

# MELCHERT • HUBERT • SJODIN, PLLP

## MEMORANDUM

DATE: October 14, 2019

TO: Lane Braaten, Community Development Director

FROM: Mike Melchert, City Attorney

RE: Proposed Amendment to Zoning Ordinance – Nonconforming Uses

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A few provisions in the City's nonconforming use ordinance are inconsistent with Minnesota statutes. The City should amend its ordinance to conform to the statutory provisions.

### Background

Cities are granted authority to enforce zoning regulations by the Minnesota legislature through state statute. When the Minnesota Statutes set forth specific requirements regarding zoning, municipal ordinances should generally conform to the state law. Because the legislature is constantly amending the Minnesota Statutes, inconsistencies between Minnesota zoning law and the City's zoning regulations arise from time to time.

Section 900.12, Subd. 12, of the Waconia City Code governs nonconforming uses. Legal nonconforming uses are those that properly exist prior to the adoption of a zoning regulation that prohibits them. Legal nonconformities are generally protected by statute in Minn. Stat. §462.357. Because of revisions made to state law over the years, the City's ordinance regarding legal nonconforming uses requires several revisions, which are described below:

First, Section 900.12, Subd. 12.B.3, of the Waconia City Code currently allows a nonconforming use that is damaged by casualty to be repaired and rebuilt if it is damaged to more than 50% of its value, excluding the value *of the land* and foundations. Minnesota law is currently more specific as to how value is determined and, importantly, bases value on the entire property including the land (Minn. Stat. §462.357, Subd. 1e(a)(2)).

Second, Minnesota law currently requires a property owner to apply for a building permit within 180 days of the damage if the property owner wants to reconstruct the nonconforming structure (Minn. Stat. §462.357, Subd. 1e(a)(2)). The City's ordinance does not contain this requirement, but it should.

Third, the City's ordinance currently allows the City to deny approval to rebuild or repair a property if doing so would "substantially extend the probable duration" of the nonconforming use. Minnesota law does not currently allow for such a limitation to be placed on the repair or replacement of the nonconforming use (Minn. Stat. § 462.357, Subd. 1e).

Fourth, Section 900.12, Subd. 12.B.4., of the Waconia City Code provides any nonconforming use abandoned for six months or more may not be continued and any subsequent use of the property must conform to the zoning ordinance. Minnesota law now provides that a use can only be considered abandoned if the use is discontinued for more than one year (Minn. Stat. § 462.357, Subd. 1e(a)(2)).

Fifth, Section 900.12, Subd. 12.B.7. and 12.B.8, of the Waconia City Code require the discontinuance of certain legal nonconforming uses within a certain period of time. Minnesota law currently prohibits such "amortization" provisions in zoning ordinances (Minn. Stat. § 462.357, Subd. 1(c)).

Sixth, Minnesota law now contains special provision for floodplain properties and nonconforming shoreland lots (Minnesota Statutes, §462.357, Subd. 1(c) and Subd. 1(e)(d)). The City's ordinance was written before these state laws were enacted and the ordinance should be updated to refer to these requirements.

While the City could choose to simply amend the entire nonconforming section to just refer to the current state statute, I recommend still including the basic statutory requirements in the City's ordinance to provide guidance to residents.

### **Proposed Amendments of §900.12, Subd. 12**

Given the above, I recommend amending §900.12, Subd. 12, of the Waconia City Code as follows (revisions shown with redlining):

#### Subd. 12. Legal Nonconforming Uses.

##### A. Classification of Nonconforming Uses.

It is the intent of this Ordinance to permit the continuance of a lawful use of any building or land existing at the effective date of this Ordinance even though such use may not conform to the provisions of this Ordinance. For the purpose of this Ordinance, two (2) classes of legal nonconforming use are defined. Class 1 lawful uses are those which are not permitted in the district within which located and those uses which are permitted in the district but violate one or more lot requirements by more than fifty percent (50%-%). Class 2 uses are permitted uses which violate no district requirement by more than fifty percent (50%-%). It is the intent of the Section not to allow the expansion of Class 1 nonconforming uses. It is further the intent of this Section to encourage the continuance

of Class 2 nonconforming uses, to allow for their expansion and to encourage even greater compliance with the requirements of the district within which the use is located.

B. Nonconforming Use Regulations.

1. Structural Alterations, Replacement or Enlargement. ~~Class 1 nonconforming uses shall not be structurally altered or enlarged unless the resultant altered or enlarged building or use shall conform in terms of usage to the provisions of this Ordinance and does not violate one or more lot requirements by more than 50%.~~ fifty percent (50%). Class 2 nonconforming uses of structures and land which do not meet the district lot requirements or off-street parking and loading regulations of this Ordinance shall be allowed to be structurally altered, replaced, restored or enlarged provided there is no further violation of said requirements than lawfully exists at the time of said alteration, replacement or enlargement and further provided enlargement can be done in full compliance with the building code.
2. Repair of Nonconforming Buildings. Nothing in this Ordinance shall prohibit the repair, improvement or modernizing of a lawful nonconforming building to prevent deterioration, obsolescence, depreciation and wear ~~provided that such repair of Class 1 nonconforming uses shall not exceed an aggregate cost of 30% of the assessed value of the building.~~
3. Restoration. Any nonconforming use existing on the date of this Ordinance may be continued until its normal expiration except that any Class 1 lawful nonconforming use damaged by fire, ~~explosion, and act of God,~~ or ~~any other causes~~ peril in excess of fifty percent (50%, excluding land and foundations%) of the estimated market value of the entire property, as indicated in the records of the Carver County Assessor at the time of the damage, shall not be reconstructed unless a building permit has been applied for within one hundred and eighty (180) days of the damage and the reconstruction has been approved by the Board of Adjustment. When a nonconforming structure in the shoreland district with less than 50 percent (50%) of the required setback from the water is destroyed by fire or other peril to greater than fifty percent (50%) of its estimated market value, as indicated in the records of the Carver County Assessor at the time of damage, the structure setback may be increased, if practicable. Approval to rebuild shall be granted only upon finding:
  - a. ~~That such rebuilding or restoration will not substantially extend the probable duration of such nonconforming use,~~
  - b.a. That restoration will not increase the size, intensity or character of the use that was destroyed;<sub>i</sub>
  - eb. That restoration constitutes no more than the replacement of the damage nonconforming use;<sub>i</sub> and

c. That restoration will ~~be in compliance~~ comply with ~~all applicable~~ building code requirements.

4. Discontinuance or Abandonment. -Whenever a legal nonconforming use of either class has been discontinued for ~~six (6) or more consecutive months~~ than one (1) year, such discontinuance shall be considered conclusive evidence of the intention to abandon the nonconforming use and shall not be reestablished. Any future use shall be in conformance with the provisions of this Ordinance.
5. Changing of Use. Whenever a Class 1 nonconforming use has been changed to a more nearly conforming use or to a conforming use, such use shall not revert or be changed back to a nonconforming or less conforming use. Whenever a Class 2 nonconforming use is changed to a use requiring the same or less parking, full ordinance compliance shall not be required, but in no case shall existing parking be diminished.
- ~~6. Prior Construction Approval. Nothing in this Ordinance shall prohibit the completion of construction and use of a nonconforming building for which a building permit has been issued prior to the effective date of this Ordinance, provided that construction is commenced within 90 days after the date of issuance of the permit and that the entire building shall have been completed according to plans filed with the permit application within one (1) year after the issuance of the building permit.~~
- ~~7. Termination of Nonconforming Land Uses. Nonconforming uses of land existing at the effective date of this Ordinance where no building is located may be continued, provided the nonconforming land use shall be terminated and converted to conform with the provisions of this Ordinance within three (3) years after the effective date; and further provided that the nonconforming land use shall not in anyway be expanded or extended during this three year interval either on the same property or on adjoining property.~~
- ~~8. Illegal Nonconforming Uses. Nonconforming uses of buildings or lands existing on the effective date of this Ordinance established without a building permit shall be declared illegal nonconforming uses and shall be discontinued within a period of three (3) years following the effective date of this Ordinance.~~
9. 6. Nonconforming Floodplain and Shoreland Properties. Notwithstanding the preceding sections, nonconforming uses and structures in floodplain areas shall be regulated as allowed by Minnesota Statutes, §462.357, Subd. 1e (c) and nonconforming shoreland lots of record that fail to meet the minimum standards for lot width or lot size shall be regulated by the terms of Minnesota Statutes, §462.357, subdivision 1e (d) to (j).

7. District Changes. Whenever the boundaries of a zoning district ~~shall be changed~~are revised so as to transfer an area from one district to another district of another classification, the provisions in this section shall also apply to any existing uses that become nonconforming as a result of the boundary changes.
  
8. Prior Construction Approval. Nothing in this Ordinance shall prohibit the completion of construction and use of a nonconforming building for which a building permit has been issued if the nonconformity results from a change to the Waconia City Code or the boundaries of any zoning district enacted after the building permit issued.