

Jeanie Orr

From: John Austin
Sent: Tuesday, March 17, 2009 3:43 PM
To: Jeanie Orr
Cc: Al Scalf
Subject: FW: Research request

Please forward to the planning commission members John A

From: Sue Enger [mailto:senger@mrsc.org]
Sent: Tuesday, March 17, 2009 2:40 PM
To: John Austin
Subject: Research request

I am responding to your question about whether the County must include a certain nonconforming use provision in its Shoreline Master Program. (Lynn Nordby passed on your request.) The County was told that if a non-conforming structure is damaged/destroyed by more than 75%, it must be relocated or rebuilt outside the protected area. You asked for a citation for the WAC or other regulation that requires this, if it exists.

The Shoreline Management Act (SMA) (Chapter 90.58, RCW) does not address nonconforming uses. Although not covered in the law, nonconforming uses are addressed in several places in the Washington Administrative Code.

The Washington State Shoreline Master Program Guidelines provide the following guidance:

WAC 173-26-191(2)(a)(iii)(A), in part:

In some circumstances existing uses and properties may become nonconforming with regard to the regulations and master programs should include provisions to address these situations in a manner consistent with achievement of the policy of the act and consistent with constitutional and other legal limitations.

Chapter 173-27, WAC (Shoreline management permit and enforcement procedures) contains the more specific direction that you have referred to:

WAC 173-27-080(8)

(8) If a nonconforming development is damaged to an extent not exceeding seventy-five percent of the replacement cost of the original development, it may be reconstructed to those configurations existing immediately prior to the time the development was damaged, provided that application is made for the permits necessary to restore the development within six months of the date the damage occurred, all permits are obtained and the restoration is completed within two years of permit issuance.

The Department of Ecology has a web page on Shoreline Management: Nonconforming Uses which also notes the 75% threshold for repairing damaged nonconforming uses. (http://www.ecy.wa.gov/programs/sea/SMA/st_guide/administration/nonconforming.html).

According to WAC 173-27-020 (in part):

"It is the intent of these regulations to provide minimum procedural requirements as necessary to comply with statutory requirements while providing latitude for local government to establish procedural systems based on local needs and circumstances."

I spoke with Betty Renkor, from DOE Headquarters, who had prepared a PowerPoint presentation several years ago that indicated that a local jurisdiction's SMP can be different than the WAC, although the WAC provision would apply if the SMP did not address non-conforming uses. Betty Renkor confirmed that DOE's position is that local jurisdictions may adopt a different nonconforming use provision, but whatever is adopted should be consistent with achievement of the policy of the act (See the excerpt from WAC 173-26-191

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(2)(a)(iii)(A) above, for instance). She also pointed to Washington court decisions, such as *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 591 (1994) that note that nonconforming uses are to be restricted and eventually phased out:

"Because nonconforming uses are disfavored, and because the public policy of this state is to restrict such uses so that they may ultimately be phased out, see, e.g., *Keller v. Bellingham*, 20 Wn. App. 1, 9, 578 P.2d 881 (1978), aff'd, 92 Wn.2d 726, 600 P.2d 1276 (1979), we believe that nonconforming uses are not precedent for other uses. That is, a finding of compatibility cannot, in our view, be substantially based on the existence of a nonconforming use in the area in question."
(<http://www.mrsc.org/mc/appellate/archive/073wnapp/073wnapp0576.htm>)

Ms. Renkor suggested contacting the Shoreline Planner, Ecology Northwest Regional Office (Barry Wenger - (360) 738-6245, or bwen461@ecy.wa.gov) if you have further questions for DOE on this subject.

I found several other examples of jurisdictions that used a replacement cost percentage that was lower than the percentage stated in WAC 173-27-080(8) to further restrict replacement of nonconforming structures:

- Sammamish Municipal Code, sec. 25.35.050(2) - http://nt5.scbbs.com/cgi-bin/om_isapi.dll?clientID=296826161&infobase=sammamish.nfo&jump=25.35.050&softpage=PL_frame#JUMPDEST_25.35.050
- Port Townsend Shoreline Master Program, sec. 11.3.1 - <http://www.cityoftpt.us/DSD/SMP/SMP.pdf>
- Bellingham Municipal Code, sec. 21.10.040(D)(4) - <http://www.ci.bellingham.wa.us/web/bmcode.nsf/30c2b313f243223f88255f9c007b495b/0e3c07e666c002ff88256fa300026418!OpenDocument>

On the other hand, some jurisdictions allow rebuilding of a destroyed nonconforming structure provided that it only may be rebuilt to the same or smaller configuration:

- Gig Harbor Ordinance No. 1018 – Eliminates 75% limitation on reconstruction of damaged non-conforming use - <https://gigharbor.imagenetllc.net/Administration/Ordinances/1018.PDF>
- Seattle 23.60.122(C) - <http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?d=CODE&s1=23.60.122.snum.&Sect5=CODE1&Sect6=HITOFF&l=20&p=1&u=/~public/code1.htm&r=1&f=G>

In summary, it appears that local jurisdictions have some latitude to establish procedures that differ from those in the WAC. However, if the County varies from the WAC regulations, we recommend that the County is clear about how the County's approach implements SMA policy.

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