

Non-conforming Uses and Structures Policy Paper

Key Issues

- How can we seek additional conformity over time for structures without precluding maintenance or reasonable use of property?
- Can we prioritize high impact situations such as structures that are overwater or in structure setback?
- How should regulations address lots containing little or no dry land?

Background

A non-conforming use is a use occurring on a property that is not allowed under code such as a residential use in an industrial zone. A non-conforming structure is a structure that is non-conforming to specific development standards such as height, lot coverage, setback, or parking. A property may be non-conforming to use standards, structure development standards, or both.

Non-conforming uses can also be divided into legal and illegal nonconforming uses. A legal non-conforming use or structure is a use or structure that was legally built under previous regulations but does not meet existing standards. An illegal non-conforming use or structure is a use or structure that was created in violation of the regulations at the time it was created. Illegal non-conforming uses or structures are violations and do not have the same rights as legal non-conforming uses. For the purposes of this discussion, we are talking about legal non-conforming use and structures, only.

The WAC provides little guidance on non-conforming uses and structures except to acknowledge that “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.” (WAC 173-26-91)

Proposed Changes to the SMP

Goals & Policies

There are no existing or proposed comprehensive plan policies referencing non-conforming uses and structures; however the general policies informing our update are as follows:

Non-conforming Structures

- Allow maintenance of existing non-conforming structures where no expansion, redevelopment, or replacement is proposed (i.e. no sunset provisions)
- Seek increasing conformity, particularly for overwater structures and high impact activities when replacement or substantial redevelopment occur
- Allow reasonable use of property in all cases

Non-conforming Uses

- Allow maintenance of existing non-conforming uses where no expansion, redevelopment, or replacement is proposed (i.e. no sunset provisions)
- On dry land outside of structure setback, allow replacement of non-conforming uses with other non-conforming uses as long as it doesn't increase non-conformity
- On submerged land and within structure setback, don't allow replacement of non-conforming uses with other non-conforming uses

Regulations

Non-conforming Structures

- For structures landward of OHW and outside of habitat buffer, make non-conformity language consistent with Chapter 23 generally (i.e. no increase in non-conformity allowed, redevelopment to same size and location allowed);
- For structures waterward of OHW or within habitat buffer, allow maintenance, renovations, repairs or structural alterations only to the extent these actions do not constitute a substantial improvement and continue to prohibit expansion. "Substantial improvements" includes the following
 - Replacement of any habitable space
 - Maintenance, renovations, repairs or alterations with a value of more than 40% of the value of the non-conforming portion of the structure in any 5 year period
 - Extensive structural repair or alteration of creosote pilings excluding replacement with pilings of a different material
- Allow "substantial improvements" to non-conforming buildings waterward of OHW or within setback as conditional use only on properties with less than 50 feet of dry land and only to the extent necessary to allow reasonable use of property
 - Considering providing guidance for what constitutes "reasonable use"; for example "to accommodate an enclosed structure with footprint equal to X

ft times the width of the lot, up to a maximum of X sq ft” for each shoreline environment

Non-conforming Uses

- Prevent new non-conforming uses where a non-conforming use currently exists within buildings located over submerged land and/or in buffers
- Allow additional flexibility to accommodate non-conforming uses in Landmark Buildings

Other Changes

- Modify “act of nature” definition to make it more consistent with the land use code generally. Change from “destroyed by fire or other act of nature, including normal deterioration of structures constructed in or over the water” to “destroyed by fire, act of nature, or other causes beyond the control of the owner, excluding normal deterioration of structures constructed in or over the water”
- Make period after which a use is considered to be discontinued 12 months consistent with nonconforming uses generally

Existing Regulations

SMC 25.09.045 Exemptions. (ECA code)

F. Maintenance, repair, renovation, or structural alteration of an existing structure that does not increase the impact to, or encroach further within, or further alter an environmentally critical area or buffer is exempt from the provisions of this chapter.

G. Rebuilding or replacing structures that are destroyed by an act of nature is exempt from the provisions of this chapter, provided that action toward the rebuilding or replacement is commenced within one (1) year of the act of nature, that the rebuilding or replacement is diligently pursued, and that the new construction or related activity does not further encroach into, or increase the impact to, or further alter an environmentally critical area or buffer and complies with restrictions on flood hazard areas reconstruction.

SMC 23.60.020 Substantial development permit required.

C. Exemptions. The following developments or activities shall not be considered substantial development and are exempt from obtaining a substantial development permit from the Director.

1. Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements. "Normal maintenance" means those usual acts to prevent a decline, lapse or cessation from a lawfully established state comparable to its original condition, including but not limited to its size, shape, configuration, location, and external appearance, within a reasonable period after decay or partial destruction, except where repair causes substantial adverse effects to shoreline resources or environment. Replacement of a structure or development may be authorized as repair where such replacement is the common method of repair for the type of structure or development and

the replacement structure or development is comparable to the original structure or development including but not limited to its size, shape, configuration, location and external appearance and the replacement does not cause substantial adverse effects to shoreline resources or environment;

2. Construction of the normal protective bulkhead common to single-family residences.

6. Construction on shorelands by an owner, lessee or contract purchaser of a single-family residence, including those structures and developments within a contiguous ownership which are a normal appurtenance, for his or her own use or for the use of his or her family, which residence does not exceed a height of thirty-five (35) feet above average grade level and which meets all requirements of the City other than requirements imposed pursuant to this chapter. A normal appurtenance is necessarily connected to the use and enjoyment of a single-family residence and is located landward of the ordinary high water mark and the perimeter of a wetland. Normal appurtenances include, but are not limited to, a garage, deck, driveway, utilities, fences, installation of a septic tank and drainfield, and grading which does not exceed two hundred fifty (250) cubic yards and which does not involve placement of fill in any wetland or waterward of the ordinary high water mark;

SMC 23.60.122 Nonconforming uses.

- Existing nonconforming use may be continued where no changes are proposed.
- Nonconforming uses that are discontinued for more than 12 consecutive months in the CN, CP, CR, CM, CW, UR, UH and US Environments or more than 24 consecutive months in the UM, UG or UI Environments shall not be reestablished or recommenced.
- A structure or development containing a nonconforming use or uses may be maintained, repaired, renovated or structurally altered but shall not be expanded or extended beyond its existing external dimensions except
 - to improve access for the elderly and disabled
 - to provide regulated public access
 - to allow reconfiguration of a non-conforming moorage
- A nonconforming use which is destroyed by fire or other act of nature, including normal deterioration of structures in or over the water, may be resumed provided that any structure occupied by the nonconforming use may be rebuilt to the same or smaller configuration existing immediately prior to the time the structure was destroyed and action toward replacement is to be commenced within twelve (12) months after demolition or destruction in the CN, CP, CR, CM, CW, UR, UH and US Environments or within twenty-four (24) months after demolition or destruction in the UM, UG or UI Environments.
- The change of one nonconforming use to another use not permitted in the shoreline environment may be authorized as a conditional use when it is determined that the new use is no more detrimental to the property in the shoreline environment and vicinity than the existing use and the existing development is unsuited for a use permitted in the environment

- Reconfiguration of an existing nonconforming moorage may be authorized as a conditional use if the Director determines that the goals of this chapter relating to views, limiting location of structures over water, and providing public access, would be better served and area of moorage is not increased.

SMC 23.60.124 Nonconforming structures.

- A nonconforming structure may be maintained, renovated, repaired or structurally altered but shall be prohibited from expanding or extending in any manner which increases the extent of nonconformity, or creates additional nonconformity, except as otherwise required by law, as necessary to improve access for the elderly and disabled or to provide regulated public access. When the development is nonconforming as to lot coverage, existing lot coverage may not be transferred from the dry-land portion of the site to the water.
- A nonconforming structure or development which is destroyed by fire or other act of nature, including normal deterioration of structures constructed in or over the water, may be rebuilt to the same or smaller configuration existing immediately prior to the time the structure was destroyed; provided that action toward replacement must be commenced within 12 months after demolition or destruction of a structure in the CN, CP, CR, CM, CW, UR, UH and US Environments or within 24 months after demolition or destruction of a structure in the UM, UG, or UI Environments.
- The Director may require compliance with the standards of Section 23.60.152, General development, for part or all of a lot as a condition for new development of part of a lot if it is found that continued nonconformity will cause adverse impacts to air quality, water quality, sediment quality, aquatic life, or human health.
- The Director may require compliance with Section 23.60.160, Standards for regulated public access, as a condition of a substantial development permit for expansion or alteration of a development nonconforming as to public access requirements.