

Regulation of Previously Conforming Structures/Uses
For Discussion at Community Planners Committee Meeting September 24

Summary: The City's previously conforming regulations (Land Development Code Chapter 12, Article 7, Division 1) are in need of clarification due to the potential for multiple interpretations counter to the intent of the Land Development Code. While the Development Services Department has been consistent in its application of these regulations since they became effective on January 1, 2000, it is evident that the regulations should be amended to ensure consistent application in the future with a more predictable outcome for applicants and the community that reflects the greater public interest. Council President Todd Gloria issued a memo on August 2, 2013, requesting that staff begin soliciting input from the community and other stakeholders for discussion at the Council Committee on Land Use & Housing this fall.

Background: Previously conforming refers to the circumstance where a use, structure, or premises complied with all applicable state and local laws when it was first built or came into existence, but because of a subsequent change in zone or development regulations is not in conformance with current regulations applicable to that zone. The City has an extensive history of zoning code amendments that modified the setbacks, floor area, height, density, and use standards for various zones. This has resulted in countless previously conforming structures and uses throughout the City.

After extensive public outreach and discussion, the City's existing previously conforming regulations were adopted in 1997 together with a major citywide rezoning effort that affected development rights for property throughout the City. There are also numerous pending rezone actions associated with various community plan updates in process (i.e. Barrio Logan, Otay Mesa, San Ysidro, Southeastern San Diego, Uptown, North Park, Golden Hill, and possibly Old Town) and the Airport Land Use Compatibility Plan for San Diego International Airport that will cause additional properties to become previously conforming. The prevalence of previously conforming structures and uses in the City of San Diego should be considered as new policy changes are contemplated in order to minimize impacts and avoid unintended consequences.

Request: Staff is currently seeking input from the Code Monitoring Team and Community Planners Committee to help shape a future draft amendment to the previously conforming regulations. The goal of the amendment is to eliminate contradiction, simplify the regulations, increase predictability in application of the code for both applicants and the community, and address potential incompatibility with the community vision for local neighborhoods. Once a draft is generated it will be processed through the typical code amendment process including Community Planners Committee, Code Monitoring Team, Technical Advisory Committee, Planning Commission, Land Use & Housing Committee, City Council, Airport Authority, and Coastal Commission.

Information/Options to Help Start the Discussion:

Previously Conforming Structures: This category deals with structures that complied with the setback, floor area, and height at the time they were developed, but the zoning has since been changed so that the building no longer complies with the current zoning.

- *Maintenance, Repair, and Alteration:* The existing code allows maintenance, repair, and alteration through a Process 1 (non-appealable, staff level approval).
 - Should the City continue to allow maintenance, repair, and alteration of a *previously conforming structure* through Process 1 to provide flexibility for the remodeling of older structures of all development types?
 - Single dwelling unit: Should the City allow maintenance, repair, and alteration of single dwelling unit residential through Process 1, or through Process 1 only if less than 50% exterior walls would be removed (and Process 2 for removal of 50% or more of the exterior walls)?
 - Multiple dwelling unit: Should the City allow Process 1 for all residential (single dwelling and multiple dwelling), or through Process 1 only if less than 50% exterior walls would be removed (and Process 2 for removal of 50% or more of the exterior walls)?
 - Non-residential: Should the City allow Process 1 for non-residential, or through Process 1 only if less than 50% exterior walls would be removed (and Process 2 for removal of 50% or more of the exterior walls)?
 - Permit threshold: Should the City use market value as the discretionary permit threshold instead of removal of exterior walls, or should both thresholds be used?
 - Should the City allow previously conforming structure remodels through Process 1 if an administrative finding can be made that the existing pattern for the neighborhood includes structures with previously conforming setbacks, floor area ratio, or height exist on surrounding properties?
 - Setbacks: Should the City allow structure remodels with previously conforming setbacks through Process 1 or should previously conforming setbacks be required to comply if 50% or more of the exterior walls are removed? Existing code provides a process for some new development to observe previously conforming setbacks or reduction up to 20%. See discussion below about expansion of previously conforming structure.
 - Floor area: Should the City allow structure remodels with previously conforming floor area through Process 1, or should previously conforming floor area be required to comply if 50% or more of the exterior walls are removed?

- Height: Should the City allow structure remodels with previously conforming height through Process 1 or should previously conforming height be required to comply if 50% or more of the exterior walls are removed?
- *Reconstruction after Disaster:* The existing code allows for reconstruction of residential structures after natural disaster/act of public enemy regardless of extent of damage. However, confusion exists because of more restrictive rules that apply to reconstruction following natural disaster/act of public enemy than to voluntary remodel/reconstruction. Damaged non-residential structures (natural disaster/act of public enemy) can be rebuilt by right if equal to or less than 50 percent valuation and require a Process 2 if reconstruction would exceed 50% valuation. If amended, this requirement should be less restrictive or equivalent to the rules for voluntary demolition/remodel of the structure.
- *Expansion or enlargement of the previously conforming structure:* The existing code allows for expansion/enlargement of a previously conforming structure if all of the new construction conforms to the current regulations. The code also allows for expansion of a previously conforming structure with a Process 2 to allow new construction to observe a reduced setback (up to 20% less than required setback).
 - Should the City allow for some portion of new construction to observe the existing previously conforming setback in accordance with Process 1 similar to the existing provision that applies to RM-1-1 zones (Section 131.0443(d)(3)(C))?

Previously Conforming Density: This category deals with residential development that was legally built with units that exceed the current density limit of the underlying zone.

- *Maintenance, Repair, and Alteration:* The existing code allows maintenance, repair, and alteration of a structure with *previously conforming density* to occur through a process 1. Confusion exists because of existing section references to the structural envelope and scenarios unrelated to residential development.
 - Should the City allow maintenance, repair, and alteration of a conforming structure with *previously conforming density* through Process 1?
 - Should the City allow maintenance, repair, alteration of a structure with *previously conforming density* through Process 1 only if less than 50% of exterior walls would be removed (and require a Process 2 for development that would remove 50% or more of the exterior walls)?
 - Should the City use market value of improvements as permit threshold instead?

- *Reconstruction after Disaster:* The existing code allows for reconstruction of residential structures after natural disaster/act of public enemy regardless of extent of damage. However, the existing regulation for reconstruction contains extra code language that is not applicable to residential and should be removed.
- *Expansion or enlargement of structure with previously conforming density:* The existing code requires a Process 2 for expansion/enlargement of a structure with *previously conforming density* even if all of the new construction conforms to the current regulations.
 - Should a Process 1 option be available to allow for minor improvements (i.e. remodel of kitchen and bathrooms, or minor improvements to meet California Building Code)?
 - The setback regulation (allowing for a reduction in setback for new construction) is not applicable to conforming structures with *previously conforming density* and should be removed from Table 127-01B.

Previously Conforming Uses: This category deals with existing land uses that are not in conformance with the existing use regulations of the applicable zone.

- *Maintenance, Repair, and Alteration:* The existing code allows maintenance, repair, and alteration of a structure with a *previously conforming use* to occur through a Process 1, unless the market value of improvement is greater than 50 percent of the market value of existing structure. However, confusion exists because of specific code references only to maintenance/repair/alteration of structures that do not expand the structural envelope, which created an unintended loophole for development that expanded the structural envelope of a conforming building, but did not expand the previously conforming use. The code should clarify that the maintenance, repair, and alteration scenario applies to scenarios where the previously conforming use is not being expanded or enlarged.
 - Residential: Should the City allow maintenance, repair, alteration of a conforming structure containing a *previously conforming use* through process 1 for all residential (see density discussion above)?
 - Non-Residential: Should the City allow maintenance, repair, alteration of a conforming structure containing a *previously conforming use* through Process 1 if less than 50% of the exterior walls would be removed, or require a Process 2 for removal of 50% or more of the exterior walls?
 - Permit threshold: Should the City use market value as the permit threshold instead of removal of exterior walls, or use both thresholds?
- *Reconstruction after Disaster:* The existing code allows for reconstruction of residential structures after natural disaster/act of public enemy regardless of the

extent of damage. Damaged non-residential structures can be rebuilt through Process 1 if the market value of the reconstruction would be equal to or less than 50 percent (and requires a Process 2 if reconstruction would exceed 50% value).

- Should this threshold be modified from market value to instead consider the percentage of exterior walls that would need to be re-constructed, or use both thresholds?
- *Expansion or enlargement of previously conforming use:* The existing code requires a Process 2 for the expansion of a previously conforming use. However, the code is unclear as to what applies where a conforming structure (that contains a previously conforming use) is expanded, and the previously conforming use is not expanded, enlarged or increased in intensity. Increased floor area and increased need for parking are typical measures of whether a use is being expanded or enlarged or increased in intensity.
 - Should the City provide a process to allow a minor increase in floor area? The existing code provides for a Process 2 NUP for an applicant to request an increase in floor area for a previously conforming use and limits that increase to 20% of the gross floor area of the existing structure.
 - What should the parameters be for requests to expand a previously conforming use that is conducted outdoors? Should a minor increase be allowed?
- *Change to another previously conforming use category:* The existing code allows for a change in use to another previously conforming use within the same use category through Process 1.
- *Continued operation and resumption of a previously conforming use after discontinuance:* The existing code allows for previously conforming uses to operate until the use rights are abandoned/terminated. A *previously conforming use* can be temporarily discontinued and resumed through Process 1 if the discontinuance is over a period of less than 2 years. A Process 2 NUP can be requested to resume the use after a period of 2 years or more. An active business license and active construction permits are evidence that can be used to show that the *previously conforming use* was not abandoned. The section regarding abandonment is what most property owners rely on for the right to continue to operate a previously conforming use after a permitted remodel.
- *Operational Characteristics of Previously Conforming Commercial Development:* Previously conforming fast food establishments in particular have been the subject of the most controversy with respect to the application of the previously conforming regulations. The existing code is unclear as to how the previously conforming regulations apply to operational characteristics not explicitly

addressed in the previously conforming regulations (i.e. hours of operation, a drive through component, live entertainment, and sale of alcohol).

- Historically, drive-throughs have been considered a development feature of an “eating and drinking establishment” based the fact that a drive through eating and drinking establishment is not identified as a separately regulated land use in need of additional limitations for compatibility with surrounding uses. The existing code identifies “Eating and drinking establishments” as the applicable land use category, and by footnote identifies certain zones where restaurants are not permitted to have a drive through component. The existing separately regulated use category is “Eating and drinking establishments adjacent to residential” and limits the hours of operation and prohibits drive throughs from being located adjacent to residential in certain zones.
- Should the City create a new land use category in Chapter 14 applicable to all drive through eating and drinking establishments?
- What are other options to better clarify how the previously conforming regulations apply to operational characteristics of commercial development not explicitly addressed in the existing code?
- At what point can the rights to previously conforming hours of operation, drive in or drive through features, live entertainment, or the sale of alcoholic beverages be terminated?
- *Amortization periods:* Amortization periods are deadlines for previously conforming uses/structures to be brought into compliance. They are typically reserved for a use that is identified as highly incompatible and in need of phase out over a specified term. For example, when the use category for “rooming houses” was established an amortization period of 3 years was adopted to allow property owners time to recoup their investment and eventually phase out this use from low density zones. This has also been used to address previously conforming signs.
 - Should amortization periods be set for the listed operational characteristics or for other specified uses?
 - Is a longer amortization period needed for something that requires significant construction investment such as a new drive through component?