

## **MEMORANDUM OF LAW**

**DATE:** May 5, 2000

**TO:** Brad Richter, Senior Planner, Centre City Development Corporation

**FROM:** City Attorney

**SUBJECT:** Expansion of Nonconforming Conditional Use Permits

### **BACKGROUND**

You have requested advice concerning how the recently adopted Land Development Code [LDC] applies to a homeless facility in the East Village Redevelopment District of the Expansion Sub Area of the Centre City Redevelopment Project. That project was approved prior to 1991 under previous zoning regulations. In 1992, the Centre City Planned District Ordinance took effect and since then such facilities are no longer permitted in the area, even through issuance of a Conditional Use Permit [CUP]. The facility in question now wants to expand, both in building square footage and onto an adjoining site. With that background, you ask the following questions:

### **QUESTIONS PRESENTED**

1. Is a CUP previously approved in conformance with zoning, but no longer permitted under the current zoning, classified as a "previously conforming use" and subject to San Diego Municipal Code section 127.0109?
2. If the answer to #1 is yes, are all such CUPs prevented from any expansion due to the conclusive presumption that such expansion is detrimental to public health, safety, and welfare?

### **SHORT ANSWERS**

1. A CUP that was lawfully issued under the zoning as it existed at the time of issuance, but which is no longer available in the zone as it currently exists, is a previously conforming use. As such, it is subject to the regulations contained in San Diego Municipal Code sections 127.0101 through 127.0109.
2. The conclusive presumption set forth in San Diego Municipal Code section 127.0109(b) does not apply to the facts as provided. Through a Neighborhood Use Permit, issued under Process Two (as defined by the LDC), a previously conforming use can expand its gross

floor area by up to 20 percent.

## DISCUSSION

San Diego Municipal Code section 127.0101 states:

Because of changes in the City's zones and zoning regulations over the years, many *structures* that were built, or uses that were established, in compliance with the applicable regulations at the time of their *development* no longer comply with existing regulations. In order to clarify this status, and to avoid confusion with illegal premises and uses, the term "*previously conforming*" is used to describe these situations and has the same meaning as "*nonconforming*."

Generally, the law in California pertaining to expansion of nonconforming structures and uses is fairly restrictive. The general policy favors the ultimate extinguishment of the use. In fact, the leading land use treatise in California states, "Most nonconforming provisions of local ordinances do not permit structural alterations because they may lead to the creation of a nonconforming building that will better accommodate and make the nonconforming use more permanent." Longins's *California Land Use* 3.82[4] (2nd ed. 1987).

Similarly, California courts have been reticent to allow expansion of nonconforming uses, even finding that there is "no legal right to expand." *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519, 1529 n.4 (1992), citing *Sabek, Inc. v. County of Sonoma*, 190 Cal. App. 3d 163, 167 (1987). In finding that there is no right to expand, these courts have relied upon the premise that the purpose of zoning is to confine certain classes of buildings and uses to particular localities and to eliminate nonconforming uses within the zone as rapidly as is consistent with proper safeguards for the interests of those affected. Any change in the premises which tends to give permanency to or expand the nonconforming use, the courts assert, would not be consistent with this purpose. *Sabek*, 190 Cal. App. 3d at 167.

In *Paramount Rock Co. v. County of San Diego*, 180 Cal. App. 2d 217 (1960), the court discussed a number of issues related to expansion of nonconforming uses. In that case, a property owner filed suit to enjoin the County from enforcing an ordinance that prohibited it from expanding its nonconforming sand and gravel business. The property owner stated that they had long-standing plans to expand the use, and should be allowed to do so. The court, in refusing to enjoin the ordinance, stated:

The provisions of the zoning ordinance under consideration, although recognizing the right of a property owner to continue a nonconforming use existent at the time his property becomes subject to the ordinance, prohibits any expansion or extension thereof and contemplates the eventual elimination of such uses through abandonment, obsolescence or destruction. "Given the objective of zoning to eliminate nonconforming uses, courts throughout the country generally follow a strict policy against their extension or enlargement." As a consequence, . . . the 22 foot extension into a vacant lot of a building used as a grocery store under a nonconforming use was not permissible; . . . increasing the capacity of property used to feed cattle by the construction of additional feeding pens

constituted an unlawful extension of a nonconforming use . . . .

*Id.* at 229 (citations omitted).

The intention to expand the business in the future does not give defendants the right to expand a nonconforming use. . . .

The activity of the owner in the use of his property at the time it becomes subject to a zoning ordinance and not his plans regarding the future use of that property determines the scope of the nonconforming use excepted from the restrictions imposed by the ordinance.

. . . .

Petitioners urge, however, that the court should enjoin enforcement of the ordinance because of the severe hardship which would be imposed upon them by its enforcement, and complain of alleged error by the trial court in excluding evidence of such hardship. It has been reiterated on many occasions that “every exercise of the police power is apt to affect adversely the property interest of somebody” and that the fact that some hardship or financial injury to a property owner may result from zoning restrictions does not invalidate the imposing ordinance.

*Id.* at 232-33 (citations omitted).

In another case involving a sand and gravel business, *Hansen Brothers Enterprises, Inc. v. Board of Supervisors*, 12 Cal. 4th 533 (1996), the California Supreme Court developed a three-pronged test for determining whether a party could continue or expand their nonconforming use after a change in zoning restricted such a use. The Court said:

First, he must prove that excavation activities were actively being pursued when the law became effective; second, *he must prove that the area that he desires to excavate was clearly intended to be excavated, as measured by objective manifestations and not by subjective intent*; and third, he must prove that the continued operations do not, and/or will not, have a substantially different and adverse impact on the neighborhood.

*Id.* at 556.

The court echoed the language of previous cases and reiterated: “The mere intention or hope on the part of the landowner to extend the use over the entire tract is insufficient; the intent must have been objectively manifested by the present operations [in effect at the time of enactment of the ordinance].” *Id.* at 557.

Although these cases demonstrate the general rule against expansion of nonconforming uses, The City of San Diego, in order to balance the burden on businesses with the protection of the public health, safety, and welfare, has allowed far greater flexibility in this regard. San Diego Municipal Code section 127.0109 specifically allows for expansion of nonconforming uses within the City of San Diego. That section states, in pertinent part:

- (a) A 20 percent or less gross floor area expansion of a structure with a *previously conforming* use requires a Neighborhood Use Permit.

Section 127.0103 provides that the issuance of a Neighborhood Use Permit for such an expansion would be decided in accordance with Process II (staff level decision, with an appeal to the Planning Commission). A Neighborhood Use Permit may be approved or conditionally approved only if the decision-maker makes the findings set forth in section 126.0205. These are:

- (a) The proposed *development* will not adversely affect the applicable *land use plan*;
- (b) The proposed *development* will not be detrimental to the public health, safety, and welfare; and
- (c) The proposed *development* will comply with the applicable regulations of the Land Development Code.

San Diego Municipal Code section 127.0109(b) states:

When making the *findings* for a Neighborhood Use Permit for the proposed expansion of a *previously conforming* use, the following uses are conclusively presumed to be detrimental to public health, safety, and welfare:

- (1) Industrial uses in residential zones;
- (2) Commercial and personal vehicle repair and maintenance in residential zones; and
- (3) Any use that requires a Conditional Use Permit in the applicable zone in accordance with Section 126.0303.

The proposed expansion that is the subject of your question is not an expansion of an industrial use. Nor is it an expansion of a vehicle repair facility. The remaining question is whether the use is one that “requires a Conditional Use Permit *in the applicable zone* in accordance with Section 126.0303.” For the reasons discussed below, it is not.

Section 127.0109(b)(3) is intended to address situations where a Conditional Use Permit is available for a previously conforming use that seeks to expand. This section's nonconclusive presumption that the expansion would be detrimental to public health, safety, and welfare forces the uses to apply for a Conditional Use Permit with the higher level of review, rather than expanding through a Neighborhood Use Permit. If the expanded use were approved through a Conditional Use Permit, it would then no longer be a previously conforming use. If, however, as is the case here, a Conditional Use Permit for such a use is not available, this presumption would not apply, and the use could expand, subject to the Neighborhood Use Permit process discussed above. Because a Conditional Use Permit for a homeless shelter is not available under the current Centre City Planned District Ordinance, its expansion is governed by the Neighborhood Use Permit process.

## CONCLUSION

A CUP that was lawfully issued under the zoning as it existed at the time of issuance but which is no longer available in the zone as it currently exists is a previously conforming use. Although the general rule in California is to preclude expansion of previously conforming uses, the San Diego Municipal Code, through the discretionary Neighborhood Use Permit, generally provides a broader ability to expand. Since there is no conclusive presumption that the expansion would be detrimental to public health, safety, and welfare, the previously conforming use, through the issuance of a such a permit, can expand its gross floor area by up to 20 percent.

CASEY GWINN, City Attorney

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