

Motion and
Statement of Consistency with Comprehensive Plan
UDO-240

I move that the following statement be adopted in support of a *Motion to Approve* Zoning Text Amendment UDO-240.

The zoning text amendment, proposed by the City Attorney's Office staff 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, is in conformance with the recommendations of the Legacy Comprehensive Plan and is reasonable and in the public interest because:

1. The proposed text amendment removes ambiguities and provides clarity to the UDO relating to discontinuance of nonconforming uses and the process of determining loss of nonconforming use status; and
2. The proposed ordinance provides 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; and
3. The proposed changes to the ordinance clearly establish the same timeframe for reconstruction of a nonconforming use after demolition or destruction; and
4. The proposed ordinance also allows for the same types of exceptions on nonconforming uses as the current ordinance.

Based on the foregoing Statement, I move adoption of UDO-240.

Second:

Vote:

FORSYTH COUNTY
BOARD OF COMMISSIONERS

MEETING DATE: September 9, 2013 **AGENDA ITEM NUMBER:** _____

SUBJECT:-

- A. Public Hearing on Zoning Text Amendment Proposed by the City Attorney's Office to Amend Chapter B, Section 5-2.7 and Section 5-2.8 of the Unified Development Ordinances to Clarify Vague and Ambiguous Language Relating to the Loss of Nonconforming Use Status (UDO-240)

- B. Ordinance Amending Chapter B of the Unified Development Ordinances to Clarify Vague and Ambiguous Language Relating to the Loss of Nonconforming Use Status

COUNTY MANAGER'S RECOMMENDATION OR COMMENTS:-

SUMMARY OF INFORMATION:-

See attached staff report.

After consideration, the Planning Board recommended approval of the rezoning text amendment.

ATTACHMENTS:- X YES NO

SIGNATURE: _____ **DATE:** _____

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 describing 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 and inconsistent application.

The proposed ordinance amendment sets forth that a nonconforming use which discontinues, for any reason, for a continuous period of more than one 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 two years of the original approval of the nonconforming use. If

the use is not established within two 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. The proposed ordinance also 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. Finally, changes are proposed to Section 5-2.7 to clearly establish the same timeframe for reconstruction after demolition or destruction.

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.

ANALYSIS

The text amendment language was prepared by the City Attorney's Office in conjunction with the Inspections Department. 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 how that policy is applied.

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 jurisdictions in North Carolina, including Charlotte, Raleigh, and Greensboro as well as counties such as Durham, High Point, Guilford, Wake County, and Davidson, which 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 established 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. In some ways, this appears to be more lenient than other jurisdictions as it relates to reconstruction after demolition or destruction. 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.

**CITY-COUNTY PLANNING BOARD
PUBLIC HEARING
MINUTES FOR UDO-240
JUNE 13, 2013**

David Reed presented the staff report.

PUBLIC HEARING

FOR: None

AGAINST:

Julie Magness, 630 Fenimore Street, Winston-Salem, NC 27103

- I represent the Winston-Salem Neighborhood Alliance.
- The Winston-Salem Neighborhood Alliance supports the fixed time limit on the building permit exception on nonconforming uses because we believe a continually renewable building permit will serve as a potentially negative delay tactic.
- A nonconforming property should convert to the current zoning when the nonconforming use is abandoned.
- We do not support a three-year time lapse as currently proposed. We feel that is going the wrong direction because there is already the established time frame of a two-year time limit for demolished or destroyed buildings.
- Two years is a reasonable amount of time for renovations or rebuilding and it's in the best interest of the surrounding tax base.
- Nonconforming uses should be maintained or revert to current zoning within two years for consistency with the current ordinance rather than changing that part of the ordinance.
- Surrounding property owners should not be submitted to the delays of the proposed three year allowance not knowing what's going to happen with that property and the potential for it to be run down.
- The Winston-Salem Neighborhood Alliance proposes that a Certificate of Occupancy should be obtained within one year of obtaining a building permit and that no change be made to the section on reconstruction after demolition or destruction.

WORK SESSION

During discussion by the Planning Board, the following points were made:

Clarence Lambe: Here's the scenario that concerns me: you have an established, legally nonconforming store within an established residential neighborhood. For some reason the store goes out of business. The owner may or may not know it's legally nonconforming, and it could

certainly take some time for them to discover they have a legally nonconforming use. If they lose the opportunity to maintain the legally nonconforming use, what are the chances that they are going to spend money to demolish it and convert it to a single-family lot? I think the chances of having a decrepit building is greater if they lose their nonconforming status than if they don't lose it. I realize all things have to come to an end and I'll probably support this, but that's what I think will happen.

Arnold King: I would suspect there are buildings out there now which are legally nonconforming but have been vacant more than a year because in this economy they can't lease them.

Paul Mullican: That structure has existed because it meets the needs of the neighborhood. I feel there could be a problem with that because there's a need for that sort of use in that area. I don't know how we can address the issue with the people who own the property to let them know they could lose their zoning status.

Clarence Lambe: Then if you're making a point that the business should be there for the neighborhood, then the neighbors should support the rezoning. That's the other side I reckon.

Arnold King: I will support this but I am concerned. I've had buildings which are legally conforming and zoned properly but have sat vacant more than a year.

Paul Mullican: The neighbors might support a rezoning, but the attorneys are going to consider that a spot zoning.

Brenda Smith: I will support this but it doesn't address the underlying issues we have with nonconforming uses.

Paul Norby: This is not unlike issues that other cities deal with concerning nonconforming uses which cease to be used. A lot of our other peer cities are more restrictive than what we are recommending.

MOTION: Clarence Lambe moved approval of the zoning text amendment.

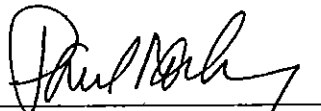
SECOND: Allan Younger

VOTE:

FOR: Wesley Curtis, Arnold King, Clarence Lambe, Darryl Little, Barry Lyons, Lynne Mitchell, Brenda Smith, Allan Younger

AGAINST: Paul Mullican

EXCUSED: None



A. Paul Norby, FAICP
Director of Planning

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 Board of Commissioners of Forsyth County, 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.