

DRAFT STAFF REPORT

DOCKET #: UDO-240

STAFF: [David Reed](#)

REQUEST

This text amendment is proposed by the City Attorney's Office to amend Chapter B Sections 5-2.7 and 5-2.8 of the *Unified Development Ordinances* (UDO) to clarify vague and ambiguous language relating to the Loss of Nonconforming Use Status (UDO-240).

The amendment was remanded to the Planning Board by the City Council at their meeting on May 6, 2013 to consider adding language establishing a time limit on building permits relating to the loss of nonconforming use status.

BACKGROUND

Given the recent requests for determinations of nonconforming use status brought before the City Attorney's Office over the past few months, it appears that Section 5-2.8 of the UDO has opened itself to multiple interpretations, especially with regard to what constitutes discontinuance. While making these determinations, it became apparent there are deficiencies in the current UDO regarding discontinuance of nonconforming uses and; therefore, a need to provide clarity to the process of determining loss of nonconforming use status.

In zoning regulations that exist across the country, the purpose of language relating to the continuance or loss of nonconforming uses is to provide a way for the nonconforming use to complete its life cycle and then either convert to a permitted use under the current ordinance or petition for rezoning to an appropriate zoning district. Unless the nonconformity remains in use as it is, it is the intent that the use will eventually come into compliance with current zoning and development standards. Some of the wording in our current UDO, such as what constitutes "voluntary termination" of a non-conforming use and what is meant for the owner to take "all necessary steps" to resume the nonconforming use before the deadline specified in the ordinance, leave the language open to interpretation.

The proposed ordinance amendment sets forth that a nonconforming use which discontinues, for any reason, for a continuous period of more than one (1) year may not be reestablished. Further, the ordinance specifies that "intent" shall not be a factor in determining whether a use has been

discontinued, since “intent” is difficult to define or document. Any subsequent use of such property must be a use permitted in the underlying zoning district.

The proposed ordinance also allows for the same types of exceptions on nonconforming uses as the current ordinance. First, some uses may have been permitted and vested under the ordinance in place at the time but before the use was established, a subsequent UDO change made it nonconforming. The exception language would allow the use to exist as a nonconforming use so long as it was established within 2 years of the original approval of the nonconforming use. If the use is not established within 2 years of the approval, then the use can no longer be established, as its nonconforming use status has been lost. The second exception applies in order to prevent loss of nonconforming use status when there is a validly issued active building permit existing for a structure maintained as a nonconforming use.

The proposed ordinance also makes clear that the resumption of a nonconforming use is not permitted if the nonconforming use is replaced by a permitted use for any period of time. Finally, the proposed ordinance sets forth that a use that is accessory to a principal nonconforming use may not be continued after the principal use has lost its nonconforming use status, unless the use is also an accessory use to other principal uses on the site permitted in the subject zoning district.

In response to the request of City Council to establish a time limit on building permits, the City Attorney’s staff prepared language to require a Certificate of Occupancy be obtained within two years of the issuance of the building permit. Furthermore, additional changes are proposed to Section 5-2.7 to clearly establish the same timeframe for reconstruction after demolition or destruction.

ANALYSIS

The original text amendment language was prepared by the City Attorney’s Office in conjunction with the Inspections Department at the request of City Council. The basic underlying policy for the discontinuance of a nonconforming use has been handled consistently over the years and there is no desire to change that policy. The only reason for this amendment is to “clean up” ambiguities in the present UDO wording as it relates to that policy.

Beyond doing what is necessary to clarify existing policy, the City Attorney’s Office and the Inspections Department do not recommend further modifying the time frame relating to the loss of nonconforming use status after one year. The one-year time frame is typical of the other major cities in North Carolina, including Charlotte, Raleigh, and Greensboro. Durham and High Point are even more restrictive in that a use loses its nonconforming rights after it ceases to exist after only six months.

On the other hand, the policy of allowing the one-year period to be extended while there is a validly issued active building permit is not currently in the UDO. The proposed amendment includes language specifying that policy, allowing additional leeway in the ordinance language that is consistent with local practice.

At the request of the City Council, language has been added to limit the amount of time an abandoned nonconforming use can retain its status while making improvements under an active building permit. The proposed time limitation is two years from the time the building permit is issued, which then extends the total possible time to re-establish a discontinued nonconforming use to three years. This again appears to be more lenient than other jurisdictions. Greensboro and Durham do not allow damaged or destroyed buildings to be reconstructed for a nonconforming use if the damage exceeds 50 percent of the pre-damaged value. Durham requires that if reconstruction does take place, a building permit must be issued within one year and construction must be completed within one year of the issuance of the building permit. In High Point, reconstruction must occur within six months.

Planning staff is supportive of the text amendment as updated and sees the new language as a clarification of our existing ongoing policies and not an attempt to revise the policies.

RECOMMENDATION

APPROVAL

UDO-240
AN ORDINANCE AMENDING
CHAPTER B OF THE *UNIFIED DEVELOPMENT ORDINANCES*
TO CLARIFY VAGUE AND AMBIGUOUS LANGUAGE
RELATING TO THE LOSS OF NONCONFORMING USE STATUS

Be it ordained by the City Council of the City of Winston-Salem, North Carolina, that the *Unified Development Ordinances* is hereby amended as follows:

Section 1. Chapter B, Article V of the UDO is amended as follows:

Chapter B – Zoning Ordinance

Article V – Nonconforming Situations

5-2 NONCONFORMING USES

5-2.7 - RECONSTRUCTION AFTER DEMOLITION OR DESTRUCTION

(A) Reconstruction Permitted

Any structure maintained as a nonconforming use may be reconstructed on the same lot, provided ~~the certificate of occupancy for such reconstruction shall be issued~~ such reconstruction shall be accomplished pursuant to all of the following requirements:

- (1) Permit.** ~~Within two (2) years of demolition or destruction of the building pursuant to a validly issued permit~~ A valid building permit must be issued within one (1) year of the demolition or destruction of the structure. In the event a demolition is preceded by a partial destruction, a valid building permit must be issued within one (1) year of the partial destruction of the structure.
- (2) Area.** ~~Without any~~ No increase in the cubical content or floor area shall be permitted, except that an increase in the cubical content or floor area not to exceed twenty-five percent (25%) may be permitted with issuance of a special use permit by the Board of Adjustment, and if the one time twenty-five percent (25%) expansion has not previously been permitted.
- (3) Location.** ~~Without any~~ No change in location shall be permitted, except to provide greater front, side, or rear yard areas.
- (4) Time.** A certificate of occupancy must be issued within two (2) years of the issuance of a building permit.

(B) No Conversion of Nonconforming Use Permitted

The use to which a structure is put after reconstruction may not result in a change from the nonconforming use which existed immediately prior to reconstruction, except to conform to current zoning.

(C) **Findings.**

No such permit shall be issued unless the Board of Adjustment shall find that the proposed expansion of the nonconforming use:

- (1) Will not materially adversely affect the use, enjoyment, or value or surrounding properties.
- (2) Will not create undue traffic congestion;
- (3) Will not result in any significant increase in lighting, offensive odors, noise, vibration, smoke, dust, or fumes;
- (4) Will not violate or result in the violation of any dimensional requirements, off-street parking requirements, sign regulations or any other applicable provisions of the Zoning Ordinance.

5-2.8 ~~DISCONTINUANCE~~ LOSS OF NONCONFORMING USE STATUS

~~(A)~~ **Applicability**

~~Any nonconforming use which has been discontinued shall not thereafter be reestablished. Any structure or land formerly devoted to a nonconforming use, which has been discontinued, shall not again be devoted to any use other than those uses permitted in the applicable district.~~

~~(B)~~ **Definition**

~~The term discontinuance shall mean the voluntary termination or cessation of a use. Any one of the following shall constitute conclusive evidence of discontinuance:~~

- ~~1. Any positive act indicating such discontinuance;~~
- ~~2. Failure to take all necessary steps to resume the nonconforming use with reasonable dispatch in the circumstances, including failure to advertise the property for sale or lease;~~
- ~~3. Regardless of intent, discontinuance of any nonconforming use of a building or any portion thereof for a period of one consecutive year, or of land for a period of thirty (30) consecutive days.~~
- ~~4. In the case of a building or portion thereof, discontinuance of the nonconforming use for a period of three hundred sixty five (365) consecutive days, unless the use is vested under the provisions of Section B.1 5.2(B)(2)(a)(i), in which case the period shall be two (2) years;~~

- (A) Subject to the exceptions contained in subsections (B) and (C) below, a nonconforming use that discontinues, for any reason, for a continuous period of more than one (1) year may not be reestablished. Intent shall not be a factor in determining whether a use has been discontinued. Any subsequent use of such site must be a use permitted in the underlying zoning district.
- (B) Notwithstanding the foregoing, nonconforming use status shall not be lost during the period when there is a validly issued active building permit existing for a structure that has been maintained as a nonconforming use, provided the building permit is issued within one (1) year of the discontinuance of the nonconforming use and a certificate of occupancy is issued within two (2) years of the issuance of the building permit. Moreover, in the event a previous validly issued building permit becomes inactive, nonconforming use status shall be lost if all periods during which operations have discontinued without the existence of a validly issued active building permit exceed one (1) year, collectively, and the continuous requirement of subsection (A) above shall not apply.
- (C) In the event a nonconforming use is vested pursuant to Section B.1-5.2(B)(2)(a), nonconforming use status shall not be lost prior to the establishment of the nonconforming use, so long as the nonconforming use is established within two (2) years of the approval of said nonconforming use.
- (D) The resumption of a nonconforming use is not permitted if the nonconforming use is replaced by a permitted use for any period of time.
- (E) A use that is accessory to a principal nonconforming use on a site may not be continued after the principal use has lost its nonconforming use status, unless the use is also an accessory use to other principal uses on said site permitted in the subject zoning district.

Section 2. This ordinance shall become effective upon adoption.