

**Planning Board Meeting
January 22, 2013
Minutes**

Members Present: Vice Chairman John Underhill, Robert Mancuso, Ruth Van der Grinten, Larry Vaughan, Joe Sparacia, Miles Dean, Brenda Lambert and Betsy Rountree.

Members Absent: Chairman Charles Cannon

Staff Present: Planning Director Zunilda Rodriguez, Planner David Bergmark

Guest: Adam LoveLady, University of North Carolina, School of Government

1. Meeting Called to Order

Vice Chairman Underhill called the meeting to order at 7 p.m.

2. Welcome and Recognition of Guests

Mr. Underhill welcomed guests

3. Chairman and Board Members' Comments

None

4. Adjustment and Approval of Agenda

Mr. Vaughan made a motion to approve the December 17, 2012 agenda. Mr. Mancuso seconded the motion. The vote was unanimous.

5. Public Comments

None

6. Approval of Minutes

Mr. Underhill made a motion to approve the September 17, 2012 minutes. Mr. Vaughan seconded that motion. The vote was unanimous.

7. Discussion, Consideration and Action on the Following Items:

David Bergmark introduced invited speaker Adam Lovelady from the UNC School of Government to speak with us about nonconformities and procedures to deal with nonconformities. He had an opportunity to briefly look at our ordinance and staff has talked to him about some of the issues and process of adopting our UDO. He is here to give us a brief overview and after his presentation, he will answer any questions that we may have. At this time I will invite Mr. Lovelady to present.

Zunilda Rodriguez invited members to sit at the head of the room to best view the presentation.

Mr. Lovelady noted he will try to provide a brief presentation and get onto the questions tonight due to the weather expected tonight. There were specific requests about your current UDO and how nonconformities are handles there.

Let us take a broader view of nonconformities. What they are. Then we can take a specific look at variances. Not always cut and dry and clear.

First, would like to provide an overview. What is nonconformity? What are some general options to address those? What are some typical restrictions and special considerations. Separately and contrasting, what is a variance? What is the specific statutory authority to allow for that process and some policy considerations for how those are adopted?

What is nonconformity? Generally, it is a situation that was legal when it started but due to new ordinances or changes to ordinances it doesn't conform to the current standard. You can imagine that the gas station that started in 1925 before there was zoning, then 10-15-20 years later the zoning ordinance was adopted and the district where the gas station is now set to be a residential district where a gas station was not allowed. That change, at the time it was established it was a lawful use of the property and now there is a new ordinance in place that says that use is not appropriate for this area but it allowed continuing as a lawful nonconforming use.

We have decades of zoning ordinance history since then, with lots of amendments. With the adoption of the new UDO, and changes that were legal in the zoning ordinance that the new ordinance applies that may not continue to be in conformance with new standards, but it is allowed to continue as legal nonconforming use.

There are different types of nonconforming uses. For example, the use may be nonconforming; the lot size may be nonconforming; and structures on the property that do not conform (i.e. accessory structure, sign, tower, different structures) An important distinction, as nonconformities are typically handled, it is the allowance of the continuing involved use, when it is started. There has been a change to the standards on the ordinance but it was permissible when it started. There is a spectrum of how municipalities handle these nonconforming situations.

These can range from immediate termination (it is rare but can be applicable in certain situations), putting limits on non-conforming use or structure; and amortization (essentially phasing out). Termination is a harsh and strict rule and generally restricted to serious public health and safety issues but it is a permissible option based within the legal framework for regulatory takings.

Commissioner Parham: Question: When you say permissible, this means it is legal?

Lovelady Response: Yes, within legal framework. It is rarely used. When you have an unsafe use surrounded by residential uses would be a rare circumstance when it may be used. It is rare. The much more frequently used option is putting limitations on a

nonconforming use; limiting the expansion of that use; and, if discontinued, not permitting the reuse.

Amortization is just “phasing out,” and it sets a specific timeline that says “Ok, a new ordinance that this use is not appropriate, or sign structure is not appropriate in this district, but we recognize that this homeowner has invested in this but you have x amount of time to come into compliance with new zoning ordinance.” This is often used for signs. It essentially helps phase out nonconformities.

The most typical ways to provide limitations – no expansion of nonconformity. For example, the property owner can continue using the gas station where it is but not expand further on onto the property. Sometimes there is often allowance for some repair to a structure. For example, a nonconforming structure was damaged due to a storm. The owner would be allowed to make a repair as to continue the use as long as they did not go so far as to replace the structure. Different ordinances note what regards to what amounts to “replacing” a structure – is it 50% of value or 60% replacing a structure. Different ordinances handle it differently but often minor repair is permitted but full replacement would be restricted.

The question of an intensification of a use is handled differently. For example, a business within a building that is using some portion of that building that is a nonconforming use. The question is whether it is allowed to expand in the building or within the lot; the question of intensification is handled differently by different ordinances.

Regarding restrictions on abandonment, typically a common element of nonconforming ordinances would set a time limit. For example, if an owner abandons a use or structure for one year or six months, the ordinance may set a specific time that use or structure could not be reused.

Commissioner Parham Question: If it is damaged, what is the timeframe regarding rebuilding?

Lovelady: Question was the use laid to sit? If it burns to down, then it is replace not repair. The ordinance would say what that percentage of for replacement or timeframe for abandonment would be. There has to be evidence. It is not always clear.

Practical application side, the local ordinance controls. There are common restrictions on these abandonment and replacement issues. They vary from place to place. There is a factual inquiry that can be challenging to figure out. When it is or is not lawfully nonconforming, the determination would be made by the Zoning Administrator. The burden to prove that would be on the property owner; the property owner would have to come forward. For example, a fire occurred on X date and a month later I hired a contractor to begin repair that cost \$5,000 which is 15% of the property value. There would be a burden of showing that it qualifies a lawful nonconforming use.

1935, 1955, 1970, 2012 zoning ordinances were adopted and you wind up with a progression of ordinances that applied and were amended. Have to track back through that to determine if they were legal back at that time and were they carried forward from its prior lawful use. Go back to challenging the aspect of factual inquiry. When was the use started? What were the rules at that time? How has it been carried forward through the years? After staff determination, that determination can be appealed by the property owner to the board of adjustment as an appeal.

Imagine a scenario of a neighborhood that has been through phases of development. There are three properties. Left, a single family home with a garage on the back, established some time ago as a lawful use; middle, a single family home built on a small lot; and a gas station that was permitted under the old zoning ordinance and continues to this date. Then a new ordinance was adopted, and due to transition in this area, they are setting minimum lot sizes to respect new market demands and the desires of the community. They are also setting rear minimum setbacks so accessory structures and main structures would not be too close to their rear neighbor. Now each of these uses that were lawful at some time, now have current issues under the new ordinance. They would not be allowed, if they were proposed today, but it is allowed to continue as a nonconforming use. If you tried to build that house today, it would not be permitted because the lot is too small, but it is allowed continue as a nonconforming use. Finally, the new ordinance states that only residential uses are permitted in this district. The gas station was setup as lawful use, and with the nonconforming language it has continued, subject to the restrictions outlined.

Let's switch topics to variances. What is a variance? It is the permission to develop property in a way generally not permitted under the ordinance. It's like a safety valve for those unique situations – generally not anticipated when applying a general zoning ordinance to a broad area. Those special lots or special aspects of land or topography that, when you are applying the ordinance, can't be applied parcel by parcel to see how it will be handled. This is a way to address special situations through variances. Nonconformities are prior uses and prior structures and allowing them to continue. Variances, to an extent, are future uses or future developments and allowing for some cushion for special circumstances for future development. With regard to policy, variances are a limited tool for unusual circumstances. Within the statute, they are strict rules for when a board can grant a variance with specific language regarding what standards need to be met in order for a variance to be granted. Variances are rarely used and used for unique situations. Variances are not a replacement for rezoning or a zoning amendment.

If there was a situation when all houses on a street are subject to a variance application that comes forward – i.e. cushion on setback or lot size minimum. If every house on the street has the same situation, then that is a matter for a changing the zoning ordinance rather than granting a variance.

Statutory limits on variances: 1) variances are granted only when the ordinance creates practical difficulties or unnecessary hardships; 2) variances must be in harmony with the general purpose and intent of the ordinance and honor the spirit of the ordinance; have respect of the ordinance and not create the use or great drastic restriction; 3) variances have to ensure that general public safety and welfare and substantial justice is done; and have taken consideration for the community, landowner and neighbors; 4) Variances cannot be granted for the change of use.

Practical difficulties and hardships – courts have narrowed it down and set high standards. Practical hardships result in the application from the ordinance itself. It requires that the difficulties and hardships are not self-created. The variance needs to be related to that specific property. (i.e. topography, lot configuration, etc.). A variance should be peculiar to that property.

Variance procedures are handled by the board of adjustment and these duties may be assigned to the governing board or planning board. It is a quasi-judicial proceeding, Subject to a 4/5 vote by the board and conditions can be applied that are reasonably related.

Commissioner Laughery Question – Can the 4/5 translated to be 80% of the vote. What is 4/5 of 7 member's board? Response from Mr. Lovelady – yes 80%. Whatever the composition of the board, you would need to meet or exceed the 4/5 vote.

Mr. Lovelady opened the meeting to discussion and questions to attendees. Commissioner Laughery noted that the nonconformities that occur when change in ordinance where variances occur as a mistake developing a property. Can variances arise from change in ordinance? Mr. Lovelady noted – yes. Sometimes the variance can arise from a change in zoning ordinance. There is a definitely relationship there. They are site specific.

David Bergmark asked if it is typical for municipalities to prohibit nonconforming structures or limit circumstances in which they operate as nonconforming structures. Lovelady noted it is hard to say because nonconformities can be handled differently depending on the ordinance. Nonconformities are viewed as non-desired. Therefore, there is a desire to have conformity but there is a respect and understanding that an existing nonconformity that needs to and will not stop today and will continue. However, there is a sense to gradually phase out nonconformity as properties change over.

Planning Board commissioner asked if nonconformities are identified when the zoning ordinance is put in place? Speaker Lovelady responded they are typically identified in categories and not as specific parcels. It may be a blanket statement such as “those lots that were platted before X date of adoption is allowed to continue as lawful nonconforming uses.” One of the tough challenges is determining when the use was started, especially 20-30 years.

Lovelady noted that depending on the ordinance, a use can be allowed to continue as a nonconforming use, some ordinances can permit increased intensification of use, or change to a less nonconforming use with some standards, or redeveloped into a lawful use. A property owner will not be locked into one use. They would be encouraged to bring the property into a lawful use.

Question was asked by Planning Board member - Do we track nonconforming districts or areas? Teresa Piner noted that when the UDO was developed, we identified non-conformed areas. We do not have a way to track nonconformities. We usually find out when a person sells a home and we identify that they may not meet setbacks. We try to reduce those situations. We now check setbacks on buildings when first developed. It can be accessory structures or homes that may not meet the setback areas. Even today the town will permit someone to build on a nonconforming lot as long as you can meet current setbacks even if you don't meet the dimensions.

What happens to a property that is considered nonconformity but it has a variance but there is a fire? Lovelady says this is a great example on the challenges on variances and nonconforming uses. Assuming that the use is permissible in that district and the gas station operator is meeting all standards on setbacks and use and acquired a variance for the canopy and the lot is the nonconforming piece, it may be illegal. It could be a court case. There are a lot of challenges on this example.

Vice Chairman asked Mr. Lovelady if this was the end of his presentation. Mr. Lovelady noted yes. Vice chairman thanked Mr. Lovelady and asked if there were any remaining questions.

Mr. Underhill said it seems like there were several nonconforming apartment complexes in town. Mr. Bergmark said there were a number of nonconforming apartment complexes in town. Teresa Piner noted it would be hard to track nonconformities because they are so many different types such as landscaping, materials, setbacks, signage, lot, use, etc. Piner noted that tracking some uses may be easier but others harder. She said staff has brought to the attention of the board problem areas related to the UDO. Mr. Lovelady noted that there will be a significant fact- finding mission with the adoption of a new UDO. He said you try to create a balance between UDO and community vision.

Question was asked by Planning Board member - Nonconformities are not a bad thing right? Lovelady responded that it is a mix bag. There can be challenges to financing properties and selling properties and tries to mitigate with properties that are lawful nonconformities.

Planning Board members thanked Mr. Lovelady for his presentation.

8. Adjourn

Mr. Underhill made a motion to adjourn until the next regularly scheduled meeting. Mr. Mancuso seconded that motion. The vote was unanimous.