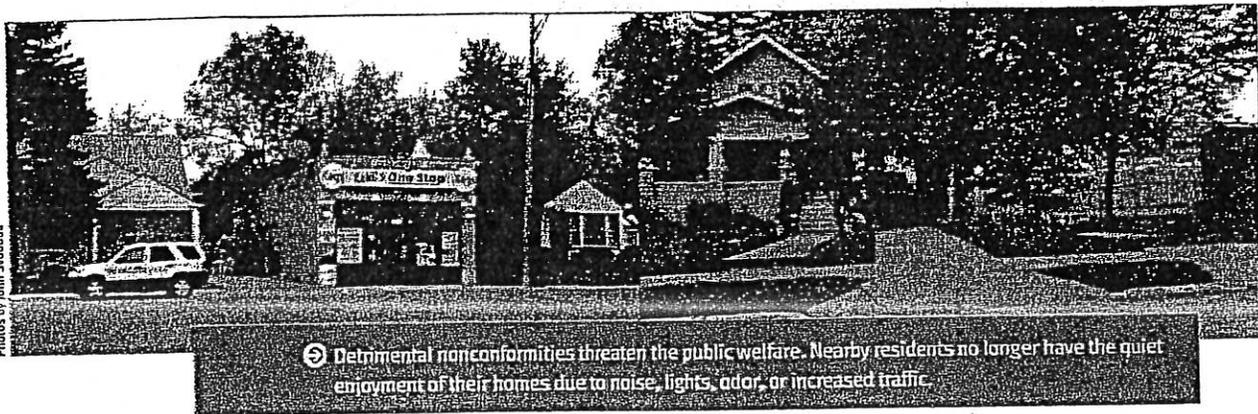
Detrimental nonconformities clearly have the potential for harm and should be subject to limitations leading to their eventual removal or

not a single concept to be routinely cited as the basis of regulation. Rather, health and safety are the basis of protection from injury, illness, danger, and other harm. Public welfare is concerned with nuisance, economic interests, convenience, and community character. While benign nonconformities may have some negative impact, the local government has determined that the negative impact is small and does not threaten the public health and safety. For example, the amount of deviation from a dimensional requirement may be so small as to be unnoticeable, such as an encroachment of only a few inches into

compliance with all remaining development standards. Such exceptions are not consistent with the idea that the nonconformity should be eliminated eventually.

- *Prohibiting or limiting a change of use* except when the new use is considered conforming or less nonconforming, often based on development standards to support the use. In this latter situation, a good example is parking. When the use requires the same or fewer parking spaces, the impact from the change of use is not increased.

- *Requiring the combination of adjacent nonconforming lots.* When a lot has less area than



Photos by John Sutoboda

⊗ Detrimental nonconformities threaten the public welfare. Nearby residents no longer have the quiet enjoyment of their homes due to noise, lights, odor, or increased traffic.

modification into compliance with current standards. This concept forms the basis for most regulation of nonconformities.

**Benign nonconformities.** When development fails to meet current design standards but the nonconformity is not harmful, there is little or no need to limit the development from expansion, redevelopment, or other activities. Local governments often struggle with this issue because, in most cases, *all* nonconformities are treated alike. The authors recommend that local governments establish a second category of nonconformities—benign nonconformities—with different standards that do not necessarily lead to eventual removal of the nonconforming situation. A nonconformity is considered benign when it does not have a negative impact on the health and safety of the public but may have a negative impact on the public welfare. Examples may include a lack of landscaping, too few parking spaces, or minimal deviations from dimensional standards.

The separation of nonconformities into detrimental and benign is based on the idea that “public health, safety, and welfare” is

a required setback. A benign nonconformity can also arise from inconvenience, such as too few parking spaces. The local government should categorize a nonconformity as benign when there is no need to eliminate it to protect the public from harm.

#### CURRENT APPROACHES TO REGULATING NONCONFORMITIES

Most regulation of nonconformities is based on the eventual elimination of the situation. This approach leads to regulations such as the following:

- *Prohibiting or limiting the expansion of a building* when the building itself is nonconforming or when the building, even though meeting the development standards, houses a nonconforming use. The idea is that, while routine maintenance is permissible, such a limitation will prevent continued investment into a situation that should not exist. However, many local governments allow a building's expansion if it does not increase the degree of nonconformity. An example is a building with a nonconforming front setback where an expansion is proposed to the rear of the building in

required for development, and the same owner has two or more contiguous lots, a typical regulation requires the lots to be combined to create one conforming lot. On the other hand, many regulations allow the development of a lot that is nonconforming as to area, provided that all other standards for development are met. This latter situation is a good example of the concept of a benign nonconformity.

- *Providing that a discontinued nonconforming use cannot resume.* Local governments set a time limit on the ability of an owner to resume a nonconforming use. Typical regulations allow six months or one year of cessation; at the end of this time only a conforming use is permissible. During the latest economic downturn, however, many nonconforming uses went out of business. To avoid empty properties and encourage another similar—even if nonconforming—business to move in, some local governments have looked for ways to extend that time limit. One way is to consider the use “continuing” if the property is actively offered for sale or rent.

- *Providing that a nonconforming building that is vacant for a specified period of time is*

not reoccupied until the nonconformity is eliminated and the entire site is brought into compliance with the standards. Again, typical regulations allow six months or one year of vacancy before requiring that the building or other development features are brought up to current standards. Similar to the cessation of use situation, many local governments are extending the time limit if properties are actively offered for sale or rent.

- *Requiring that buildings and other development features that are destroyed are reconstructed only in compliance with current standards.* Most local governments allow reconstruction to the current conditions if there is a determination that the loss of the building is not due to an act of nature and that the loss is less than 50 percent of the value of the building. Therefore, a partially destroyed building can be rebuilt in its same nonconforming situation.
- *Amortizing the nonconformity.* In some instances, a local government establishes a time frame within which the nonconformity must cease. The basis for doing so is to allow the property owner an opportunity to recover his

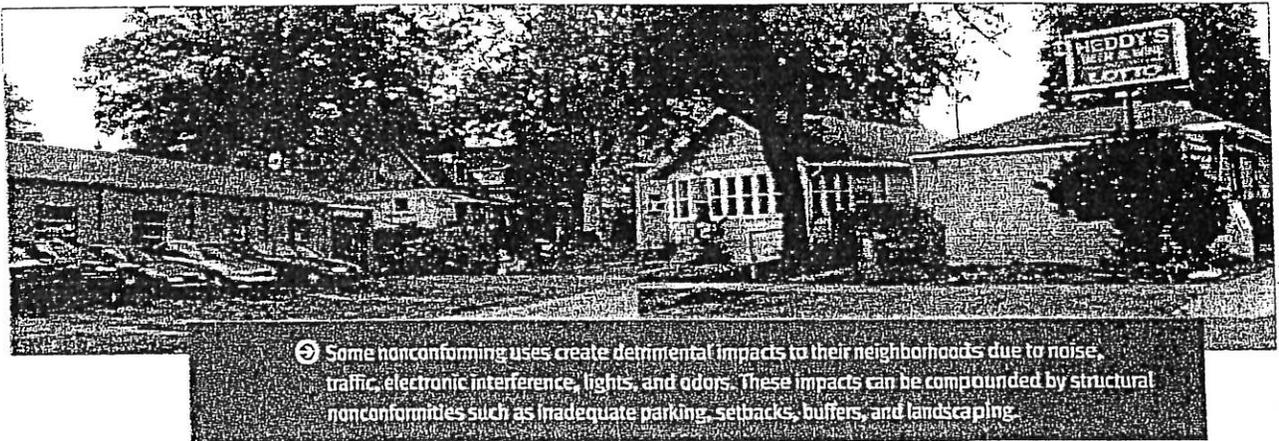
## A local government may wish to avoid the creation of nonconformities through greater attention to creating mixed use districts or the use of flexible design standards and overlay districts.

unsafe by the local government, with the result that elimination or reduction of the nonconformity is not the goal. Further, as planning practice moves away from the rigid separation of uses for the sake of strict uniformity within a district, we recognize that variation is not only acceptable but also is often desirable. Compatible development does not demand sameness. Rather, the public seeks and planners provide mixed use options in modern zoning codes. Increasingly, we see the need to focus on impact, character, compatibility, and urban form—which means that a nonconformity may not be unwelcome in a neighborhood.

A local government may wish to avoid the creation of nonconformities through greater attention to creating mixed use districts or the

dards are intended to reflect urban form rather than prescriptive and uniform dimensions. This contemporary approach avoids nonconforming uses and provides diversity and variation in design rather than the sameness planners and the public seek to avoid.

Another approach that we often use is to create an overlay for a specific neighborhood. A typical example is an older subdivision, established when lots and yards were smaller. The current residential zoning district requires a larger lot area, greater lot width, and larger setbacks; all the older houses and lots become nonconforming. Under typical nonconforming standards, additions to the houses are not allowed because the purpose of the nonconforming provisions is to eliminate, not continue



Some nonconforming uses create detrimental impacts to their neighborhoods due to noise, traffic, electronic interference, lights, and odors. These impacts can be compounded by structural nonconformities such as inadequate parking, setbacks, buffers, and landscaping.

economic investment before being required to cease the nonconformity. This approach has been used for many different types of uses, such as gas stations in residentially zoned areas, adult entertainment facilities, junk yards, concrete plants, commercial uses, and billboards. The length of the amortization period is based frequently upon the economic life of the nonconformity.

### REGULATING BENIGN NONCONFORMITIES

The distinguishing characteristic of the benign nonconformity is that the type and degree of nonconformity are not considered harmful or

use of flexible design standards and overlay districts. A neighborhood or other identifiable geographic unit may contain uses that would be nonconforming in a traditional zoning district, which seeks uniform uses. However, when nonconforming uses are desirable, the government should consider a mixed use district. This avoids the creation of nonconforming uses and may also achieve a vibrant, diverse neighborhood that benefits the community.

Planning practices include many examples of flexible design standards, such as context-sensitive standards, performance standards, or compatibility standards. Such stan-

and expand, the nonconforming situation. Flexible standards may not be a good fit in this situation. However, the creation of the "old neighborhood overlay," with standards that recognize the existing situation, keeps a stable neighborhood in conformance and allows property improvements with no special procedures or requirements other than compliance with the overlay standards.

Some practitioners have argued that flexibility is the necessary ingredient in regulating nonconformities. However, we believe that a local government does not need to examine nonconformity on a case-by-case basis. Instead,

the standards in a manner consistent with the public interest.

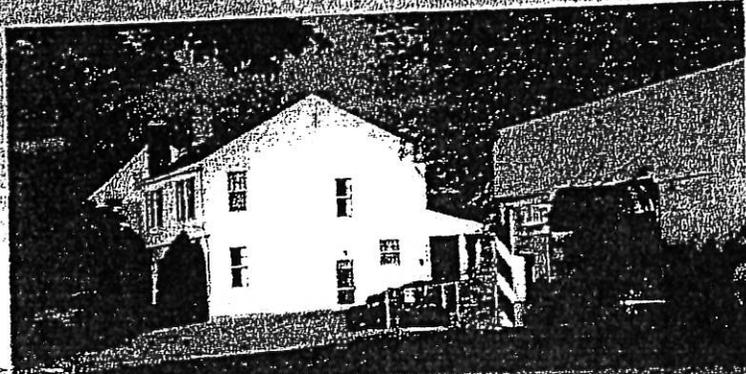
#### DISTINGUISHING BETWEEN DETRIMENTAL AND BENIGN NONCONFORMITIES IN THE REGULATIONS

Many local governments adopt regulations for nonconformities and include exceptions to those regulations, as described earlier. This approach does not establish clear bases for the exceptions, which are often added on a piecemeal basis to address a particular situation. We recommend the creation of two categories of nonconformities at the outset. Such distinctions make it clear when the nonconformity must be eliminated to protect the public health and safety and can provide a basis for amortizing the nonconformity. The second category, benign nonconformities, still requires specific consideration, but is not intended for elimination.

Regulations that are adopted after a deliberative process can clearly describe those situations which are both nonconforming and detrimental. In such cases, it should be the policy and goal of the local government to eliminate such nonconformities. A detrimental nonconformity is presumed to be harmful to the abutting properties, the surrounding neighborhood, or the community as a whole. If this is the case, regulations should clearly lead to elimination of the nonconformity for the protection of the public.

Therefore, appropriate regulations for detrimental nonconformities would do the following:

- Prohibit *any expansion* of the principal building, accessory buildings, or site features. Continued investment in the property is contrary to the intent to eliminate the nonconformity.



Kris Marley

⊖ This massage parlor in a low-density residential neighborhood is a detrimental nonconforming use. The traffic, lights, and noise generated by this use can have a harmful effect on the surrounding neighborhood.

it can decide up front which situations are detrimental and which, even if not sought out, are at least benign in their impact on the neighborhood. Again, the distinction is that detrimental nonconformities are harmful to the public health and safety while benign nonconformities have a potential negative impact on the public welfare.

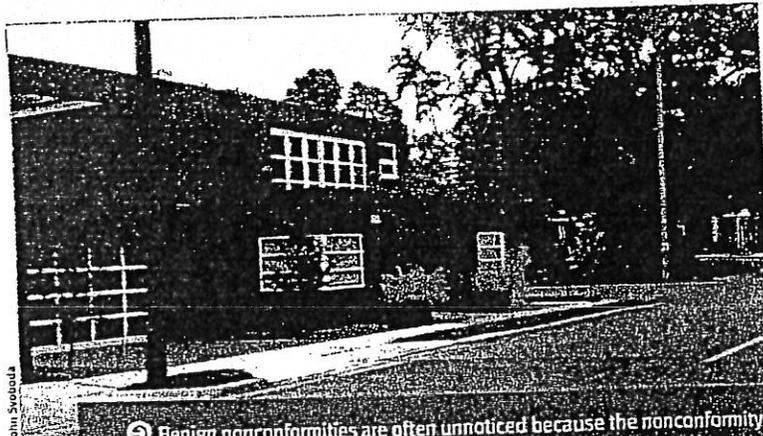
Examples of benign nonconformities include:

- De minimis (i.e., negligible) deviations from a dimensional requirement, such as encroaching a few inches into a required setback, with no resulting negative impact on neighborhood character.
- A lot that fails to meet a dimensional or area requirement, but the deviation is small enough that the shortfall does not affect the neighborhood character.
  - A change in the list of permissible or conditional uses, or eliminating an existing use that is not, in fact, objectionable. It may seem that the change in listed uses is an indication that those not listed are now objectionable. However, unless every existing lot with its existing use is examined during revision to the list of permissible uses, it is often the case that uses become nonconforming not as a matter of policy, but as a matter of oversight. Often, a use considered objectionable at adoption is no longer considered objectionable in later years as times, customs, and lifestyles change.
- Nonconformities arising from a government action, such as the loss of a required front yard for road widening. While the district regulations may require the yard, most properties along the road have the same situation, so the encroachment does not negatively impact that portion of the neighborhood.

- De minimus deviations from a standard, such as required parking spaces, which do not create a negative impact on the surrounding area.

A local government must decide for itself the degree of deviation from a standard that is de minimis. It must also decide how to define the character of a neighborhood and how much change to a lot, its use, or development would have a negative impact. All such determinations are based on impact to public welfare and not public safety or health, where a stricter standard applies.

Such a determination is not unusual for a local government, as the consideration of impact on neighborhood character and deviation from required standards is routine in variance requests and consideration of conditional uses. In fact, we believe that benign nonconformities are similar to variances in that the end result authorizes a deviation from



John Svoboda

⊕ Benign nonconformities are often unnoticed because the nonconformity is so similar to surrounding uses. Thus, there is no harm to the public in the continuation of the nonconforming situation.

- Prohibit *any addition* of site features, unless such features actually reduce the nonconformity. An example of this would be adding parking when part of the nonconformity is that there are too few parking spaces. Another example is the addition of landscaping, either to the parking lot or the entire site, when part of the nonconformity is failure to have required landscaping.
- Prohibit *any extension* of the use to other parts of buildings or the site that were not occupied by the nonconforming use at the time the regulations changed.
- Prohibit a change of use to any use that is not permissible in the zoning district.
- Establish the shortest feasible time for vacancy before new occupancy requires compliance with the current standards.
- Establish the strictest feasible limit on reconstruction after a disaster to ensure that the reconstruction conforms to current standards.
- Establish the strictest feasible limit on reconstruction following voluntary demolition to ensure that the reconstruction conforms to current standards.

This procedure ensures an opportunity for public participation and allows for the addition of conditions to approval. For example, a property that is nonconforming due to a de minimis setback deviation and lack of adequate landscaping is eligible for expansion. However, the board can require that the landscaping be brought to current standards as a condition of approval of the building expansion. The setback nonconformity continues unchanged. The public welfare is improved and the property owner can make economic use of the property.

Thus, appropriate regulations for benign nonconformities would do the following:

- Allow expansions of the principal building, accessory buildings, or site features, provided that the expansions are conforming to current standards.
- Allow the addition of site features that conform to current standards.
- Allow extension of the use to other parts of buildings or the site.

Increasingly, we see the need to focus on impact, character, compatibility, and urban form—which means that a nonconformity may not be unwelcome in a neighborhood.

In contrast, the local government may determine that a benign nonconformity is not harmful to the abutting properties or surrounding neighborhood, but is contrary to the public welfare in some way. Just as a variance is a process to authorize a deviation from development standards, recognition of a benign nonconformity authorizes a deviation from development standards and does not require elimination of the nonconformity.

We further recommend that changes to benign nonconformities should not be permissible by right, but rather must be authorized by a board of adjustment, similar to the process for authorizing a variance. The justification for granting a variance is different than the justification for changes to benign nonconformities. Therefore, a change to property categorized as a benign nonconformity should not be authorized as a variance. However, we recommend that the *process* for the two situations, variances and modifications to benign nonconformities, could be similar.

- Allow a change of use to a permissible or conditional use in the zoning district.
- Allow vacancy of the property for any period of time, provided that the property is properly maintained to ensure safety.
- Allow reconstruction to restore existing conditions following a disaster.

The idea of categorizing nonconformities as detrimental and benign is a new way of labeling nonconformities, but it is not an altogether new idea. For example, Cape Canaveral, Florida, allows some nonconformities to be modified through a special permit. In establishing this provision, the city recognizes that some nonconformities do not have a detrimental impact on the community. San Leandro, California, has a list of exceptions to nonconformity provisions along with an overlay district for nonconforming situations. Identifying exceptions to the nonconformity provisions is a typical method of addressing benign, or nondetrimental, nonconforming situations. Lowndes County,

Georgia, also has an overlay district to avoid creation of nonconformities, although it is not labeled a nonconforming overlay, as is the case in San Leandro. Lompoc, California, classifies nonconformities into groups A and B to distinguish detrimental from nondetrimental situations.

## CONCLUSIONS

This article makes the case for two categories of nonconformities—detrimental and benign—with separate regulations for each category. While the initial basis for nonconformities continues to exist, many local governments are seeking ways to retain and even encourage the continuance of nonconformities that are not harmful or unsafe. The distinction between nonconformities that are detrimental and destined for elimination and nonconformities that are benign and even desirable renders the regulations more meaningful for property owners and easier to administer by the local government.



VOL. 26, NO. 11

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for \$85 (U.S.) and \$110 (foreign). W. Paul Farmer, FAICP, Executive Director; William R. Klein, AICP, Director of Research

Zoning Practice (ISSN 1548-0135) is produced at APA. Jim Schwab, AICP, and David Morley, AICP, Editors; Julie Von Bergen, Assistant Editor; Lisa Barton, Design and Production.

Copyright © 2009 by American Planning Association, 122 S. Michigan Ave., Suite 1600, Chicago, IL 60603. The American Planning Association also has offices at 1776 Massachusetts Ave., N.W., Washington, D.C. 20036; www.planning.org.

All rights reserved. No part of this publication may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the American Planning Association.

Printed on recycled paper, including 50-70% recycled fiber and 10% postconsumer waste.