

(DRAFT) AGENDA
Regular Meeting - Bremerton Planning Commission
(Subject to PC approval)
August 17, 2010
5:30 P.M.
345 – 6th Street
Meeting Chamber – First Floor

- I. CALL TO ORDER**
 - II. ROLL CALL (quorum present)**
 - III. APPROVAL OF THE AGENDA**
 - IV. APPROVAL OF MINUTES:**
 - July 20, 2010 Regular meeting.
-

V. PUBLIC MEETING

- A. Call to the Public:** Public comments on any item not on tonight's agenda
 - B. Public Workshop:**
 - 1. South Kitsap Industrial Area (SKIA) Sub-Area Plan overview of process and grant.**
 - 2. Gorst Watershed Planning Grant expectations and scoping process.**
 - 3. Shoreline Master Program (SMP) educational workshop on "Grandfathering/Non-conforming".**
-

VI. BUSINESS MEETING

- A. Chair Report:** Chairman Cockburn
 - B. Director Report:** Andrea Spencer.
 - C. Old Business:**
 - D. New Business**
-

- VII. ADJOURNMENT:** The next regular meeting of the Planning Commission is
September 21, 2010
Planning Commission meeting packets are available on-line at
www.ci.bremerton.wa.us

**Minutes for
City of Bremerton Planning Commission
Regular Meeting**

July 20, 2010

I. Call to Order

The meeting was called to order by **Chairman Hoell** at 5:31 p.m.

II. Roll Call

Those present were: Commissioner Cockburn, Commissioner Jose, Commissioner Kosusko, Commissioner Streissguth, Commissioner Tift, and Chairman Hoell. Commissioner Mosiman was excused. Quorum certified.

Also present: JoAnn Vidinhar, Nicole Ward, and Pam Bykonen (DCD staff) and Dave Sherrard and Jan Cassin (SMP Consultants, Parametrix).

III. Approval of Agenda

Chairman Hoell introduced the agenda. Staff noted an error in the agenda and proposed deleting item Agenda Item IV, *Election of a Vice-Chairman*. **A motion was made by Commissioner Kosusko and seconded by Commissioner Streissguth to approve the agenda as amended.** It was agreed by general consensus to approve the agenda as amended.

IV. Approval of Minutes

The minutes of the Regular Meeting held on May 18, 2010 were presented for approval by Chairman Hoell. It was noted that a typographical error appeared on page two, paragraph seven; *amendable* should read *amenable*. **A motion was made by Commissioner Jose and seconded by Commissioner Streissguth to approve the Regular Meeting Minutes of May 18, 2010 as amended.** Called for a vote: Commissioner Cockburn: Abstain; Commissioner Jose: Yes; Commissioner Kosusko: Abstain; Commissioner Streissguth: Yes; Commissioner Tift: Yes; Chairman Hoell: Yes. The motion carried.

V. Public Meeting

A. Call To The Public (public comments on any item not on tonight's agenda).

Chairman Hoell asked if there were any comments from citizens. Seeing none, she closed this portion of the meeting.

B. 1. Public Workshop – Shoreline Master Program (SMP) Update: **Nicole Floyd, City Planner**, began the public workshop with a PowerPoint presentation and an overview of the history of shoreline management practices. The SMP came into existence in 1972; the City of Bremerton adopted their SMP in 1978 which, with the exception of some minor amendments, has remained basically the same since adoption. In 2003,

Washington State revised the Shoreline Management Act to emphasize ecologically appropriate development and all jurisdictions with shorelines are required to update their adopted codes to reflect that revision using funds allocated by the State for this purpose. The State has final approval on Bremerton's updated Shoreline Master Program which will cover all of Bremerton's salt and fresh water shorelines, including those in Bremerton's Urban Growth Areas. The update includes documenting existing conditions, predicting foreseeable development, and creating a plan that will allow development while balancing the ecological functions.

Jan Cassin, Parametrix, continued the presentation by outlining the inventory and characterization portion of the SMP update. This first step of the update process is essential to provide the science foundation for the policies and regulations that are subsequently developed. An accurate inventory of shoreline locations and conditions helps each jurisdiction meet the "no net loss" of ecological functions, encourage water dependent uses, and public access requirements set forth by the Shoreline Management Act. Public participation and input can help the team collect additional data that may not otherwise be available.

Dave Sherrard, Parametrix, explained the policies and regulations of the SMP. The guidelines for the update process can be found in the Washington Administrative Code (WAC) Chapter 173-26 and each jurisdiction must comply with the guidelines in a way that is focused on the local community. Through this process, Bremerton will adopt regulations that are designed to be implemented through permit decisions with an eye on what the cumulative impacts may be. If there are existing non-conforming uses, they will be "grandfathered" in, but the goal is to bring these non-conforming uses into compliance.

Nicole wrapped up the presentation with a list of opportunities for public participation:

- Beach walk on Saturday, August 7th from 9:00am – 11:00am at Evergreen Park;
- Citizen Advisory Committee meeting August 10th;
- Shoreline website which is updated regularly with meeting and SMP data information (www.bremertonshorelines.com);
- Become an "interested party" and receive e-mail updates and meeting dates;
- Talk to staff on the phone or in person.

Nicole asked members of the public for questions or comments on the presentation that are broad in nature and not site specific because site specific information is not available yet.

James Anderson, The 400, Washington Avenue: [Mr. Anderson's comments/questions are summarized as he did not use a microphone and his comments were not completely audible on the recording]. Mr. Anderson asked questions regarding shoreline setbacks, removal of vegetation, and the process for approval to remove vegetation along a shoreline. His comments were directed specifically to the Washington Avenue shoreline between the Harborside Condominiums owned by Housing Kitsap (formerly KCCHA) and property owned by Mr. Mark Goldberg at approximately 600 Washington Avenue.

Nicole explained that shoreline setbacks can vary depending on the zoning of the property. Commercial property has a shoreline setback of 25' whereas property zoned Urban Conservancy can have a shoreline setback of up to 200' to create a buffer. Currently there is very little enforcement regarding removal of vegetation and any rules

pertaining to vegetation removal comes from the Critical Areas Ordinance and not the Shoreline Master Program. The setbacks along the Washington Avenue shoreline are measured from the ordinary high water mark. Nicole encouraged Mr. Anderson to speak to her about the more site specific questions during regular office hours.

Jordy Andrews, 1328 Hayward Avenue: "I have a question: I had some preliminary information that I received in April from the City and in that information the last revision of the SMP was in 2006. Is that correct?"

Nicole said it was, but the revisions submitted to the Department of Ecology were not adopted because DOE wanted Bremerton to complete the process of a full Shoreline Master Program Update in 2009-2011 and the 2006 revisions were submitted too close to the start of the update process.

Jordy Andrews: "Does the City have an approved Shoreline Master Plan?"

Nicole replied that there was an approved SMP and it was last amended in 1992.

Roger Coyle, Cascade Trail: "We own some waterfront on Jacobsen Boulevard and, in the preliminary draft, is there a proposed setback for new residential construction?"

Nicole answered that the update had not reached that stage yet and an inventory of existing conditions would need to be completed before site specific setbacks could be determined. She reminded Mr. Coyle of the State's requirement of "no net loss".

Roger Coyle: "Right now they're 50 feet, is that correct?"

Nicole said it was correct.

Chairman Hoell asked for any other comments from the public. Seeing none, she closed the Public Comment portion of the workshop and asked the Commissioner for their comments or questions.

Commissioner Cockburn asked if the northern Urban Growth Areas like Rocky Point will be included in the shoreline inventory.

Nicole said all Urban Growth Areas associated to Bremerton would be included in the inventory and update.

Commissioner Jose asked for details regarding the funding for the SMP update, specifically, were there any City funds attached to this project?

Nicole explained that the Washington State Department of Ecology awarded Bremerton a \$200,000 grant to complete the update in order to prevent this required update from being an unfunded mandate. The City is not required to have matching funds.

Commissioner Streissguth thanked the citizens attending and asked for their continued participation throughout the SMP update process.

Chairman Hoell closed the Public Workshop.

VI. Business Meeting

- A. **Chairman's Report: None.**
- B. **Director's Report: JoAnn Vidinhar, Assistant Director of Community Development,** reviewed the proposed agenda schedule for the remainder of the year.
- C. **Old Business: Commissioner Streissguth** asked about including rising sea levels in the SMP workshops. **Dave Sherrard** responded that rising sea levels will be included in the shoreline inventory and will be addressed at future workshops.

Commissioner Tift requested a matrix outlining who the stakeholders are and how they "vote" on the final SMP document.
- D. **New Business: None.**

VII. Adjournment

Meeting was adjourned at 6:17 p.m. The next Regular Meeting is scheduled for August 17, 2010.

Respectfully submitted by:

Andrea Spencer, Executive Secretary

Approved by:

Lois Hoell, Chairman

TECHNICAL MEMORANDUM

DATE: August 5, 2010
TO: Bremerton Staff, Planning Commission and Public
FROM: David Sherrard, Parametrix
SUBJECT: Bremerton Shoreline Master Program – Policy Options
Provisions for existing development/Nonconforming uses/

This is one of several Technical Memoranda to be presented to the Planning Commission and public that address the framework of decisions needed to be made to update the Bremerton Shoreline Master Program (SMP) and implement the 2003 Shoreline Guidelines WAC 173-26.

This memorandum addresses Non-Conforming Development and outlines the following

1. SMP Guidelines found in WAC 173-26 and other Department of Ecology guidance;
2. The existing Bremerton SMP provisions;
3. Options for consideration of the Planning Commission and public
4. The consultants recommendation

1. SMA Guidelines

The SMP must include provisions to address situations where uses and properties become nonconforming (WAC 173-26-191(2)(a)(iii)(A)).

Provisions for nonconforming uses are contained in a separate WAC 173-27 that addresses the shoreline permit process and was not updated in 2003. The provisions for nonconforming uses apply only if the local jurisdiction has not adopted provisions.

In the Shoreline Master Program (SMP) Handbook Ecology has provided the following as a general recommendations to how local jurisdictions may approach this issue.[available at http://www.ecy.wa.gov/programs/sea/shorelines/smp/handbook/Nonconforming_development_guidance.pdf]:

Ecology does not expect, nor is it asking, local governments to eliminate all nonconforming development from shorelines. Some nonconforming uses and structure within shoreline jurisdiction have existed for many years.

The basic general “sideboards” for nonconforming development regulations suggested by Ecology include:

- “Grandfathered” (nonconforming) existing legal uses and structures may continue.

- Owners of grandfathered structures that wish to expand the structure may be able to do so if they do not increase the nonconformity. For example, a house partially within the buffer could be expanded outside the buffer.
- Regulations must be applied fairly to new development and existing development. Local governments cannot excuse existing neighborhoods from meeting new standards while enacting new standards for new development.
- Local governments have the right to terminate nonconforming development. (On occasion, an existing use may have a high potential for use conflicts, such as a fuel storage facility within a city’s wellhead protection zone. In these cases, a specific time may be set for the use to be amortized and removed.)
- As reflected in case law, local governments may adopt regulations to phase out nonconforming development over time. More commonly, phasing out is accomplished by adopting disincentives such as strict limits on change of use or expansion.
- For updated SMPs, the “no net loss” policy objective should guide review of proposed expansions or other changes to grandfathered uses and new development on substandard vacant lots.
- Consider whether nonconforming developments are “benign” or “detrimental”
- The cumulative impact of numerous minor or lesser impacting “benign” developments should be considered.
- SMPs need to cover the breadth of the nonconforming provisions that are in WAC 173-27-080, including:
 - Definitions.
 - Structures – maintenance and repair, expansion, moving the structure.
 - Uses – expansion, change in use,
 - Reconstruction after damage, including timelines for permitting and reconstruction. Ecology suggests that SMPs include criteria to avoid reconstruction in hazard areas.
 - Abandonment.
 - Undeveloped lots.

2. Existing Bremerton Code:

The existing SMP does not have provisions for “non-conforming uses.” It contains the following provisions:

Nonconforming development may be continued provided it conforms to requirements in Bremerton Zoning Ordinance Chapter IX: Nonconformities.

That code section has been re-codified as Chapter 20.54 with the following headings

- 20.54.010 Intent
- 20.54.020 Establishment of a Legal Nonconformity and Applicability
- 20.54.030 Annexation
- 20.54.040 Definitions

- 20.54.050 Nonconforming Lots
- 20.54.060 Nonconforming Uses
- 20.54.070 Nonconforming Structures
- 20.54.080 Nonconforming Landscaping
- 20.54.090 Conditional Nonconforming Uses
- 20.54.100 Nonconforming Signs.
- 20.54.110 Unlawful Uses and Structures

These provisions generally meet the “sideboards” established by Ecology, with the following exceptions:

20.54.060(b) allows a change to another non-conforming use by CUP. The criteria, however, do not consider some of the important provisions of the SMA including the preference for “water oriented” uses and “no net loss”

The Ecology guidelines would likely require the “no net loss” policy objective to be added as a criteria

20.54.070(b) allows expansion of enlargement of a structure if it meets site development standards or if the expansion is not more than 20%

The Ecology guidelines likely would require

- the “no net loss” policy objective to be added as a criteria
- a criteria that expansion would not increase the nonconformity. For example, a house partially within the buffer could be expanded outside the buffer only

20.54.070(c) requires a structure damaged beyond 75 percent of its replacement value to be reconstructed in accordance with the zoning requirements.

The Ecology guidelines likely would support this provision as bringing uses into compliance. However, if more stringent buffers and setbacks were implemented on some shorelines, existing lots sizes may constrain rebuilding in compliance with those standards.

20.54.080 addresses landscaping and requires additional landscaping related to the extent of the expansion

The Ecology guidelines likely would support this provision as it applies to buffers and vegetation conservation. It also may be desirable to set a threshold of expansion at which any new requirements for buffer vegetation would be implemented.

For example, the b) allows expansion of enlargement of a structure if it meets site development standards or if the expansion is not more than 20%

3 Options:

- a) Keep the existing provisions in Chapter 20.54 for Non Conforming uses and apply to the shoreline, as is presently the case. The major advantage of this is that it treats all property in the city the same. The disadvantage is that it doesn’t address specific shoreline criteria such as no net loss.

- b) Keep the existing provisions in Chapter 20.54 for Non Conforming uses but add additional provisions specific to the shoreline, such as consideration of no-net loss. This maintains the existing code structure, but adds specific provisions unique to shorelines.

One disadvantage of options (a) and (b) is that future revisions to city-wide regulations – if they apply in the shoreline – require Department of Ecology review and approval. This provides an extra layer of review for revisions the city may make that are primarily oriented to non-shoreline issues.

- c) Adopt separate Nonconforming provisions in a separate code section applicable only to shorelines. This would address unique shoreline conditions, but may be more complicated to apply, especially for sites that span shoreline and non-shoreline jurisdiction.
- d) Monitor the policies and regulations that are developed as part of the SMP update and determine whether they involve additional issues not currently foreseen in the city's non-conforming provisions.

Issues that may arise include:

- Desirable vegetation buffer standards may present problems for compliance for some existing lots that are limited in area and depth;
- There may be areas of the shoreline where existing conditions present continuing negative impacts on important ecological processes. In those areas it may be desirable to provide more incentives to discontinuing those features that present problems.
- The existing nonconforming provisions don't address issues like non-conforming shoreline protection structures or moorage structures. It may be desirable to have specific provisions that address these unique shoreline structures.

3 Recommendation:

Given the early stage of the process of updating the SMP, it appears prudent to pursue alternative (d) above and revisit these issues when the specific provisions under consideration in the updated SMP are better known.

ZONING PRACTICE

NOVEMBER 2009



AMERICAN PLANNING ASSOCIATION

➔ ISSUE NUMBER 11

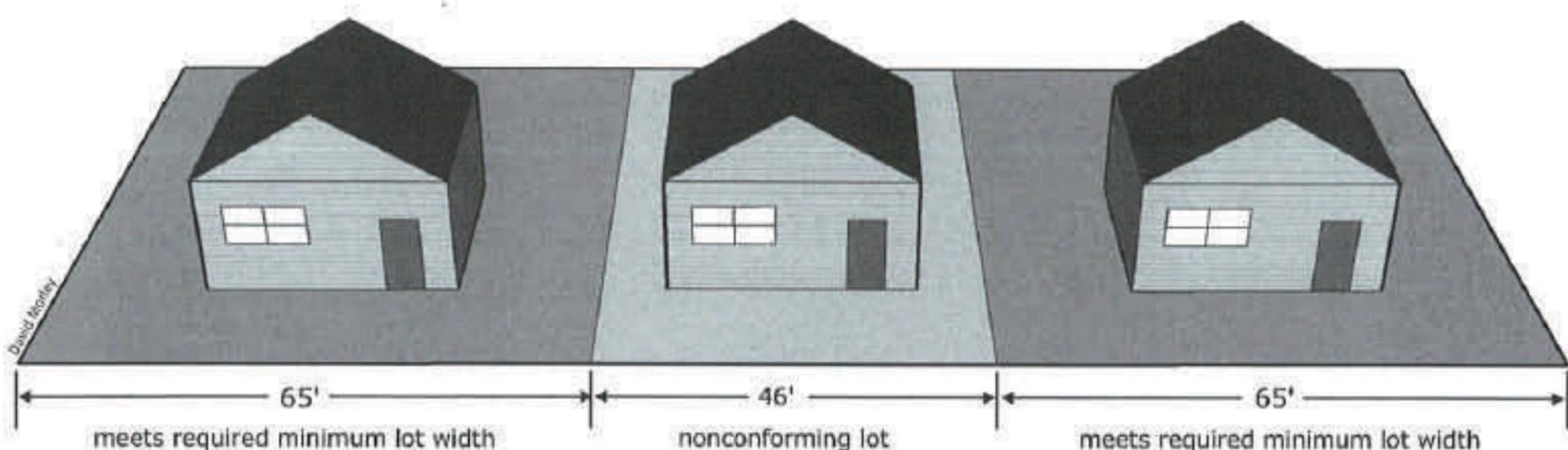
PRACTICE NONCONFORMITIES



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 preexisting 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 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

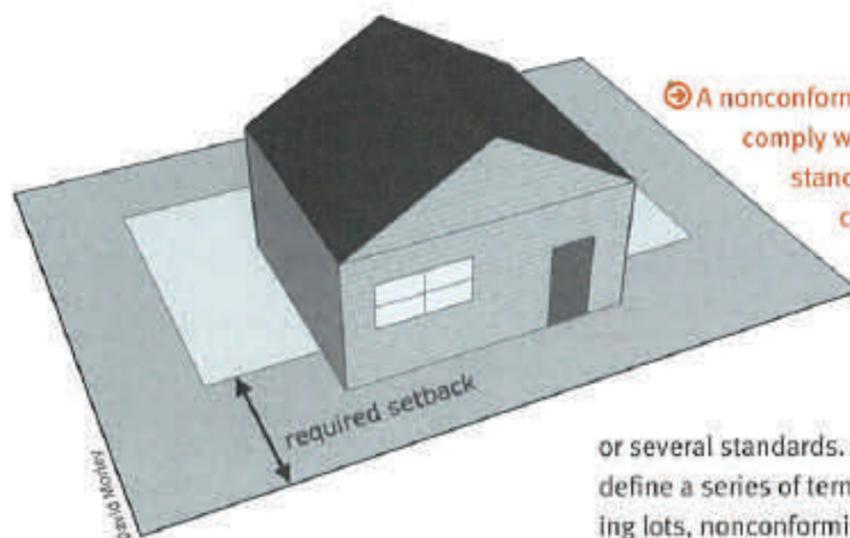
In order to be clear about the concepts, a few terms pertaining to nonconformities are explained here:

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."

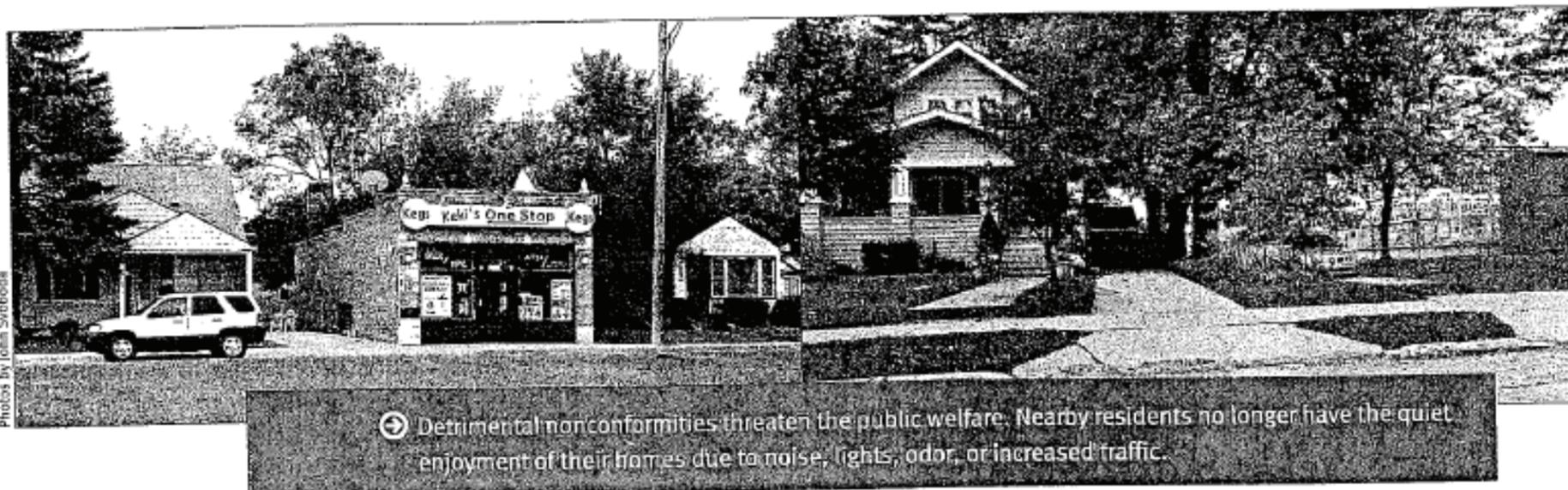
Detrimental nonconformities are those that have a negative impact on the health and safety of the public. Examples include uses involving hazardous materials, such as gasoline stations in single-family neighborhoods; uses that produce significant noise, such as body shops or paint shops; uses that have 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



ⓘ 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

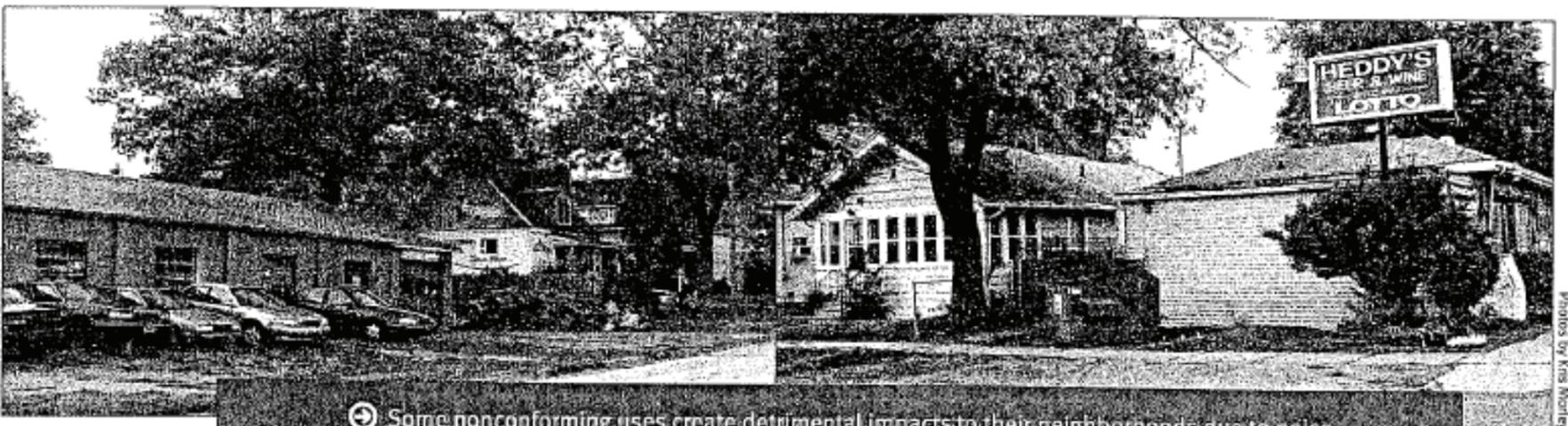
A local government may wish to avoid the creation of nonconformities through greater attention to creating mixed use districts or the use of flexible design standards and overlay districts.

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

standards 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

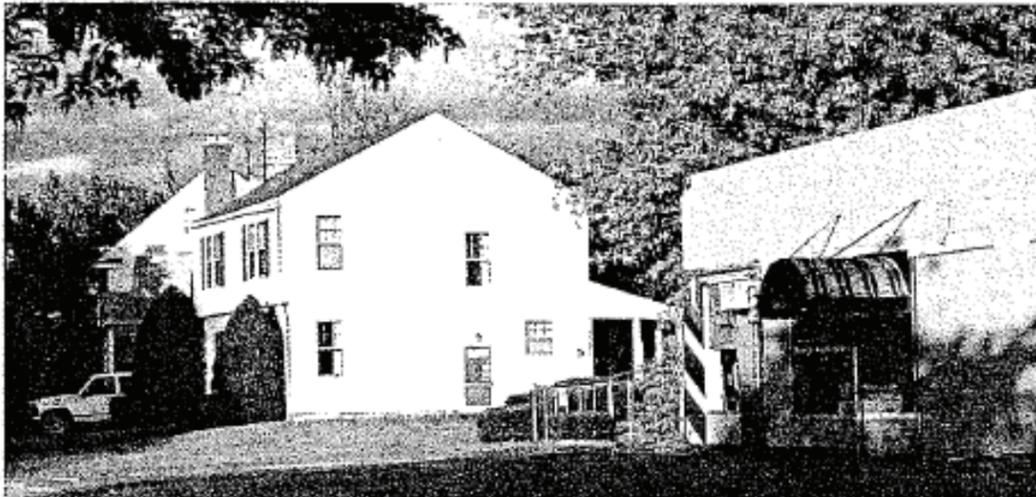
The distinguishing characteristic of the benign nonconformity is that the type and degree of nonconformity are not considered harmful or

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,



Kris Morley

⊖ 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 minimis 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

the standards in a manner consistent with the public interest.

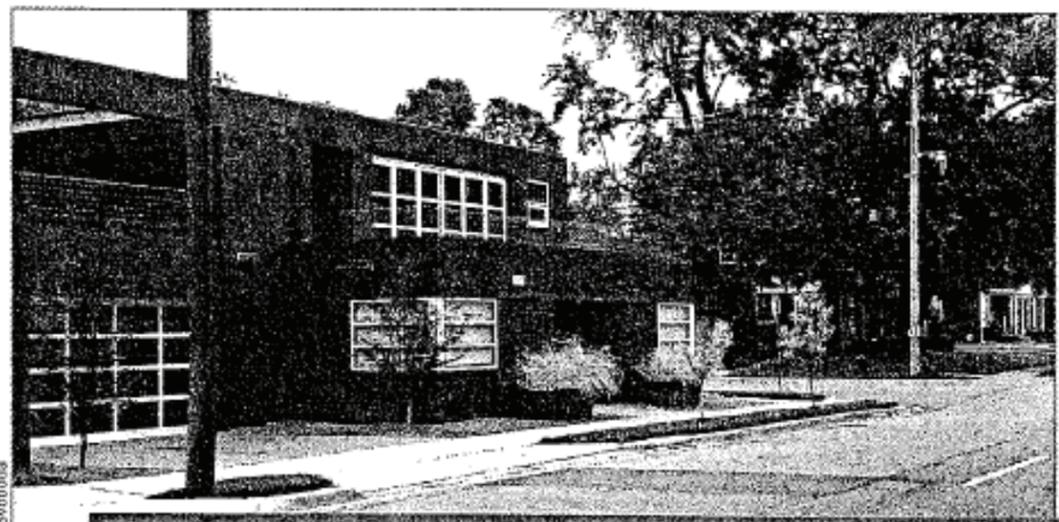
DISTINGUISHING BETWEEN DETRIMENTAL AND BENIGN NONCONFORMITIES IN THE REGULATIONS

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.



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.

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.

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.

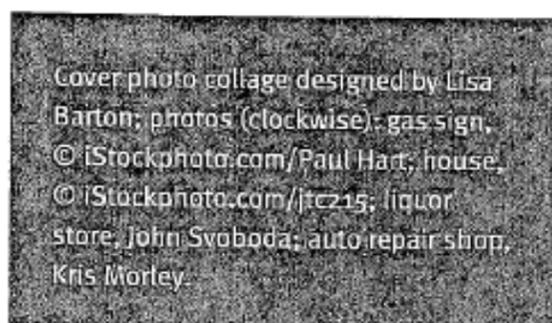
- Allow a change of use to a permissible or conditional use in the zoning district.
- Allow vacancy of the property for any period of time, provided that the property is properly maintained to ensure safety.
- Allow reconstruction to restore existing conditions following a disaster.

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.



Cover photo collage designed by Lisa Barton; photos (clockwise): gas sign, © iStockphoto.com/Paul Hart; house, © iStockphoto.com/jtc215; liquor store, John Svoboda; auto repair shop, Kris Morley.

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, AICP, 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.

ZONING PRACTICE

AMERICAN PLANNING ASSOCIATION

122 S. Michigan Ave.
Suite 1600
Chicago, IL 60603

1776 Massachusetts Ave., N.W.
Washington, D.C. 20036

NON-PROFIT ORG.
U.S. POSTAGE
PAID
CHICAGO, IL
PERMIT #4342



*****AUTO**ALL FOR ADC 980



Z41-D
109755

Andrea Liv Spencer AICP
City of Bremerton
345 6th St Ste 600
Bremerton WA 98337-1873

DOES YOUR COMMUNITY DISTINGUISH
BETWEEN DETRIMENTAL AND BENIGN
NONCONFORMITIES?

11