CITY OF OTHELLO PLANNING COMMISSION

Regular Meeting
500 E. Main St.
August 19, 2024
6:00 PM

For those who would like to attend remotely, see virtual instructions on the next page

1. Call to Order - Roll Call

2. Public Input

3. Approval of July 15, 2024 Minutes p.3

4. Zoning Update – Home Occupations – OMC 17.59 – Public Hearing and Recommendation to City Council p.8

5. Nonconforming Use Code – OMC 17.79 – Introduction and Discussion p.14

6. Subdivision Update – OMC Title 16 – Reimbursements/Latecomer Agreements Continued Discussion p.27

7. July 2024 Building & Planning Department Report p.37

8. Old Business
    a. Housing – We should look at further implementation possibilities from the Housing Action Plan (p.15 of HAP/p.24 of PDF)
    b. Columbia Street Local Improvement District (LID) – Nothing to report

Next Regular Meeting is Monday, September 16, 2024 at 6:00 PM

Remote Meeting Instructions:

Join Zoom Meeting
https://us06web.zoom.us/j/81894213261?pwd=MjMwZ01Ubmdaai8xdlFua0dvd3dMUT09

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City of Othello
Planning Commission Meeting
July 15, 2024
Zuleica Morfin

CALL TO ORDER
Vice Chair Alma Carmona called the meeting to order at 6:01pm.

ROLL CALL
Commissioners Present: Brian Gentry, Alma Carmona, Daniela Voorhies, Maria Martinez, Ruth Sawyer
Absent: Chair Chris Dorow (out of town), Kevin Gilbert
Staff: Community Development Director Anne Henning, Building and Planning Secretary Zuleica Morfin
Attendees: Bob Carlson, Kim Bailey, Yaremy Ibarra, Danae Mendez

PUBLIC INPUT
Kim Bailey, a retired teacher from Othello, said having had had probably 1,000 kids pass through her classroom, her interest was for the kids. She said she wanted to talk about the next neighborhood plan that will maybe go across from Wal-Mart. She would like to see a park-like setting go into the neighborhood rather than creating block after block and grid after grid of tarmac cement and one house after another. Back in her younger days, she was a world traveler and went to London, Paris, Quebec City, and Romania. She said all those Cities created little pockets of beauty. You would walk 5 blocks along a neighborhood and there was a block set aside of green grass, trees, and benches. She said for her it was important to create pockets of beauty and when you have a little neighborhood park like in France or Walla Walla, people get to know each other.

MINUTES APPROVAL
April 15, 2024, minutes approved M/S Brian Gentry/ Ruth Sawyer

ZONING UPDATE- HOME OCCUPATIONS- OMC 17.59
When the zoning code was updated (2017-2020), staff and the Planning Commission's goal was to deal with the most glaring inconsistencies and the most important aspects that needed change, with the idea that we could come back to the other sections as we discovered problems with them. At the September 2023 meeting, the planning commissioners renewed discussion of home occupations. We started this work in spring 2022, because the topic had been coming up as an issue, but then more pressing issues crowded out completing this item at that time. Now there is a business owner directly affected by this regulation, so we are back to looking at this code section. The September 2023 meeting included discussion of the purpose statement and review of the table comparing standards in various cities. Ms. Henning told commissioners there was someone who would like to have a barber shop in their home but that is currently prohibited. She provided a draft based on the previous discussions by the commissioners, so that commissioners could review it and compare it to what they had in mind, focusing on the list of prohibited uses.

Vice Chair Alma Carmona read over the proposed prohibited uses: Retail sales, kennels, stables, animal hospitals, pet grooming, real estate offices, restaurants, medical and dental clinics, vehicle repair,

painting, servicing, and renting; welding and metalwork; cabinet, carpentry, and paint shops; mortuaries, private or nursery schools, and private clubs.

Commissioner Brian Gentry said his only three issues with the ordinance were parking, signage, and the traffic that would be coming in and out. Vice Chair Alma Carmona said from what she could remember the last time they had talked about this, they talked about allowing one vehicle per appointment. Ms. Henning said she remembered they had talked a lot about it but didn't remember that they had settled on it. In the existing OMC 17.59.080 it states that no traffic shall be generated by such home occupation in greater volume than would normally be expected in a residential neighborhood, and any need for parking generated by the conduct of such home occupation shall be met off the street and other than in a required front yard. Commissioner Gentry said he was ok with this although it was a little vague.

Commissioner Ruth Sawyer asked if there are a lot of existing businesses at homes. Ms. Henning said there has not been a good way to track them so she couldn't really answer that.

Commissioner Brian Gentry said if they were keeping it to one appointment at a time, there wouldn't be two cars unless a couple arrived is separate cars. Vice Chair Alma Carmona said they should maybe allow two cars at most per appointment. Commissioner Gentry said they would have to be able to park off the street and it'll start looking commercial. Commissioners agreed that the verbiage for the parking restrictions was good.

Commissioners removed pet grooming from the prohibited list, based on it being similar to beauty and barber shops which are being removed from the prohibited list.

Vice Chair Alma Carmona asked about the purpose statement of the home occupations. Ms. Henning replied that she did add the new purpose statement the Commission had drafted but she forgot to underline it. It is 17.59.005. Vice Chair Carmona read the purpose statement:

> **17.59.005 Purpose**.
>
> Home occupations provide residents with the option to use their residence for small scale business activities while guaranteeing all residents freedom from excessive noise, traffic, nuisance, fire hazard, and other possible effects of commercial uses in residential neighborhoods.

Commissioners liked the purpose. Commissioner Daniela Voorhies asked if they needed to define small scale. Commissioner Brian Gentry said with the traffic and the parking it would be enforced.

Commissioners reviewed the sign provisions:

> **17.59.050 Advertising and appearance restricted**
>
> There shall be no change in the outside appearance of the building or premises, or other visible evidence of the conduct of such home occupation other than one sign, not exceeding one square foot in area, nonilluminated, and mounted flat against the wall of the principal building.

With this being what is currently in the code, commissioners agreed to leave as is.

Commissioner Martinez arrived at 6:23.

Bob Carlson asked commissioners to look at the past minutes where they discussed allowing a non-resident employee and rediscuss it. Commissioners had voted against allowing to have an employee. Vice Chair Carmona mentioned that allowing an outside employee meant there would likely be another vehicle parked at the site. Ms. Henning suggested that if they were worried about vehicles, they should regulate

the number of vehicles associated with the business. Consensus on leaving it as stated in the draft: no outside employees.

Ms. Henning will bring the chapter back with the changes at the next meeting for a public hearing and recommendation to council.

SUBDIVISION UPDATE- OMC TITLE 16- CONTINUED DISCUSSION

When property is divided, it must be done through the subdivision process. Each jurisdiction sets standards based on state requirements. Othello Municipal Code Title 16: Subdivisions is our local version of that. This code is in need of a major update. There are many provisions that don't match up to current practice or conflict with other sections of the code. In addition, the Title is long, confusing, and overly complicated. Most sections of the Title have not been updated since initial adoption in 1995. The intent of updating the Subdivision Title is to streamline the process, organize it better, make it easier to understand, and eliminate discrepancies. This title is complicated to work on because the chapters are so interrelated, requiring a lot of time and effort by both staff and the Commission to understand the issues and try to solve them in the best way possible. The Commission has done a considerable amount of work on this title already, but it has been spread over several years.

The Commission looked at the following provisions:

16.29.040 Neighborhood ~~Minor~~ streets- Discouragement of through traffic

Neighborhood ~~Minor~~ streets which serve primarily to provide access to abutting property only shall be designed to discourage through traffic, including traffic calming measures such as curves.

Ms. Henning asked the Commission how they felt about the proposed changes to this section. Vice Chair Alma Carmona said she remembered as part of the traffic safety plan they wanted to encourage the developer to put in traffic circles and if not, they would have to go back later and put them in. Ms. Henning said the traffic safety plan was more for existing streets rather than new developments, which could be designed differently. Vice Chair Carmona said raised sidewalks needed to be put in because there is a problem in the existing developments as is. Commissioner Daniela Voorhies suggested ending it at "including traffic calling measures " and not trying to list them.

16.29.210 Block-Lengths

~~In general, blocks shall be as long as is reasonably possible consistent with the topography and the needs for convenient access, circulation, control and safety of street traffic, and type of land use proposed, but ordinarily~~, Residential block lengths shall not exceed six ~~twelve~~ hundred feet or be less than three hundred feet. [*Shorter block lengths provide better connectivity and walkability and slow traffic by creating more intersections. Original Othello from 8th to 14th has 300' block lengths, and the blocks from 7th to 8th and 13th to 14th are slightly longer*] Residential blocks longer than 600' may be allowed when a mid-block multi-use pathway is provided through the block, and a raised crosswalk is provided for the mid-block crossing. Block length shall be measured from the edges of the lots, not including right-of-way. [*March 2021, Commission discussed also requiring a raised crosswalk in this situation, confirmed by Commission April 2024*].

Ms. Henning said the Commission had previously discussed that if the block is longer than 600 feet, it would need a pedestrian walkway through that block and a raised crosswalk. She asked the Commission to think about who was going to be responsible for that extra sidewalk, including shoveling snow, pulling weeds, and eventually repairing the concrete. The Sagestone development has pedestrian walkways and the plat states that adjacent lot owners are to maintain it. Commissioners wondered who maintains the walkways at Palos Verdes and the middle school.

Ms. Henning told commissioners she had not put in language about fencing, but they should think about whether to restrict fencing along those walkways. People don't like others looking into their backyards but if there is a tall fence, it can turn the path into a scary hallway. Vice Chair Alma Carmona said she was leaning more towards allowing the homeowner to put up a fence. She said the walkway at Palos Verdes has a fence, and although it's a little tight it's ok because it's a short distance. Commissioners agreed to allow abutting homeowners to put up a fence. Ms. Henning said something she had seen in other codes was that they didn't allow for walkways to have corners so that people could be seen from both ends so that it didn't create a safety issue. Commissioners like that.

16.29.280 Tree planting.

Street planting plans in duplicate must be submitted to the commission and receive its approval before planting is begun. Care of any trees that are planted by the subdivider will be the responsibility of the adjacent landowner. [*March 2021 Planning Commission direction was that this provision should be removed and coordinated with the revisions to the Landscape chapter OMC 17.74*]

Since March 2021, City Council has reviewed the landscape chapter and has determined that the developer shouldn't be required to put in landscaping and that it should be up to the homeowner to install it. But the problem here is how to get the homeowner to plant a tree because in the landscape code they have a year to put in landscaping and no requirement for any trees. Commissioner Ruth Sawyer said it should be up to the homeowner whether they want to plant a tree because it's a lot of responsibility. Commissioner Daniela Voorhies asked Ms. Henning who put in the trees on 14th Ave and who maintains them. Ms. Henning said these trees were put in as a city project and Vice Chair Carmona said they are watered by the city.

Vice Chair Alma Carmona said neighborhoods need trees because they make it homey and keep things cooler, but she didn't like what they do to the concrete. Commissioner Brian Gentry said he was a little torn on this one, he didn't like forcing people to do things, but the City should encourage trees. Commissioner Maria Martinez said she wanted the neighborhood to look nice but what if the tree starts growing into the pipelines, so she was also torn on this one. Ms. Henning said there is a list of approved trees in the landscape code (17.74.110) that are approved as street trees and shouldn't impact pavement. Commissioner Brian Gentry said he was trying to think of how they could encourage homeowners to put in trees without forcing, maybe a property tax incentive? Vice Chair Carmona said they could have the developer put in the tree but that might create a nuisance. Commissioner Gentry mentioned that he works with a developer in Connell who puts in the front yard and one tree for each house because he wants his development to look nice. Vice Chair Carmona said she felt like this topic needed more discussion. Commissioner Daniela Voorhies suggested that every other house be required to have a tree, so the buyer could choose a house with a tree or without a tree. Vice Chair Carmona asked Commissioner Gentry if the buyers have been happy about having the landscaping already installed. He said they are very happy and there have been no complaints. Vice Chair Carmona suggested requiring the developer put in one tree per lot, not the other landscaping or irrigation, just one tree per house, and not installed until there was a buyer who would maintain it.

OMC 16.52 Reimbursement Agreements

For the next meeting, Commissioners will look over the reimbursement chapter from the city of Kent to discuss how it compares to Othello's reimbursement chapter.

ADJOURNMENT

Having no further business, the meeting was adjourned at 7:27pm. Next meeting is Monday, August 19, 2024.

_____ Date: _____
Chris Dorow, Chair

_____ Date: _____
Zuleica Morfin, Building and Planning Secretary

TO: Planning Commission

FROM: Anne Henning, Community Development Director

MEETING: August 19, 2024

SUBJECT: Zoning – OMC 17.59—Home Occupations – Public Hearing & Recommendation to City Council

The Planning Commission started looking at the Home Occupation regulations, OMC 17.59, in 2022 at the request of the Code Enforcement Officer, since there had been issues coming up, such as uses listed as allowed and prohibited weren't always matching up well with current practice. The world has changed a lot since 1995 when Othello's home occupation rules were adopted. Just in recent times and specific to Othello, conversion of garage area to living space is now allowed in certain circumstances, and accessory dwelling units are allowed. More generally, home-based businesses have become more common, as people try to supplement their incomes or work for themselves rather than an outside employer. Attitudes toward appropriate uses in residential have also been changing, as well as attitudes toward regulation of how people use their property.

Staff looked for examples of more modern home occupation codes but they proved hard to find. Many of the codes around the state are very similar, with just slightly different phrasing. Many also seem unnecessarily wordy and bureaucratic; staff and the Planning Commission are in favor of shorter and simpler regulations. We reviewed several of the most concise codes and staff contacted 5 of those jurisdictions for input on how their home occupation codes have been working. The Planning Commission compared Othello's regulations to 12 other cities on issues such as the purpose statement, whether an accessory building could be used, whether the business could include an employee who didn't live in the home, how to limit the scale of the business, whether a sign should be allowed, and deliveries, traffic, and parking.

After much discussion over several meetings, spread out over time due to the many other topics the Commission has been working on, at the July 15 meeting, the Commission determined they are ready to schedule a public hearing and provide a recommendation to the City Council.

Staff Comments

1. Summary of major changes:
    a. Purpose statement added.
    b. Reorganized/reworded some of the existing language, such as putting all the requirements in one section.
    c. Reconfigured "Home Occupation Defined" section into "Applicability" and "Requirements". There is an existing definition in the Definitions chapter of the Zoning Code, and this section was more about requirements than definitions.
    d. Expanded to be allowed in an accessory structure instead of just in the residence.
    e. Clarified that outdoor storage is not allowed for a home occupation.
    f. Clarified that parking or storage of construction equipment or large vehicles is not allowed.
    g. Clarified that any business operating at a residence must meet the home occupation regulations (so that enforcement can write a ticket for non-compliance).

h. Added a statement that conditions may be placed on a home occupation license, to ensure staff has the power to place conditions.
i. Deleted the list of allowed home occupations. This list is dated and not very useful. Most codes do not have a list like this.
j. Removed the floor area limitation because this is very hard to verify or enforce, and the Commission thought it should be up to the owner to decide how to use their space.
k. Removed barber shop and beauty parlor from the list of prohibited home occupations. The Commission felt that with the limit of 1 client at a time and no outside employees, allowing barber/beauty services was acceptable as a home occupation. Similarly, pet grooming was removed from the prohibited list.

2. At the July 22 City Council meeting, several Council members complimented the Planning Commission's work on the Home Occupation update. There only questions were about nursery schools and food businesses:
    a. There was a concern that prohibiting "private schools and nursery schools" would prohibit childcare. Staff felt that childcare is defined differently enough that it shouldn't be a problem. Family home daycare (care in the home of the provider, of up to 12 children) is regulated by the state, and all cities must allow these businesses anywhere homes are allowed. Because of the state preemption, staff does not consider family home daycare to be a home occupation and instead issues a standard business license.
    b. There was a concern about oversight of businesses preparing food in a home. Staff's response is that any business involving food preparation is required to show their license from Adams County Health Department.

Attachments

- Draft OMC 17.59

Procedural actions

Action	Date
Topic introduced to Planning Commission	Feb 2022
Planning Commission discussed briefly	March 2022
Extensive discussion at Planning Commission study session	April 2022
On Planning Commission agenda but too many other things on the agenda so didn't have time to discuss	May 2022
Extensive discussion but didn't get through all of them	Sept 2023
On Planning Commission agenda but too many other things on the agenda so didn't have time to discuss	Oct 2023
Planning Commission finished reviewing the issues	July 15, 2024
Introduced to City Council	July 22, 2024
DNS issued (SEPA review)	Must be issued by July 26, 2024
Submitted to Commerce for 60-day review	Not required (Othello is partially-planning under the Growth Management Act
Planning Commission public hearing & recommendation to City Council	Scheduled for Aug 19, 2024
City Council public hearing	Scheduled for Sept 9, 2024

Public Hearing: Notice of the DNS and public hearing was published July 31. The Planning Commission should hold a public hearing and take testimony on the proposed amendment of OMC 17.59.

Action: The Planning Commission should hold a public hearing on the proposed changes to the Municipal Code, and make and recommendations to the City Council on the proposed amendments to the Home Occupation chapter, OMC 17.59.

Chapter 17.59

HOME OCCUPATIONS

Sections:

17.59.005 Purpose

Home occupations provide residents with the option to use their residence for small scale business activities while guaranteeing all residents freedom from excessive noise, traffic, nuisance, fire hazard, and other possible effects of commercial uses in residential neighborhoods.

17.59.010 ~~Home occupation defined~~ Applicability.

~~A home occupation means~~ This section applies to any endeavor conducted for financial gain or profit in a dwelling unit where the endeavor is not generally characteristic of activities for which dwelling units are intended or designed, provided, that endeavors where the only activities include the receipt of mail, the use of a telephone, the occasional commercial delivery of goods and materials not inconsistent with such vehicular traffic in residential neighborhoods, are not considered home occupations subject to permitting requirements under this title. To be defined as a home occupation, the occupation or activity:

17.59.012 Requirements.

A home occupation:

(1) Must be carried on entirely within a residence or accessory structures by the occupants. No person other than members of the family residing on the premises shall be engaged in the business.

(2) Must be clearly incidental to the use of the residence as a dwelling.

(3) Must not change the residential character of the dwelling, except that one sign may be allowed per OMC 17.59.050.

(4) Must be conducted in such a manner as to not give any outward appearance nor manifest any characteristic of a business in the ordinary meaning of the term, including no outdoor storage related to the business.

(5) Must not infringe upon the right of the neighboring residents to enjoy a peaceful occupancy of their homes for which purpose the residential zone was created and primarily intended.

(6) Must not use any equipment or process which creates noise, vibration, glare, fumes, odors or electrical interference detectable to the normal senses off the lot. In the case of electrical interference, no equipment or process shall be used which creates visual or audible interference in any radio or television receivers off the premises, or causes fluctuations in line voltage off the premises.

(7) Must allow only one customer appointment at a time.

(8) Must not include parking or storage of construction equipment or large vehicles.

~~An occupation~~ A business which does not meet ~~this definition~~ these requirements or which is incapable of or does not comply with the general requirements of this title shall not be ~~deemed~~ approved as a home occupation.

17.59.015 Application for home occupation uses and appeals.
Compliance with the home occupation requirements is required for any business operating on a residential property in a residential zone. An application for a home occupation use shall be submitted to the clerk's department for consideration. Such uses may be permitted by the individual(s) designated to review the applications subject to the provisions of this chapter. Conditions may be placed to ensure compliance with the requirements and intent of the home occupation regulations. Any party aggrieved by a decision rendered by the individual(s) reviewing the application may appeal the decision to the hearing examiner, subject to the provisions of Chapter 19.11, Appeals.

~~**17.59.020 Permitted occupations.**~~
~~Permissible home occupations include but are not limited to the following:~~

~~(1) Accountant and tax consultants;~~

~~(2) Artists and writers;~~

~~(3) Architects and draftsmen;~~

~~(4) Dressmakers, seamstresses and tailors;~~

~~(5) Music or dance teachers;~~

~~(6) Catering and party decorators;~~

~~(7) Office facilities used in conjunction with business activities conducted off the premises, e.g., clergymen, salesmen, brokers, professional persons, etc.;~~

~~(8) Tutoring;~~

~~(9) Massage parlors;~~

~~(10) Small appliance repair.~~

~~The above home occupations are limited to one client at a time.~~ *[One client at a time moved to 17.59.012]*

~~**17.59.030 Participation restricted.**~~
~~No person other than members of the family residing on the premises shall be engaged in such occupation.~~ [*Moved to 17.59.012(1)]*

~~**17.59.040 Floor area limitation.**~~
~~The use of the dwelling unit for the home occupation shall be clearly incidental and subordinate to its use for residential purposes by its occupants,~~ [*Covered to 17.59.012(2)]* ~~and not more than thirty percent of the floor area of the dwelling unit shall be used in the conduct of the home occupation.~~ *[9-18-23 Commission not in favor of setting a square foot limitation and noted that any area limitation would be hard to enforce]*

17.59.050 Advertising and appearance restricted.
There shall be no change in the outside appearance of the building or premises, or other visible evidence of the conduct of such home occupation other than one sign, not exceeding one square foot in area, nonilluminated, and mounted flat against the wall of the principal building.

~~**17.59.060 Accessory building use prohibited.**~~
~~No home occupation shall be conducted in any accessory building.~~ *[9-18-23 Planning Commission directed to allow the use of accessory buildings]*

~~**17.59.070 Retail sales prohibited.**~~
~~There shall be no retail sales of merchandise in connection with such home occupation.~~ *[Added to 17.59.100]*

17.59.080 Traffic and parking restricted.
No traffic shall be generated by such home occupation in greater volumes than would normally be expected in a residential neighborhood, and any need for parking generated by the conduct of such home occupation shall be met off the street and other than in a required front yard.

~~**17.59.090 Noise and interference prohibited.**~~
~~No equipment or process shall be used in such home occupation which creates noise, vibration, glare, fumes, odors or electrical interference detectable to the normal senses off the lot, if the occupation is conducted in a single-family residence, or outside the dwelling unit if conducted in other than a single-family residence. In the case of electrical interference, no equipment or process shall be used which creates visual or audible interference in any radio or television receivers off the premises, or causes fluctuations in line voltage off the premises.~~ [This concept moved to 17.59.012]

17.59.100 Prohibited occupations.
Prohibited home occupations include but are not limited to the following:

(1) ~~Barber shops~~ Retail sales;

(2) ~~Beauty parlors~~;

~~(3)~~ Kennels;

~~(4)~~ (3) Stables;

~~(5)~~ (4) Animal hospitals;

~~(6) Pet grooming;~~

~~(7)~~ (5) Real estate offices;

~~(8)~~ (6) Restaurants;

~~(9)~~ (7) Medical and dental clinics;

~~(10)~~ (8) Vehicle repair, painting, servicing and renting;

~~(11)~~ (9) Welding and metal work;

~~(12)~~ (10) Cabinet, carpentry, and paint shops;

~~(13)~~ (11) Mortuaries;

~~(14)~~ (12) Private or nursery schools;

~~(15)~~ (13) Private clubs.

TO: Planning Commission

FROM: Anne Henning, Community Development Director

MEETING: August 19, 2024

SUBJECT: Nonconforming Uses—Discussion

When the Zoning Code was updated (2017-2020), our goal was to deal with the most glaring inconsistencies and the most important aspects that needed change, with the idea that we could come back to the other sections as we discovered problems with them.

The Nonconforming Use chapter is one that wasn't urgent at the time but definitely needs an update. The provisions are out of line with current practices in other cities, specifically the requirement that each nonconforming use have a public hearing and the Planning Commission and City Council making quasi-judicial decisions about whether the use can continue. Also, the 20-year time frame for nonconforming uses to be discontinued is unusual and has not been applied.

Staff looked at a number of other codes across the state for nonconforming uses, and has created the attached draft for discussion.

Staff Comments

1. Staff reviewed codes from Bainbridge Island, Benton City, Blaine, Bremerton, Clallam County, Clark County, Friday Harbor, Kent, Mukilteo, Spokane, and Sumner.

2. The existing Othello ordinance has a 20-year period to terminate a nonconforming use. A termination period would appear to still be allowed by court cases, but is not common practice. Of the 11 jurisdiction reviewed, only 3 had any sort of time limit: Benton City requires nonconforming structures or uses with an assessed valuation of less than $500 to be removed within 2 years. Blaine and Spokane both have time limits for nonconforming adult business (12 months for Blaine and 36 months for Spokane). Therefore, to stay in line with current practice, the time limit portions of the chapter are proposed for deletion.

3. None of the 11 jurisdictions reviewed had a case-by-case review process or public hearings like in the Othello code, so that portion is also proposed for deletion.

4. Should expansion of a nonconforming use and/or addition to a building used for a nonconforming use be allowed? We should address this definitively one way or the other. Per the 1972 court case of Bartz v. Bd. of Adjustment (80 Wn.2d 209), the jurisdiction had the authority to approve constructing a building at an auto wrecking yard because there was no prohibition in the zoning ordinance against the extension or expansion of a nonconforming use, and because the expansion would improve the unsightly conditions at the yard. The draft as currently written would not allow expansions. Here is how other jurisdictions address it:

Jurisdiction	Expansion/Addition regulations
Bainbridge Island	Expansion not allowed, except that mini-storage can expand up to maximum lot coverage
Benton City	Expansion allowed only by conditional use permit

Jurisdiction	Expansion/Addition regulations
Blaine	Expansion not allowed
Bremerton	Expansion or enlargement not allowed, except that residential dwellings may expand the building area if there is no change in the number of dwelling units and the number of parking spaces is not decreased below the minimum required
Clallam	Expansion allowed only by conditional use permit
Clark County	Expansion only allowed for uses established with planned unit development or site plan approval
Friday Harbor	Expansion not allowed
Kent	Expansion allowed only by conditional use permit
Mukilteo	Expansion allowed only by conditional use permit
Spokane	Expansion allowed in some commercial zones under certain circumstances
Sumner	Multifamily and commercial and profession service uses may expand up to 25% by conditional use permit

5. While several codes have a provision that a nonconforming use may be changed to a different nonconforming use, this does not appear to be allowed by the 2000 court case Open Door Baptist Church v. Clark County, 140 Wn.2d 143. The draft retains the existing language in OMC 17.79, which does not allow the conversion to a different nonconforming use.

6. The attached article from Zoning News provides an interesting perspective on nonconforming uses.

Attachments

- Draft changes to OMC 17.79 Nonconforming Uses
- "Pigs in the Parlor or Diamonds in the Rough? A New Vision for Nonconformity Regulation", Zoning News, April 2003

Action: The Planning Commission should discuss the draft changes to the nonconforming use regulations and provide direction to staff. Once the draft is suitable, the Commission will need to schedule a public hearing.

Chapter 17.79

NONCONFORMING USES, STRUCTURES, AND LOTS

Sections:

17.79.010 ~~Limitation on nonconforming uses~~ Intent.

(a) Within the zones established by OMC Title 17 and amendments thereto, there exist uses, structures, and lots which were lawful at the time of their establishment but are prohibited, regulated, or restricted under the existing zone requirements or future amendments. It is the intent of this chapter to permit these nonconformities to continue and be maintained until they are moved or discontinued, but not to encourage their survival.

(b) To avoid undue hardship, nothing in this chapter shall be deemed to require a change in the plans, construction, or designated use of any building or site legally established. The intent of this chapter is to set forth the conditions under which these nonconformities may continue to exist until such time they are discontinued as prescribed by law.

~~Any nonconforming use in existence on January 1, 1996, which is nonconforming as to the type of structure allowed in a zone shall be removed as a nonconforming use by the owner not later than twenty years from that date. Any structure which becomes a nonconforming use in any zone after January 1, 1996, shall be removed not later than twenty years after such structure becomes a nonconforming use. Any nonconforming use existing in any zone on January 1, 1996, shall be terminated not later than ten years from that date. Any use which becomes nonconforming in any zone after January 1, 1996, through the action of a rezone or an amendment of the text of the zoning ordinances shall be terminated not later than ten years after such use becomes nonconforming.~~

(c) A use which becomes nonconforming through the actions of the owner or occupant of the land, shall be terminated immediately.

(d) Any residential use of a structure which (a) exists on a property on or before March 1, 2016, and (b) is a nonconforming use of the zone in which the property is located, or the structure otherwise violates any provision of Title 14, 17, or 18, may be allowed to continue ~~indefinitely beyond the time period identified in this section~~ if the owner (1) enters into a voluntary compliance agreement in accordance with Chapter 1.20 et seq.; (2) obtains the necessary permits and completes the work necessary to bring the property into compliance with all applicable building codes; and (3) ensures that existing tenants on the property have substitute housing (at no additional cost to the tenant) while the owner completes said work during all times the tenant is required to move out of the premises to enable the owner to complete the work provided said requirement does not violate any provision of the Washington Landlord Tenant Act or other Washington State law. (Ord. 1465 § 6, 2016: Ord. 975 § 1 (part), 1995: Ord. 948 § 2 (part), 1995).

17.79.012 DEFINITIONS.

The following definitions are applicable to this chapter:

(a) Nonconforming Lots. A lot that does not meet the lot area, width, street frontage, or other requirements of the zone in which it is located, but was lawfully created prior to the effective date of the zone or subsequent amendments thereto.

(b) Nonconforming Structure. A building or structure that does not comply with the required setbacks, height, lot coverage and other development requirements of the zone in which it is located, but was lawfully constructed prior to the effective date of the zone or subsequent amendments, or that was legally granted a variance.

(c) Nonconforming Use. Any activity, development, or condition that by the zone in which it is located is not permitted outright or by a special permitting process; but was lawfully created prior to the effective date of the zone or subsequent amendments thereto and was continually maintained as defined in this chapter. A nonconforming use may or may not involve buildings or structures and may involve part of or all of a building or property.

(d) Substantial Destruction. For the purpose of this chapter, "substantial destruction" means the repair or replacement of a building or structure which exceeds one (1) of the following:

(1) Seventy-five percent (75%) of the assessed value of the structure as determined by the Adams County Assessor. An appraised value may be substituted for the assessed value at the request of the applicant and as deemed appropriate by the Director.

(2) For accessory structures which are typically not assessed (such as decks, sheds, garages, and retaining walls) and the value cannot be determined, substantial destruction will occur at the point that seventy-five percent (75%) or more of the structure is replaced.

17.79.015 Establishment of a legal nonconformity.

A party asserting the existence of a lawfully established nonconforming use, lot, or structure has the burden of proof that the use, lot, or structure was not substandard in meeting the requirements of the zone which were in effect at its creation.

17.79.020 Continuation of nonconforming uses.

(a) Any legally established nonconforming use may be continued until such time that it is discontinued as prescribed in subsection (b) of this section.

(b) Discontinuation. A nonconforming use that is discontinued shall have its legal nonconforming status terminated and any subsequent use of the property or building shall be that of a use that conforms to the requirements of the zone. A nonconforming use is determined to be discontinued if any of the following circumstances apply:

(1) The nonconforming use is changed to a conforming use;

(2) The nonconforming use has ceased for a period of more than one (1) year.

(3) The structure containing a nonconforming use has suffered substantial destruction as a result of fire or other casualty not intentionally caused by the owner or tenant and a complete building permit application is not filed within one (1) year of such fire or other casualty.

(c) Repair and Maintenance. A building or structure containing a nonconforming use may be repaired and maintained if the cost of the work does not exceed 75% of the assessed value of the structure.

(d) Expansion/Addition. A nonconforming use may not be expanded or enlarged.

~~Notwithstanding Section 17.79.010, the use of land existing on January 1, 1996, although such use does not conform to the provisions of this title, may continue upon such conditions as prescribed by the planning commission. After this ordinance becomes effective, and if such nonconforming use is abandoned, or is discontinued for any period of time, subsequent use of the land shall be in conformity with the provisions of this code. The extension of a nonconforming use to a portion of a structure which was arranged or designed for the nonconforming use on or before January 1, 1996, shall not be considered an extension of a nonconforming use.~~

The conditions prescribed by the planning commission for the continued use of a nonconforming use must bear a substantial relation to the alleviation of a hazard to the health, morals, safety or general welfare of the entire affected community and in particular that of surrounding inhabitants. Conditions may be prescribed including, but not limited to, those situations existing because of fumes, odors, glare, noise, smoke, dust, unsightly materials, or other objectionable factors. If, in fact, conditions are prescribed by the planning commission, such conditions shall be reviewed and revised if necessary no less frequently then every two years and/or upon change of ownership.

An appeal may be taken of the planning commission's ruling to the city council as prescribed in Chapter 17.83* of this code. (Ord. 975 § 1 (part), 1995: Ord. 948 § 2 (part), 1995).

* Code reviser's note: Chapter 17.83 was repealed by Ord. 1547. Chapter 17.79 is scheduled to be revised by the city.

17.79.030 Nonconforming uses, conditions upon continued existence, when, procedure.

(a) Those nonconforming uses allowed to continue to exist pursuant to Section 17.79.020, as now enacted or as hereafter amended, may be conditioned as provided in this section.

(b) The building official, upon receipt of any claim, complaint, report or information that a nonconforming use exists within the city shall investigate such claim, complaint, report or information and make a determination as set forth below.

(c) At the conclusion of his or her investigation, the building official shall determine if the use is a nonconforming use.

(d) If the use is found to be a conforming use, the building official shall determine whether or not the use is allowed to continue pursuant to Section 17.79.020. If the use is not found to be a use allowed to continue pursuant to Section 17.79.020, the building official shall proceed as provided in this chapter to terminate the use.

(e) If the use is found to be a nonconforming use allowed to continue pursuant to Section 17.79.020, the building official shall make written summary of his or her findings and submit them, together with any conditions that, in his or her opinion, should be attached to the use, to the planning commission.

(f) Upon receipt of the documentation described in subsection (e) of this section, the planning commission shall proceed to set a date for a public hearing before it. The purpose of that hearing shall be to determine what conditions, if any, shall be attached to the continuing nonconforming use pursuant to Section 17.79.020. Notice of the hearing shall be published at least once prior to the hearing in a newspaper of general circulation in the city. Additionally, the building official shall cause notice of the public hearing to be delivered to the adjacent land owners and occupants by mailing, posting, or personal notification, whichever the building official determines is likely to give actual notice of the hearing to those persons.

(g) At the conclusion of the public hearing, the planning commission shall make a finding on whether or not conditions need to be imposed pursuant to Section 17.79.020. If the planning commission finds conditions are necessary, it shall make findings as to what conditions shall be imposed and the reasons therefor.

(h) Any nonconforming use found to be required to be conditioned, will be allowed to continue as long as the person, firm, partnership or corporation responsible for that nonconforming use agrees to abide by and be governed by the conditions imposed by the planning commission within the time limit set by the planning commission. The conditions imposed by the planning commission may be for a period of up to twenty-four months. The planning commission may require more frequent review of the conditions imposed on the use as it may direct at the initial public hearing or any subsequent review.

(i) Additionally, the planning commission may bring a set of conditions on for review before the date provided at the time the conditions were set, upon a complaint being brought to its attention by the building official or any citizen. The planning commission shall determine from a review of the complaint whether or not the allegation is sufficient to warrant a further hearing on the question. If a further hearing is deemed appropriate, the planning commission shall cause to be sent to the person, firm, partnership or corporation responsible for the nonconforming use a notice of a hearing before the planning commission setting the date, time and place of the hearing. The notice shall provide, in all capital letters, in a conspicuous place thereon: "THIS HEARING COULD DETERMINE

~~WHETHER OR NOT YOUR NONCONFORMING USE IS ALLOWED TO CONTINUE." Said notice shall be delivered in the same manner as personal service of summons to the responsible person, or posted upon the real property in question, or sent by United States mail service, postage prepaid, to the address of the responsible person. Said notice shall allow the responsible party five days' time before the hearing within which to prepare, unless the planning commission findings at the time it considers the allegation of noncompliance are that the public health, safety and morals require a hearing before that time.~~

~~(j) Either prior to or at least at the time of the hearing to consider the allegations of a complaint concerning noncompliance with conditions, the planning commission shall inform the person, firm, partnership or corporation responsible for the nonconforming use of the notice of the alleged violation. The building official shall present the evidence of the failure to comply. The responsible person shall then be allowed to respond if that person so desires. The planning commission shall then make its findings. It shall find whether or not the conditions have been violated; whether or not any violation has occurred of such magnitude to require additional conditions, more frequent reviews of conditions, or termination. If termination of the privilege to continue the nonconforming use is determine by the planning commission as the only method that can protect the public health, safety and morals to an acceptable degree, the planning commission shall determine the date and time of termination. Once the privilege is terminated for failure to observe conditions, the planning commission shall proceed to direct the building official to enforce the provisions of this chapter to terminate the use.~~

~~(k) Any person aggrieved by the decision of the planning commission may appeal to the city council as provided in Chapter 17.83*. (Ord. 948 § 2 (part), 1995).~~

~~* Code reviser's note: Chapter 17.83 was repealed by Ord. 1547. Chapter 17.79 is scheduled to be revised by the city.~~

17.79.040 Nonconforming structure.
A structure conforming with respect to use but nonconforming with respect to height, setback or coverage may be altered or extended if the alternation or extension does not deviate further from the standards of this title, unless otherwise stated in this chapter. (Ord. 948 § 2 (part), 1995).

17.79.045 Nonconforming lots.
(a) Continuation and Development. A nonconforming lot may be developed for any use allowed by the zone, provided the development meets, through design or by an approved variance, the requirements of the zone in which it is located.

(b) Lot Modifications, Divisions, or Adjustments, No lot may be modified, divided, or adjusted in a manner that would violate dimensional, area, or other requirements of the zone in which it is located, except that a government agency may lawfully modify a lot in a manner that would result in nonconformity, if portions of a lot are acquired for a public use or purpose, or is allowed otherwise by law.

17.79.050 Change of a nonconforming use.
If a nonconforming use is replaced by another use, the new use shall conform to this title and shall not subsequently be replaced by a nonconforming use. (Ord. 948 § 2 (part), 1995).

17.79.060 Change of district.
The provisions of this chapter shall also apply to nonconforming uses in districts hereafter changed or established ~~and any time limit for the suspension of a nonconforming use of land shall date from the date of the enactment of the ordinance codified in this title or any amendment of district boundaries or amendment or adoption of zoning ordinances~~. (Ord. 948 § 2 (part), 1995).

17.79.065 Annexation.
Lots, structures, uses of land and structures that were legally in existence prior to annexation to the City, but that do not conform to the requirements of the zone in which they are located following the date of annexation, shall become a legal nonconformity subject to the requirements of this chapter.

~~**17.79.070 Remodeling a nonconforming use.**~~
~~Recognizing that there are nonconforming buildings or structures which are now existing which should be upgraded or improved by replacement, rebuilding or addition thereto, the city council may, after a public hearing before the~~

planning commission, issue a permit for the replacement, rebuilding or addition to an existing nonconforming building or structure. As a condition to the issuance of the permit the city council shall require plans and specifications of the proposed replacement, rebuilding or addition be filed and that a bond in an amount to be set by the council be posted to assure compliance with the plans and specifications so filed. No permit shall be issued unless the city council finds that the proposed replacement, rebuilding or addition will be compatible with the lot or tract of land involved and, further, that it will not be detrimental to the health, safety or welfare of the surrounding area. *[See 17.79.020(c) for repair and maintenance]*

This section shall not apply to duplexes in areas currently zoned R-1 or areas subsequently zoned R-1 either through a rezoning or upon territory being annexed into the corporate limits of the city of Othello which are intended to be replaced, rebuilt or added to totally or partially because of destruction. In the case of such replacement, rebuilding or addition, Section 17.79.080 shall apply. (Ord. 948 § 2 (part), 1995).

17.79.080 Rebuilding duplexes or triplexes in R-1 zones.

In areas currently zoned R-1 or areas subsequently zoned R-1 either through a rezoning or upon territory being annexed into the corporate limits of the city of Othello, if a duplex or triplex exists as a nonconforming use and is destroyed, it may be replaced, rebuilt or added to by the owner/purchaser/vendee of the duplex or triplex without reference to the provisions of Section 17.79.070. In the case of such aforesaid replacement, rebuilding or addition, the duplex or triplex may be replaced, rebuilt or added to upon obtaining a building permit as is required for all construction in the city, provided, that the replacement, rebuilding or addition otherwise complies with all other current or subsequently enacted ordinances of the city.

If an exclusion from any ordinances is desired during this rebuilding, replacement or addition process, application must be made to the city council who may allow the sought after exclusion if the city council finds that strict adherence to the ordinances would work an injustice against the owner/purchaser/vendee of the duplex or triplex and further would not be detrimental to the health, safety or welfare of the surrounding area. (Ord. 975 § 1 (part), 1995: Ord. 948 § 2 (part), 1995).

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Pigs in the Parlor or Diamonds in the Rough?

A New Vision for Nonconformity Regulation

By Arthur Ientilucci

All photos by Jon Remmel in Rochester, New York

A functionally obsolete firehouse converted to a retail store that sells crafts.

Most of us who have been involved in zoning administration for any appreciable time have virtually been brought up respecting the sanctity of separation of use and accepting it as an article of faith. After all, every planner and zoner has been well schooled in *Village of Euclid v. Ambler Realty Co.* (272 U.S. 365, 47 S. Ct. 114, 71.Ed 303 (1926)), the seminal case that established the constitutionality of use district zoning. The phenomenon of the nonconformity, born and bred in Euclidean zoning, has always been seen as anathema to this doctrine. And so the theory held that for comprehensive zoning to be successful nonconformities had to be eliminated.

Time and observation have led to the realization that in spite of clear legislative intent and judicial interpretation geared toward their elimination there is a seemingly never-ending inventory of nonconformities. In fact, I have to believe there has been little real progress in eliminating nonconformities in most cities. This has caused me to think anew about regulating nonconformities. Most recently, I have been intently involved in the rewriting of a 25-year-old zoning code and have concluded that the zoning of nonconformities should be approached much differently than it traditionally has been.

ASK THE AUTHOR

. . . about this article. Join us online!

From May 19-30 go online to participate in our "Ask the Author" forum, an interactive feature of *Zoning News*. Arthur Ientilucci 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 an e-mail link. The author will reply, posting the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of *Zoning News* at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA *Zoning News* webpages.

Origins of Policy

Let's take a step back. Euclidean zoning codes neatly prescribed the specific land uses that could be established in various districts throughout a community. Each and every land use would be compartmentalized and appropriately situated in a particular district where a single category of land use would be permitted. Typically, these districts were the basic three: residential, commercial, and industrial. Every residential use would be segregated into a residential zone with like uses—commercial uses with similar commercial uses and the same for industrial uses. Never the twain should meet. The main tenets of comprehensive zoning were the separation of uses for mutual protection, the preservation of property values, and the facilitation of planning efforts to achieve similar community goals. The fly in the ointment was the problem of the nonconformity.

Early drafters were concerned that the whole philosophical basis and justification for comprehensive zoning might be impaired if nonconformities were to be legitimized as part of comprehensive planning and zoning schemes. At the same time it was feared that if these nonconformities were eliminated immediately there would be takings challenges and zoning would not be accepted by the body politic. So, the drafters of the first codes foisted a compromise. Inconsistencies were allowed to continue, but regulations were imposed that would cause them eventually to disappear. Restraints were placed on alteration, expansion, intensification, change of use, lapses of use, and restorations, all of which did not apply to permitted uses. The key words were limit, restrict, prohibit, disallow, prevent, discourage, eliminate, and terminate—all uniformly and synonymously negative. These kinds of restrictions are still found in most contemporary zoning codes. They reflect a rigidity in terms of reuse evident in both the directive to eliminate and also in the typical form of relief being the use variance, which, if approved, declassifies the nonconformity and results in its permanency.

Regulation of nonconformities has had the intention and the result of imposed uniformity. Conformity was sought as a means of avoiding potential conflict. The ultimate goal of most zoning codes has been to achieve uniformity of uses within each zoning district, which could only be accomplished by the elimination of those uses and structures that do not conform. Hence, to achieve conformity of use and building types, traditional codes worked primarily to restrict further investment in nonconformities and eventually to eliminate them. The validity of the comprehensive plan and the success of comprehensive zoning rested on their transformation to conformity or their gradual termination. Joseph Katarincic, an observer of early zoning, noted in 1963 in *Duquesne University Law Review* (Vol. 2, No. 1) that "one difficulty, and by far the most serious, is the continuation of the nonconforming use without an effective provision for its elimination. Until some method is devised to permanently eliminate the nonconforming use from our cities and towns, effective city planning cannot be achieved." In retrospect, it seems as though it was too often conformity for the sake of conformity.

To achieve conformity of use and building types, traditional codes worked primarily to restrict further investment in nonconformities and eventually to eliminate them.

An aging mixed-use building in the heart of a residential area is now home to a popular upscale restaurant.

An abandoned gasoline service station converted to a bakery and coffee shop in a neighborhood preservation area.

In taking this route to purge districts "clean," the restrictions have often been extremely harsh. For instance, many codes trigger abandonment of nonconforming uses when they are discontinued for a period of time, regardless of the intent of an owner or user not to abandon the use. When abandonment does occur, reuse of nonconformities is made difficult, and in many cases the use variance is the prescribed relief, with its demanding and difficult burden of proof. Flexibility in dealing with these "deviant" properties has been considered contrary to the purpose and intent of the zoning regulation and the comprehensive plan on which it is based. Homogeneity has been the goal, the purpose, and the mission.

As urban land-use controls evolved over the course of the 20th century, the players in the zoning game were continually concerned about the undesirable impacts of nonconformities. Along the way, the allowance of nonconforming uses has been characterized by the courts as a "grudging tolerance." This characterization is reflected in the many regulations that

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prescribe that nonconforming uses, buildings, and structures should be eliminated as quickly as possible. In fact, the traditional viewpoint is clearly that nonconformities violate the spirit of zoning laws. It was thought that the existence of nonconformities would lead to lowered property values, affect the area's desirability, and result in physical deterioration. However, what has more often been the case is that traditional regulation has fostered vacancy, with buildings falling into disrepair due to their loss of marketability. Also, property value is diminished or destroyed while the property is effectively isolated from the market, tax revenue is lost, and there is difficulty in obtaining mortgage financing and insurance. Marginal uses are encouraged to continue while owners divest, knowing there is little hope of even approximating highest and best use. Reinvestment is inhibited and discouraged as is the creativity and innovation that is often needed to restore and reuse these types of properties. There is an unavoidable negative impact on the neighborhood, ironically as a result of the very regulations that have been put in place for its protection. But are nonconformities always the "pig in the parlor?" I think not.

An obsolete industrial facility converted to loft apartments and office space near residential, commercial, and institutional uses.

Changing Perspectives

All the traditional theory and practice that have contributed to the severe restraint on nonconformities ostensibly served a purpose during the age of industrialism, where heavy, dirty industrial uses were rampant and needed to be restrained from having negative, obliterating impacts on residential areas. This was a time before the advent of comprehensive building codes, long before the information/high-tech revolutions and the advent of environmental consciousness and regulations at all levels of government. This traditional approach persisted through and fostered the era of suburbanization, with its belief system grounded in the separation of use, reverence for the single-family dwelling, and the canonization of the automobile. Zoning has sought to safeguard the future, in the expectation that time will repair the mistakes of the past. In doing so, particularly with respect to nonconformities, zoning has focused so much on protection from the undesirable that it has at the same time discouraged the activity, creativity, and vibrancy that diverse, mixed-use buildings impart to a community.

Times have changed. This is the day of efficient land use, of the reascendency of the urban form; of mixed use, high density, and diversity; of urban places complete with living, working, and recreating opportunities interwoven and designed with a focus on the public realm rather than on introverted private property interest. Twenty-first-century zoning should no longer dwell on how best to separate uses in the quest for uniformity but how best to blend and mix uses in the interest of harmonizing diversity. Just as the rights to nonconformities have traditionally been restricted in order to protect the community's health, safety, and welfare, why can they not be embellished with more flexibility in using, reusing, cultivating, and recycling them to protect and enhance that same public interest? What is needed is a new outlook with respect to nonconformities—an outlook that sees them as not violating the spirit of zoning and effective land use but rather as part of the heart and soul of the urban framework.

Nonconformities in reality are not inherently bad and should be considered as potential assets for any city neighborhood rather than as prima facie detrimental.

In a nutshell, instead of restraining and eliminating nonconformities based on the false dictum of use separation, the emphasis should be on their use, reuse, and adaptation to current needs and market expressions as contributing members of the neighborhoods in which they reside. This is by no means a legal prescription, nor is it a commentary on the body of law on nonconformities such as was so aptly presented here by Mark S. Dennison ("Change or Expansion of Nonconforming Uses," March 1997). Rather, as a practitioner of zoning, I am suggesting a new strategy for dealing with these zoning orphans, one that recognizes that nonconformities in reality are not inherently bad and that they should be considered as potential assets for any city neighborhood rather than as prima facie detrimental.

Judging in Context

Whether a particular nonconformity is a negative influence on a neighborhood is much more of a contextual issue than one of inherent problems with the nonconformity itself. It has been acknowledged that, even though a nonconformity may be thought of as a nuisance, it may simply be the right thing in the wrong place. In a more contemporary view of what creates a sense of place, nonconformities may now be considered the right thing for many places. Hence, they should be dealt with on a case-by-case basis rather than by general requirements that seek to extinguish them. Selective removal rather than blanket elimination is a concept that should underlie nonconformity regulations if zoning codes are to evolve in the direction of promoting good urban form, diversity, activity, and creating quality mixed-use urban neighborhoods.

As long as zoning exists as a land-use tool, there will be nonconformities and the unique challenges they represent. As such, nonconformities should not be uniformly perceived as problematic and requiring elimination. Certainly, some nonconformities can be detrimental to surrounding properties and community goals and should be eliminated. The conventional wisdom on the treatment of nonconformities has begun to change through the acceptance of mixed-use development districts, overlay zones, allowances for residential uses in commercial districts, and loft-type residential

conversions. It is better understood than at any time in the recent past how essential mixed use is to a lively, vibrant urban environment. Trends toward form codes and emphasis on design in recognizing the benefits of recycling buildings rather than uses also bode well for the future constructive use and reuse of nonconformities. The affording of viable opportunities for adaptive reuse of some of our cities' older, albeit nonconforming, buildings is a recognition that these unique assets can make a strong contribution to a city's vitality and sense of place.

The regulation of all types of nonconformities—nonconforming uses as well as nonconforming structures—needs to be examined through fresh eyes. However, the nonconforming structure not designed for a use permitted in the district in which it is located, whether housing a conforming or a nonconforming use, is of particular interest. The nonconforming use in the structure designed for conforming use generally has viable reuse options and can more easily be readjusted to market alignment for the use and purpose for which it was originally designed. The truly nonconforming structure type, the very different structure in the midst of structures of alternative design and purpose, has posed the greatest issue and holds the greatest promise. It is these types of nonconformities that can make significant contributions to a neighborhood and afford invaluable opportunities to express the diversity of use and form that best reflect the beauty of the urban tapestry.

A former heavy service/industrial facility successfully adapted to a neighborhood retail use.

If the "disease" associated with nonconformities has been spread by restriction, elimination, prohibition, and termination, then the prescription for health is harmony, diversity, variety, charm, historic conservation and focus on form—the harmony of diversity. Rather than being perceived as corruptively infectious, they must represent and give rise to an infectious enthusiasm and desire to adapt, revitalize, and reuse. Nonconforming structures provide an existing infrastructure readily capable of housing mixed-use opportunities and the diversity and interest they promote.

Process Issues

Flexibility in relief is also essential. Processes for dealing with nonconformities must afford much more flexibility to deal with their irregularity and peculiarity. These processes must involve public participation and input in decision making and also must assure continued protection for the neighborhood. Traditionally, the use variance has most often been the prescribed means of relief to overcome the myriad of restrictions on nonconformities. This is a difficult burden of proof for the nonconforming user and also serves to make the use permanent if granted. This dilemma often nullifies neighborhood acceptance over the valid concern with lifetime vesting and permanency of use rights.

> It has been acknowledged that, even though a nonconformity may be thought of as a nuisance, it may simply be the right thing in the wrong place.

In the case of expansions, intensifications, and enlargements of nonconforming uses, it is preferable to employ the area variance as the means of relief. If granted, then the approval is to expand, intensify, or enlarge the nonconformity, but the use essentially remains nonconforming as modified. It is a vehicle through which the benefits to the user can be weighed against the potential detriments to a neighborhood. At the same time it does not declassify a use as nonconforming.

With respect to reoccupancy of nonconforming uses and structures, especially in structures not designed for conforming use, the special use permit is the most attractive option. The suggestion is that this technique be employed to restore nonconforming uses to their prior, original, or lesser intensity or to reestablish a different use of similar intensity. This inherently keeps the restored use at a level commensurate with the prior use of the building and avoids excursions into more intensive uses. Special use permits are typically not permanent, as are use variances, and they offer both greater flexibility and continued controls over reuse. Special use permits also can be readily conditioned to clarify the terms of reuse and to set operational constraints as necessary to protect adjacent properties. Time-limited special permit approvals also can be employed as a means of monitoring a use over a reasonable period of time to ensure that the conditions and operational limitations are in fact accomplishing their desired goal. Specific standards for this category of special permit can be adopted that allow reoccupancy for the accommodation of neighborhood walk-to-service uses, walk-to-work opportunities, live-work spaces, and the reuse of buildings with architectural or historic value. Using the special permit at once states a legislative intent that nonconformities are permissible, as is their continued use so long as in their particular location they are not detrimental to the surrounding neighborhood. This is a far cry from grudging acceptance.

Another situation with respect to discontinuance needs to be addressed. That is the case where the nonconforming owner or user is befallen by personal circumstances, or by market or other matters that contribute to the inability to reoccupy a nonconformity within the established time period to avert abandonment of use. These may be situations where the owner or user fully intends to continue the nonconformity and is willing to maintain it and to make further investments. However, due to circumstances beyond their control, they cannot meet the codified deadline for reoccupancy. In these instances, the zoning administrator, after public notice and opportunity for comment, should be authorized to extend the time frame for abandonment. If the particular nonconformity has been problematic for the neighborhood and it is discovered that the nonconforming user has been disingenuous in an attempt to

maintain and reoccupy, then the administrator can opt not to extend the abandonment period and let the nonconformity terminate. If there is reasonable supporting data to extend the abandonment period, then perhaps a vacant building (and its associated neighborhood impacts) can be avoided.

Many nonconforming structures are old buildings and are readily adaptable for small-scale commercial and mixed uses.

The Need for Old Buildings

Codes typically permit changes of use in nonconforming buildings as long as the replacement use is restricted to the same degree as the former nonconforming use. Equal restriction has often been adjudged in terms of being or not being regulated at the same level, in terms of use district, as the preceding use. What is needed is a more realistic and definite measure of intensity. Uses and technologies change over time, today more rapidly than ever. Calibration of intensity based on district hierarchy can be deceiving and can be an inaccurate measure. Specific criteria for measuring intensity of use such as traffic, parking, employee levels, deliveries, hours of operation, noise, and odors should be codified. This will promote re-occupancy within prior intensity limits, allow for flexibility, and at the same time protect neighborhood interests.

A firehouse converted to a photography studio.

The whole idea of a more forgiving, more flexible, and progressive view of dealing with nonconformities is in line with the tenets of smart growth and efficient land use. Many nonconforming structures are old buildings and are readily adaptable for small-scale commercial and mixed uses. As Jane Jacobs wrote in *The Life and Death of Great American Cities*: "Cities need old buildings so badly it is probably impossible for vigorous districts and streets to grow without them." Many nonconforming commercial and industrial buildings can be used for residential purposes and offer exciting loft-style designs marketable to a wide range of people. Nonconforming structures in neighborhoods can accommodate walk-to-neighborhood services and work possibilities, live-work space, and more walkable, active, and interesting urban neighborhoods.

I suggest that comprehensive plans and neighborhood plans include a strategy for the use and reuse of viable nonconforming structures. Also, clearly articulated purpose statements should be included in zoning codes, enunciating a community's policy for the regulation of nonconformities and relating that policy to a preconceived plan of action. A nonconformity management plan can serve to delineate and categorize those nonconformities that are capable of contributing in a positive way to the character and needs of the community and also cite those that are incapable of contributing and warrant elimination. Just as such plans are needed to create a vision for new development, they can be useful in establishing a blueprint for the rehabilitation and reuse of existing nonconforming buildings.

It is important to view the nonconformity supply of a city prospectively as having potential for reuse and added value. Planning and promoting accordingly will encourage private-market building decisions to factor in the potential of nonconformities with an eye toward creative, profit-yielding reuse and adaptation. This kind of planning effort lays the foundation for discretionary decision making and substantiates and supports selective treatment over categorical elimination. Processes used to employ regulations and facilitate plans associated with nonconformities should be flexible but also must afford a reliable measure of certainty.

In Rochester, New York, we have chosen to embark on a new approach to the regulation of nonconformities. It is based on many of the ideas expressed in this article and is evident in our 2003 zoning code. It is one that seeks to use our man-made urban resources most efficiently. I believe we are headed in the right direction and that time and experience will prove just how valuable these diamonds in the rough can be.

A copy of the Rochester, New York, nonconforming uses ordinance is available to *Zoning News* readers by contacting Michael Davidson, Editor, *Zoning News*, American Planning Association, 122 South Michigan Avenue, Suite 1600, Chicago, IL 60603, or send an e-mail to mdavidson@planning.org.

News Briefs

Can D.C. Require a University to House Its Students on Campus?

George Washington University (GWU) and the District of Columbia's Board of Zoning Adjustment (BZA) have been duking it out for years. An ever-increasing enrollment requires university students to look off-campus for their housing, most often in the nearby Foggy Bottom and West End neighborhoods. The BZA is concerned about protecting the residential character and stability of those neighborhoods and requires a special exception for a university use in areas zoned residential or special purpose.

The special exception process is a two-step review. The university is required to submit a campus plan that describes its general intentions for new land uses. After the plan is approved, the BZA reviews individual projects to determine whether they are consistent with the plan. The *Campus Plan 2000* was approved with several conditions that GWU challenged in federal district court. The conditions include a requirement that the university house its freshmen and sophomores on campus as well as providing on-campus housing for at least 70 percent of its students. Another condition imposed an enrollment cap tied to the university's supply

of on-campus housing. After the court (*George Washington University v. District of Columbia*, U.S. Court of Appeals, D.C. Circuit, February 4, 2003, No. 02-7055 & No. 02-7060) ordered the BZA to revise some of the conditions, the BZA eliminated the enrollment cap but added a new condition that requires GWU to provide housing on campus or outside Foggy Bottom for 70 percent of its approximately 8,000 undergraduate students, plus one non-Foggy Bottom bed for every full-time undergraduate student over 8,000. GWU went right back to court, arguing that the housing requirements violated the university's substantive due process rights.

A substantive due process right requires that land-use regulations advance a legitimate governmental purpose (separate from procedural due process rights, which require the government to follow a fair process). However, before the D.C. Court of Appeals could even review the conditions the BZA had placed on the campus plan, it had to decide whether GWU has a constitutionally protected property interest, the threshold question. Did GWU have an expectation that a special exception would be issued, strong enough to qualify as a property interest? If it did, then the court would look at the conditions the BZA placed on the campus plan.

After examining how other circuits have determined the existence of a property interest, the court concluded that the BZA's procedures limit its discretion in granting or denying special exception permits, and thus GWU had a protected property interest in the permit. But did the board's requirement that GWU provide housing for its students away from the Foggy Bottom neighborhood rise to the level of egregious government misconduct, a violation of the university's substantive due process rights? Ultimately, the court said "no." GWU couldn't make a case that the BZA's condition reflects a hostility of the Foggy Bottom residents to its students—or a "group animus." Neither could the court find any irrationality in the BZA's requirement. "Given the [BZA's] concern that an excess of students in the Foggy Bottom area is negatively affecting the character of the neighborhood, it cannot be irrational for the [BZA] to adopt rules likely to limit or reduce the number of students in the area." The court also commented on the BZA's condition requiring GWU to house its freshmen and sophomores on campus by saying, "[a] city might reasonably consider the youngest college students to be the ones most likely to disturb residents in the surrounding communities, as well as most likely to need whatever shreds of parietal rules may subsist on campus." The court concluded that the BZA's conditions "merely require the university to house its students in a way that is compatible with the preservation of surrounding neighborhoods." *Lora Lucero, AICP*

Lora Lucero, AICP, is a land-use attorney in Albuquerque and former editor of APA's Land Use Law & Zoning Digest.

Court Finds Zoning Denial Discriminated Against Disabled

On January 23, a U.S. District Court in Connecticut found that the city of New London, in denying a local mental health care agency's attempt to move its vocational training facility to a new building, violated the American with Disabilities Act (ADA) and the Rehabilitation Act of 1973 by intentionally discriminating against persons with psychological disabilities. The case *First Step, Inc. v. City of New London (2003 WL 678484 (D.Conn.))* is the latest in a growing number of cases where zoning decisions against similar institutional uses have been found to run afoul of these two acts.

First Step, which provides vocational training to people with psychological disabilities, sought to relocate its existing New London training facility to a downtown location that had more usable space and was handicapped accessible. It applied for a special use permit as an "educational establishment for learning disabled or mentally retarded adults" as well as a "rehabilitation facility," and proposed amending the zoning ordinance to remove the former use's exclusion of "adults with mental illness."

The planning and zoning commission held four public hearings, at which neighbors expressed concerns about traffic impacts, their safety from First Step clients, drugs being brought into the neighborhood by those clients, and clients loitering in front of the facility, as well as about the mentally ill in general. The commission first denied the proposed ordinance amendment as unnecessary because First Step could apply as a rehabilitation facility, then denied a permit for that use. Stated reasons for the denial included the lack of a public safety plan, concerns about the safety of First Step clients who must walk up a narrow driveway from a van drop-off zone in the front of the facility to the main entrance at the rear, and concerns about traffic from the site onto a narrow, home-lined road to the rear of the site. Citing neighbors' concerns, the commission also stated that the site is "not the proper site for the intended use."

First Step successfully demonstrated violations of the ADA and Rehabilitation Act by showing that the mental disability of First Step clients was a significant factor in the commission's denial (ADA), or the sole reason for it (Rehabilitation Act), and that the city failed to make "reasonable accommodations" to avoid discrimination against First Step clients. The court found that the city's adoption of, and refusal to remove, the exclusion of mentally ill from the educational establishment use was evidence of discrimination. It also concluded that the commission's stated reasons for denial were merely pretexts for its discriminatory motives, finding that public safety concerns reflected "the misinformed and biased viewpoints" of opponents, that any pedestrian safety problem along the driveway was created by the commission's refusal to allow First Step vans to take clients to the main entrance at the rear of the facility, and that the facility would generate less traffic than the preceding use (a Department of Motor Vehicles office) or nearly any other potential use of the site. The court characterized the commission's labeling the site "improper" as "a thinly veiled adoption of the community's prejudice against the mentally ill." Furthermore, it noted that the city could have addressed the cited pedestrian safety concerns (which the court called "the only legitimate concern raised") simply by allowing vans to drop off clients at the main entrance at the rear of the facility, at no cost to the city or its regulatory scheme. *Stephen Sizemore, AICP*

Stephen Sizemore, AICP, is the editor of APA's Land Use Law & Zoning Digest.

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TO: Planning Commission

FROM: Anne Henning, Community Development Director

MEETING: August 19, 2024

SUBJECT: Municipal Code Update – Subdivision Code – Reimbursement Agreements/Latecomer Agreements – OMC 16.52 - Discussion

The Planning Commission has been working on updating the Subdivision Code, OMC Title 16. While most of the chapters are very interrelated and hard to review in isolation, the chapter for Reimbursement Agreements (also known as Latecomer Agreements) can be discussed independent of the rest of the Subdivision updates. In fact, this chapter is typically not found within a Subdivision title, but more often in a Public Works or Infrastructure title. However, since Othello has separate titles for streets and for utilities, making it awkward to locate a chapter that relates to both within one or the other, it may make sense to keep it within the Subdivision title.

Staff Comments

1. The City Attorney's office reviewed OMC 16.52, Reimbursement Agreements and didn't find any significant problems. He noted that it is similar to Lynnwood's. He did suggest looking at the City of Kent's Chapter 6.05, Latecomer Agreements, because it has recently been overhauled. Staff recommends revising the chapter to follow the Kent example, because it is much clearer and easier to understand than the existing Othello Code, although it also is longer, which staff generally does not prefer.
2. One change in procedure would be that the existing code requires that a public hearing be held and the Council makes the decision on the assessment area and the cost share. The Kent code requires certified mail notification to the affected property owners, who then have 20 days to request that a hearing be held for them to contest the assessment area or the preliminary assessment amount. If no hearing is requested, the decision of city staff is final without the need for Council action.

Attachments

- Draft OMC 16.53, based on City of Kent Code 6.05 Latecomer Agreements
- Existing OMC 16.52, Reimbursement Agreements (proposed for deletion)

Action: The Planning Commission should review the attached draft and provide direction to staff.

Chapter 16.53

LATECOMER AGREEMENTS – STREET AND UTILITY

Sections:

16.53.010 Purpose.

The purpose of this chapter is to provide the conditions and procedures under which developers, including the city, who installed qualifying street system improvements and/or utility system improvements required as a prerequisite for future development and pursuant to the city's development ordinances and policies, may be partially reimbursed for the expenses of such improvements by other property owners that receive a benefit from these improvements but did not contribute to the cost of the improvements. The city is authorized to enter into latecomer agreements for these reimbursements pursuant to Chapters 35.72 and 35.91 RCW, as they now exist or are hereafter amended.

16.53.020 Definitions.

The following words, terms, and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

A. "Adjacent" means abutting on public roads, streets, rights-of-way, or easements in which street system improvements are installed or directly connecting to street system improvements through an interest in real property such as an easement or license.

B. "Assessment" means an equitable proportionate charge to be paid by an owner of property within the assessment reimbursement area for the cost of construction of street and/or utility system improvements made pursuant to a latecomer agreement.

C. "Assessment reimbursement area" means that area which includes all parcels of real property adjacent to street system improvements or likely to require connection to or service by utility system improvements constructed by a developer.

D. "City administrative costs" means all costs incurred by the city that are directly related to the drafting, execution, recording, and administration of the latecomer agreement, including any mailings to other property owners, any hearings before city council, as well as any costs and expenses incurred for attorneys or consultants. City administrative costs do not include permit fees or the application fee for the latecomer agreement.

E. "Cost of construction" means the sum of the direct construction costs incurred to construct the street and/or utility system improvements plus developer administrative costs and the city latecomer administrative costs. "Direct construction costs" include but are not limited to the actual labor and material construction costs incurred by the developer, reasonable engineering and surveying costs, bonding costs, environmental mitigation, relocation and/or new construction of private utilities as required by the city, and relocation and/or installation of street lights and signage.

F. “Developer” means the individual or entity that contracts with the city for the construction of street and/or utility system improvements, where such improvements are a requirement for development of real property owned by such entity or individual. As permitted by RCW 35.72.050 and 35.91.020, the city may join with or be construed as a developer for the purpose of recovery of street or utility system improvement costs.

G. “Developer administrative costs” means all indirect costs incurred by the developer in the creation and execution of the latecomer agreement and managing the project, such as office supplies, mailings, clerical services, telephone expenses, accounting expenses, and project oversight. Developer administrative costs shall not exceed three percent of all direct construction costs.

H. “Director” means the city of Othello public works director, or his or her designee.

I. “Latecomer agreement” means a written contract between the city and one or more developers providing partial reimbursement for the cost of construction of street system improvements and/or utility system improvements to the developer by owners of property who would be required to construct these improvements and who did not contribute to the original cost of construction.

J. “Latecomer fee” or “latecomer assessment” means a charge collected by the city against a real property owner within the assessment reimbursement area who:

1. Connects to or uses the utility system improvement where fees are separately stated, or is a part of a connection fee or other fee for providing access to the city’s utility system; or

2. Receives a building or development permit for real property located adjacent to, or having access to, the street system improvement constructed under this chapter.

K. “Street system improvements” means public street and alley improvements made in existing or subsequently dedicated or granted rights-of-way or easements and any associated improvements including but not limited to such things as design, engineering, surveying, inspection, grading, paving, installation of curbs, gutters, pedestrian facilities, street lighting, bike lanes, and traffic control devices, relocation and/or construction of private utilities as required by the city, relocation and/or construction of street lights, traffic control devices, signage, and other similar improvements.

L. “Utility system improvements” means city-owned water, sewer, storm drainage, and irrigation system improvements as defined by RCW 35.91.015, which shall include but not be limited to design, engineering, surveying, inspection, testing, and installation of improvements as required by the city, and includes but is not limited to the following, by utility type:

1. Water system improvements, including but not limited to such things as mains, valves, fire hydrants, telemetry systems, pressure reducing stations and/or valves, and other associated appurtenances;

2. Sewer system improvements, including but not limited to such things as gravity mains, lift stations, force mains, telemetry systems, and other associated appurtenances;

3. Storm sewer system improvements, including but not limited to such things as water quality structures and systems, detention and retention facilities, and storm water collection and conveyance facilities; and

4. Irrigation system improvements, including but not limited to such things as mains, valves, pressure reducing stations and/or valves, and other associated appurtenances.

16.53.030 Application for latecomer agreement.

A. *Applicants.* Any developer using private funds to construct street system improvements and/or utility system improvements required as a prerequisite to further property development may apply to the city for a latecomer agreement in order to recover a proportionate share of the costs of construction from other property owners that will later connect to or use the street and/or utility system improvements constructed by the developer.

B. *Application form and fee*. An application for a latecomer agreement shall be submitted upon a form provided by the city and be accompanied by the application fee established by resolution by the city council. *[$1500 in the existing ordinance]*

C. *Timing of application*. The application for a latecomer agreement shall be made before the street and/or utility system improvements proposed for construction are approved by the city through the issuance of a civil construction or other applicable permit.

D. *Application contents*. The application shall contain the following information which shall be approved by a state of Washington licensed engineer or other appropriately licensed professional:

1. A description and vicinity map of the developer's property.

2. A description of the properties within the developer's proposed assessment reimbursement area, together with the names and addresses of the owners of such property as shown on the records of the Adams County Assessor's Office.

3. The developer's proposed assessment reimbursement area and general location of the system improvements to be included.

4. The developer's proposed allocation of the costs of construction to the individual properties within the proposed assessment reimbursement area and the method used for such allocation.

5. Statement from a state of Washington licensed contractor or civil engineer containing an itemized estimate of the total projected cost of construction.

6. Such other information as the director determines would be relevant in considering the application.

E. *Application review*.

1. The director shall review all applications and shall approve the application if following criteria are met:

a. The application is timely, complete and the application fee has been paid;

b. The city's ordinances require the proposed improvements to be constructed as a prerequisite to further property development;

c. The proposed improvements fall within the definition of street and/or utility system improvements as those terms are defined in this chapter; and

d. The proposed improvements are consistent with the City of Othello Public Works Design Standards, development regulations, land use comprehensive plan, comprehensive sanitary sewer plan, comprehensive water system plan, storm water master plan, transportation master plan, and any other relevant plans and regulations.

2. If any of the above criteria are not met, the director shall either condition approval as necessary in order for the application to conform to such criteria, or deny the application. The final determination of the director shall be in writing.

3. The director may establish policies and procedures for processing applications and complying with the requirements of this chapter and applicable state law.

16.53.040 Preliminary determinations.

Upon approval of a latecomer application, the director shall formulate a preliminary assessment reimbursement area and preliminary assessment amount for each real property parcel included in the preliminary assessment reimbursement area as follows:

A. For street system improvements, the assessment reimbursement area shall be formulated based upon a determination of which parcels adjacent to the street system improvements would require similar street system improvements upon development or redevelopment.

B. For utility system improvements, the assessment reimbursement area shall be formulated based upon a determination of which parcels in the proposed area would require similar utility system improvements upon development or redevelopment or would be allowed to connect to or use the utility system improvements.

C. A proportionate share of the cost of the improvements shall be allocated to each parcel included in the assessment reimbursement area based upon the benefit to the property owner. The method or methods used to calculate the allocation of the assessment may be either front footage, number of units, square footage, or other equitable method, as determined by the city.

16.53.050 Preliminary determination notice.

A. The city shall send the preliminary assessment reimbursement area and the preliminary assessment formulated by the director, including the preliminary determination of area boundaries, assessments, and a description of the property owner's rights and options, by certified mail to the property owners of record within the preliminary assessment reimbursement area.

B. The developer or any property owner within the preliminary assessment reimbursement area may, in writing within 20 days of the date of mailing the notice, request a hearing to be held before the city council to contest the preliminary assessment reimbursement area and preliminary assessment. Notice of such hearing shall be given to all property owners within the preliminary assessment reimbursement area and the hearing shall be conducted as soon as is reasonably practical. The city council is the final authority to establish the assessment reimbursement area and the assessment for each property within the assessment reimbursement area.

C. If no written request for a hearing is received as required, the determination of the director shall be final.

16.53.060 Latecomer agreement.

A. Based upon the preliminary assessment reimbursement area and the preliminary assessment if no hearing is requested, or based upon the city council's determination of the assessment reimbursement area and assessment if a hearing is requested, the director shall prepare and give to the developer a latecomer agreement. A separate latecomer agreement shall be executed for each of the following categories of improvement, as applicable: street system improvements and utility system improvements.

B. Each agreement shall include a provision requiring that, every two years from the date the agreement is executed, the developer entitled to reimbursement under this section shall provide the city with information regarding the current contact name, address, and telephone number of the person, company, or partnership that originally entered into the agreement. If the developer fails to comply with the notification requirements within 60 days of the specified time, then the city may collect any reimbursement funds owed to the developer under the agreement. The funds collected under this subsection shall be deposited in the capital expenditure account of either the city's utility fund or street fund, as appropriate.

C. The term of latecomer agreements is as follows:

1. For street system improvements, each latecomer agreement shall be valid for a period not to exceed 15 years from the effective date of the agreement.

2. For utility system improvements, each latecomer agreement shall be valid for a period not to exceed 20 years from the effective date of the agreement.

D. The city may terminate a latecomer agreement if the developer fails to commence or complete construction within the time and manner required in the permits for the improvements. If the agreement is terminated, the city shall record a release of latecomer agreement in the Adams County Auditor's office.

16.53.070 Construction – Final costs – Conveyance.

A. The developer shall construct the improvements and, upon completion, request final inspection and acceptance of the improvements by the city, subject to any required obligation to repair defects. All construction, inspection, and testing shall conform to the Othello Municipal Code and Othello Public Works Design Standards.

B. Within 120 days of completion of construction, the developer shall provide the city with documentation of the actual costs of the improvements and a certification by the applicant that all of such costs have been paid. The city shall use this information to finalize the assessment paid by owners within the assessment reimbursement area, which will become part of the latecomer agreement recorded in accordance with OMC 16.53.080.

C. After the requirements of subsections (A) and (B) of this section have been satisfied, the developer shall provide the city with an appropriate deed of conveyance or other equivalent written document transferring ownership of the improvements to the city, together with any easements needed to ensure the city's right of access for maintenance of the improvements. Title to the improvements shall be conveyed to the city clear of all encumbrances.

D. No connection to, or other use of, the improvements will be allowed or permitted until the city has officially accepted the construction and title to the improvements has been conveyed to the city.

16.53.080 Recording of latecomer agreement.

A. The provisions of the latecomer agreement shall not become effective as to any owner of real estate not a party to the agreement until it is recorded with the Adams County Auditor's office. For a utility latecomer agreement, recording must be prior to the time that the owner of the real estate taps into or connects to water or sewer facilities.

B. The city shall file the fully executed latecomer agreement in the official property records of Adams County within 30 days of final execution; provided, that the developer shall have an independent duty to review the Adams County Auditor's office records to confirm that the latecomer agreement has been properly and timely recorded.

16.53.090 Defective work.

The developer shall be responsible for all work found to be defective within one year after the date of acceptance of the improvements by the city. Nothing in this chapter shall preclude the director from requiring a performance bond or maintenance bond for the street or utility system improvements as authorized for such improvements within the Othello Municipal Code or Othello Public Works Design Standards.

16.53.100 Payment of assessment – Remittance to developer.

A. Upon recording, the latecomer agreement shall be binding upon all parcels located within the assessment reimbursement area who are not party to the agreement and did not contribute to the original cost of the utility system improvements and/or street system improvements. Payments shall be paid to the city in one lump sum as follows:

1. Assessments for street system improvements shall be paid prior to the development or redevelopment of property.

2. Assessments for utility system improvements shall be paid prior to connection to or use of the utility system improvements.

B. The city will pay over to the developer the amounts collected less any unpaid city administrative costs within 60 days of receipt.

C. When the assessment for any property has been paid in full, the director shall issue a certification of payment that will release such property from the latecomer agreement which may be recorded by the owner.

D. The latecomer assessment shall be in addition to the usual and ordinary charges, including connection charges, tap charges, system development charges, and any other fees or charges which must be paid by persons applying for city services.

16.53.110 Segregation.

The director shall, upon the request of any property owner within the assessment reimbursement area, segregate the assessment. Any request to segregate the assessment must be submitted before the application for a lot line

adjustment or subdivision. The request shall include a map showing the proposed subdivision of property, including legal descriptions and the proposed cost segregation based on the original method of assessment. The assessment shall only be segregated if the lot line adjustment or subdivision is completed. The property owner seeking segregation of the assessment shall pay an additional review fee as established by resolution by the city council.

16.53.120 Removal of unauthorized connections or taps.

Whenever any tap or connection is made into any utility improvement without payment of the assessment being made as required by this chapter, the director is authorized to remove and disconnect, or cause to be removed and disconnected, such unauthorized tap or connection including all connecting tile or pipe located in the right-of-way and to dispose of such unauthorized material without liability. The owner of the property where the unauthorized connection is located shall be liable for all costs and expenses of any type incurred to remove, disconnect, and dispose of the unauthorized tap or connection.

16.53.130 City fees and cost recovery.

The developer shall pay the following fees:

A. *Application fee*. The application fee as set forth in OMC 16.53.030, payable at the time the application is submitted.

B. *City administrative costs*. The developer shall reimburse the city for its administrative costs, as defined in OMC 16.53.020(D). This shall be paid prior to and as a condition of the recording of the latecomer agreement.

C. *Recording fee*. For every separate parcel of property within the developer's assessment reimbursement area, the city shall charge a recording fee in accordance with fees charged by the Adams County Auditor's office. This fee shall be paid as part of the city administrative costs prior to and as a condition of the recording of the latecomer agreement.

16.53.140 Enforcement of latecomer obligations.

A. Nothing in this chapter is intended to create a private right of action for damages against the city for failing to comply with the requirements of this chapter. The city, its officials, employees, or agents may not be held liable for failure to collect a latecomer assessment unless the failure was willful or intentional.

B. In processing and imposing obligations in this chapter for reimbursement of developers, the city in no way guarantees payment of assessments, or enforceability of assessments, or enforceability of the latecomer agreement, or the amount(s) thereof, against such persons or property; nor will the offices or finances of the city be used for enforcement or collection of assessments beyond those duties specifically undertaken by the city herein. It shall be the obligation of a developer to take whatever authorized means are available to enforce payment of assessments, and developers are hereby authorized to take such actions. The city shall not be responsible for locating any beneficiary or survivor entitled to any benefits by or through a latecomer agreement.

C. If the developer fails to comply with the notification requirements set forth in OMC 16.53.050 and within the latecomer agreement within 60 days of the specified time, then the city may collect any reimbursement funds owed to the developer under the latecomer agreement. Such funds must be deposited in the capital fund of the city.

16.53.150 City participation authorized.

As an alternative to financing projects under this chapter solely by a developer, the city may join in the financing of improvement projects and may be reimbursed in the same manner as the developer who participates in the projects. As another alternative, the city may create an assessment reimbursement area on its own initiative, without the participation of a private property owner or developer, finance the costs of the street or utility improvements, and become the sole beneficiary of the reimbursements that are contributed. The city will only seek to be reimbursed for the costs of improvements that benefit that portion of the public who will use the improvements within the assessment reimbursement area established pursuant to state law. No costs for improvements that benefit the general public may be reimbursed.

Chapter 16.52

REIMBURSEMENT AGREEMENTS

Sections:

16.52.010 Application authorized—Purpose—Term.

Any developer utilizing private funds to install infrastructure (street, water, or sewer (sanitary and/or storm)) improvements and appurtenances may apply to the city to establish a latecomer agreement for recovery of a prorated share of the cost of constructing said public improvement from other properties that will later derive a benefit from said improvements. This chapter is intended to apply to all street system improvements and all utility system improvements where the construction of such improvements are the result of a city ordinance or ordinances that require such improvements as a prerequisite to property development. No reimbursement agreement/latecomer agreement shall extend from a period longer than fifteen years from the date of final acceptance by the city unless a longer period is allowed pursuant to RCW 35.72.020 or 35.91.020. The city council shall have discretion to authorize or not to authorize latecomer agreements on a case-by-case basis and to determine the length of the term of any latecomer agreement. (Ord. 1332 § 1 (part), 2010).

16.52.020 Rights and nonliability of city.

The city has discretion and reserves the right to refuse to enter into any latecomer agreement or to reject any application therefor. All applications for latecomer agreements shall be made on the basis that the applicant releases and waives any claims for any liability of the city in establishment and enforcement of latecomer agreements. The city shall not be responsible for locating any beneficiary or survivor entitled to benefits by or through latecomer agreements. (Ord. 1332 § 1 (part), 2010).

16.52.030 Application requirements.

All applications for latecomer agreements shall be on forms approved and established by the city and reviewed and approved by the city attorney. Applicants for latecomer agreements shall comply with the following procedures as a prerequisite to a latecomer agreement with the city:

(a) The owner desiring to contract with the city shall notify the city administrator, in writing, at least thirty days prior to construction of the facilities of the owner’s request to enter into a latecomer agreement with the city.

(b) The notice shall contain the following information:

(1) The description of the facilities to be installed;

(2) The description of the area where the facilities are to be installed and a map showing the location thereof;

(3) The cost estimate of the facilities.

(c) The owner shall submit the final construction costs to the city administrator within thirty days from the date of final approval of the construction by the city. The matter shall then be submitted to the city council which shall determine whether or not to enter into a latecomer agreement with the owner. If the project is approved for a latecomer agreement by the city council, the city shall have ninety days thereafter to finalize the agreement. In the event the owner fails to comply with the time limitations set forth in this chapter, then and in that event the owner shall have waived the owner’s right to enter into a latecomer agreement with the city.

(d) In addition to the amounts agreed to be collected by the city, the city shall charge a sum equal to fifteen percent of the agreed amount to defray the cost of labor, bookkeeping and accounting.

(e) The ownership of all water and sewer main lines installed on private property shall be conveyed to the city and the owner shall grant the city an easement therefor. All deeds and easements for said main line shall be submitted to the city within sixty days of the completion of construction. The ownership of all other improvements under the latecomer agreement shall be conveyed to the city by appropriate deed and/or conveyance document within sixty days of completion of construction. (Ord. 1332 § 1 (part), 2010).

16.52.040 Eligibility of applicants.

In order to be eligible for processing of latecomer agreements, applicants for latecomer agreements shall be in compliance with all city ordinances, rules, and regulations. (Ord. 1332 § 1 (part), 2010).

16.52.050 Procedures for reimbursement agreements.

(a) If a reimbursement agreement is requested, the property owner shall submit project plans and a site plan, map or diagram of the proposed benefitted area prepared by a licensed professional engineer, ownership reports on properties within the proposed benefitted areas, a cost estimate for the project based upon the plans of a licensed civil engineer from which reimbursable costs shall be estimated, and such other information as the city may require.

(b) Property owners requesting a reimbursement agreement shall submit, along with the application, a nonrefundable payment in the amount of one thousand five hundred dollars to be applied to the city's legal, engineering and administrative costs (including but not limited to staff time and costs for title reports, appraisers, or other costs) associated with preparing the reimbursement agreement, which costs shall be included as reimbursable costs in the reimbursement agreement; provided, that whenever city engineering, legal, and administrative costs exceed the payment required herein, the city shall not process the application until such costs have been paid in full.

(c) The city administrator will formulate an assessment reimbursement area (benefit area) based upon a determination of which parcels did not contribute to the original cost of such infrastructure improvement and which connect to or specially benefit from such infrastructure.

(d) The city administrator, based on information submitted by the owner, will estimate pro rata share of costs. The city administrator may require engineering costs or construction bids to be provided.

(e) The city administrator, in the city administrator's discretion, may utilize the application fee to pay the costs of an appraiser to be retained by the city to assist the city administrator in formulating an assessment reimbursement area.

(f) The preliminary determination of area boundaries and assessments, along with a description of the property owner's rights and options, shall be forwarded by first class mail to the property owners of record as shown on the records of the Adams County assessor within the proposed assessment area. A hearing shall be held before the city council, notice of which shall be given to all affected property owners at least twenty days in advance of the council meeting. At the hearing, the city council determines whether to accept, reject, or modify the proposed reimbursement agreement. If the city council accepts, it shall establish the reimbursement area; provided, that the city council may only increase the reimbursement area upon new notice to the owners of the affected property. Improvements constructed subsequent to preliminary approval and prior to the final council action on a proposed agreement are done at the owner's or developer's own risk. The approval of a preliminary latecomer agreement does not create or vest any right to a final latecomer agreement.

(g) Prior to commencing construction of the project, the owner shall submit a construction bid on forms provided by the public works department based upon city-approved plans to the city. Upon completion of the project, a reasonable pro rata share of project costs shall be established by the city, which shall then notify owners of the benefitted properties of the amount of reimbursement connection charges against their property and the date the reimbursement agreement shall be presented to the city council for public hearing. On the date scheduled, the city council shall hear from affected parties and thereafter set the terms of the reimbursement agreement and maximum amount and terms of reimbursement from affected properties. The decision of the city council shall be final and determinative.

(h) The latecomer agreements must be recorded in the Adams County auditor's office within thirty days of the final execution of the agreement. It shall be the sole responsibility of the latecomer applicant to record said agreement.

(i) Once recorded, the latecomer agreement shall be binding on owners of record within the assessment area who are not party to the agreement.

(j) The latecomer applicant shall be solely responsible for keeping the city informed of their correct mailing address and contact information by providing the city with written notice thereof at least every two years following execution of the latecomer agreement. (Ord. 1332 § 1 (part), 2010).

16.52.090 Enforcement responsibility and future services.
It shall be the responsibility of the owner of the latecomer agreement to monitor, enforce and notify the city of any connections to improvements which come within the terms of the latecomer agreement. The city will use its best efforts to collect latecomer fees but will not accrue any liability for failure to collect fees due. The city has no obligation to provide notice of the latecomer agreement to any party other than as provided in this chapter. Neither preliminary nor final approval of a latecomer agreement shall be construed to vest or grant the right to the extension or allocation of water and/or sewer to properties affected by the latecomer agreement. (Ord. 1332 § 1 (part), 2010).

16.52.100 Relief—Similar facilities.
The city, through its designated agency, may relieve a parcel of a latecomer fee if the property has a benefit from either (but not both) of two similar facilities. Relief shall be based upon sound engineering and policy justifications as to which facility(ies) benefit and/or are utilized by the parcel. Absent such justifications, the city shall give the applicant the choice of facilities to utilize. The assessment due shall be that associated with the utilized facility. (Ord. 1332 § 1 (part), 2010).

16.52.110 Severability.
If any section, subsection, sentence, clause, phrase, or word of this chapter should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality thereof shall not affect the validity or constitutionality of any other section, subsection, sentence, clause, phrase, or work of the ordinance codified in this chapter. (Ord. 1332 § 1 (part), 2010).

City of Othello
Building and Planning Department
July 2024

Building Permits			
	Applied	Issued	Final
Residential	16[1]	24[4]	9[7]
Commercial	5[2]	6[5]	1[8]
Industrial	0	0	0
Total	21	30	10

[1] 1 remodel/addition to create a duplex, 1 demo (fire damage), 2 HVAC replacement, 2 patio covers, 6 reroof, 1 stucco, 1 siding, 2 fences

[2] Adding pool at Columbia Physical Therapy, repair to hospital utility tunnel, reroof at Catholic Church, interior remodel to add offices at 381 E. Main, adding overhead door at 1655 S. Broadway

[4] 2 Sand Hill apartment buildings (24 units each), 5 single family, 1 remodel/addition to create a duplex , 1 remodel/addition to duplex to create a triplex, 1 demo (fire damage), 1 stucco, 1 siding, 6 reroof, 1 patio cover, 2 HVAC, 3 fences

[5] Addition for restroom at Ramiro's, Office Building for Sand Hill Apartments, repair to hospital utility tunnel, reroof at Catholic Church, interior remodel to add offices at 381 E. Main, restroom remodel at Foursquare Church

[7] 4 single family, 1 addition to create a duplex, 1 patio cover, 2 reroof, 1 HVAC

[8] Ambulance station

Inspections

- The Inspector completed 131 inspections in July, including 10 rental inspections.

Land Use Permits		
Project	Actions in July	Status as of July 31
Bench Road Annexation	City Council accepted the Notice of Intention to Annex 755 acres southeast of existing city limits. This is not a commitment to approve the annexation, but just allowing the proponent to start to collect signatures from affected property owners.	Waiting for: City to evaluate water and sewer capacity to serve this potential annexation. Proponent to get signatures from property owners of at least 60% of the assessed value of the annexation area.
Charan Short Plat final plat (approved Aug. 2023)	Notified plat owner that plat would be void unless a new bond provided for the sidewalk construction. Property owner called to schedule a meeting with staff.	Property owner will be meeting with staff in September about obtaining a new bond to preserve approval of the plat.
Home Occupation update, OMC 17.59 SEPA Review	Environmental Checklist completed. DNS issued. Public hearing scheduled.	Planning Commission will hold public hearing at their Aug. meeting.

Land Use Permits		
Project	Actions in July	Status as of July 31
MBRAR – Gas Station Short Plat	No change (Plat revisions submitted and reviewed in March).	Waiting for final plat submittal. Staff will bring an update to the OMC for the street name.
Ochoa Short Plat	No change (Deferrals heard at Aug. 2021 Planning Commission meeting.)	Waiting for proposed covenant language from applicant's attorney, as specified in PC recommendation.
Othello-Maverick Telecom Tower 1525 Industrial Ln	Hearing Examiner Findings reviewed. Notice of Decision sent. Appeal period through July 30.	No appeals filed. Project is complete.
Pegram Major Plat & Development Agreement	Developer's engineering office contacted staff with questions about the status. (In March 2024, proponents met with staff to discuss their ideas on how to deal with the groundwater. They also planned to discuss the well issue with an attorney.)	Waiting for formal proposals from proponent on the shared well and drain line/groundwater issues.
Sand Hill Estates 6 (multi-family) preliminary short plat	Construction of public utility improvements complete. (Preliminary plat approved in April.)	City Engineer will process acceptance of utility improvements. Waiting for final plat submittal.
Sand Hill Estates #7 Preliminary Plat	Continued to discuss the sewer capacity issue. Discussion with MRSC. Meeting with proponent.	Notice of Completeness and Notice of Application drafted but waiting for resolution of sewer capacity issue.
Wahitis Short Plat	No change (Updated plat drawings routed for review in May.)	Staff will need to review the updated drawings.

Development Projects

- Proposed gas station/convenience store at Broadway and Curtis submitted traffic study, driveway variance request, and septic system information.
- Approved Multi-Family Tax Exemption application for Sand Hill Estates Apartments (48 units).

Rental Licensing & Inspection Program

- 5 rental applications for 54 units were submitted in July.
- 4 sites with a total of 4 units were approved in July.
- There were 10 rental inspections in July.
- 186 locations with a total of 366 units have been fully approved so far.
- There are currently 35 active applications for 134 units in various stages of inspection and correction (including 48 units in new apartment buildings).
- Based on landlord authorizations for utility payments, in early May we sent 42 letters to landlords (for 44 sites), notifying them of the need to apply for rental licenses and schedule inspections. All but 12 of these are now in the process of getting their rental licenses. We will send another letter soon.

Municipal Code

- Updates to OMC 17.59, Home Occupations:
    - Planning Commission finished discussion.
    - City Council was introduced to the draft updates.
    - Planning Commission will hold a public hearing in August and forward a recommendation to Council.
- Looking at Reimbursement Agreements chapter (OMC 16.52), because it is part of the Subdivision title that the Planning Commission has been working on updating. Planning Commission will review in August.
- Looking at Nonconforming Use chapter, to address annexations and update to more current procedures. This will be introduced to Planning Commission in August.

Rural Development Initiatives (RDI) Elevate Othello Project

- Posted final report submitted by RDI https://www.othellowa.gov/elevateothello

Other

- Provided comments on the Othello portion of the draft Adams County Hazard Mitigation Plan.
- Provided comments/history on the business license application for coffee business wanting to locate on city right-of-way.
- The Building Inspector continues to dedicate time to patrolling for code violations like tall weeds, since the Code Enforcement Officer now needs to spend time on animal control. The Inspector fills out a form for each address and leaves a copy with the resident (or taped to the door if no one answers). He follows up in 10 days to see whether it has been corrected. Compliance has improved to about 90% this month. Those not corrected are forwarded to Code Enforcement for the next step in the process.