



536
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MEMORANDUM

DATE: May 23, 2006

TO: Zoning Administration Division
DSD Zoning Review Section

FROM: Walter Tellez
Zoning Administrator

SUBJECT: LUC 5.3.6 Nonconforming Status; LUC 1.2.4, State or Federal Health and Safety
Laws Compliance
Land Use Code: Zoning Administrator Determination

Zoning has held that improvements that are required to comply with State or Federal health and safety laws may be made to nonconforming properties without being considered new construction or an expansion of the nonconforming structure or use (ie: Halcyon Acres well site).

s:zoning administration/za determination/LUC 5.3.6b.doc

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From: Craig Gross
To: Connor, Andrew; St. Paul, Michael
Date: 02/28/2006 2:36:42 PM
Subject: 1802 E. Prince T05CM03968

Per Walter Tellez, when an existing approved building encroaches into a future setback or landscape buffer we do not require a variance or a portion of the building to be removed to meet code. In this case the property has a future ROW of an additional 30 feet (75') that will extend to the leading edge of the existing building. No landscape buffer will be required in front of the building between the building and the future ROW. If additional room exists beside the building and behind the future ROW then a landscape buffer can be provided in that area. This does not apply for any new construction adjacent to the future ROW, only to existing development. Please come see me if you have additional questions.

Craig

CC: Linville, Joseph; Rivera, David; Tellez, Walter

5.3.1 - AM 2004
3.16 - 2005
296

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From: Walter Tellez
To: Gross, Craig
Date: 02/15/2006 12:59:34 PM
Subject: Re: Adkins property

Should be OK. See LUC 3.2.10.2.B.2 and 3.2.11.2.B.2. McCrory has also allowed some City purchases the same as condemnations to make a site legal nonconforming.

>>> Craig Gross 02/15/2006 12:39:58 PM >>>

Walter, the City wants to buy a portion of the common area of a subdivision adjacent to the Atkins property on Craycroft (they don't want to condemn it) to expand the park. It is a triangular portion between the Adkins property and San Francisco Blvd. The subdivision association is willing to voluntarily sell it to the City. It is part of the La Sonrisa Townhomes originally platted for 28 lots but fully developed with 26 lots (partial lot combos). The zoning is HR-1. The original plat was 4.281 acres with a density of 6.54 RAC (which actually exceeds the maximum 6.25 allowed in R-1) but it was developed at 6.07 RAC. The portion of the common area that the City wants to buy is about .28 acres which means the project would end up with 26 units on 4.0 acres for a density of 6.5 RAC. Since the revised density would still be less than the original approved density do you think this would be OK? The area in question is natural open space not required by NPPO or other regs.

CC: Duarte, Ernie

11:59 AM
2/15/2006
223

536
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From: David Rivera
To: Tellez, Walter
Date: 02/10/2006 2:02:07 PM
Subject: Re: R-1 lots less than 7000 sq.ft.

Walter

Yes!

What we have done in the past is ask the customer for a copy of the title or deed of the property. If the legal description on the deed or title describes the lot in it's original configuration prior to the date in the LUC, I have accepted the lot as non-conforming with regards to lot size. The design or proposed development must meet code or applicable variances/DDO's must be applied for and approved before we will sign off on the plan. We also check the original plat because some of the subdivisions were platted with lots smaller in size than our code requires today. The guys should and for the most part talk to me first if there is a question with a possible non-conforming lot size.

David

>>> Walter Tellez 02/10/2006 11:39:17 AM >>>

David,

if the lot meets date of 1948, can't it be approved by your staff without a ltr to me?

224

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From: Craig Gross
To: Gehlen, Patricia; Rivera, David; Wells, Russlyn
Date: 09/13/2005 10:25:14 AM
Subject: Re: 2810 N. Campbell Avenue - formerly Catalina Bicycle Shop

correct. Walter ruled that it is non-conforming for retail/commercial at 1:200. Any use equal or less than 1:200 is OK.

>>> Patricia Gehlen 09/13/2005 9:15:49 AM >>>

If the site is grandfathered for retail, the new use does not have to provide parking at 1:200 because it is grandfathered....correct?

>>> Russlyn Wells 09/07/2005 3:57:34 PM >>>

I was asked to confirm whether a parking variance had been granted for 2810 N. Campbell Avenue. The last approved use is the Catalina Bicycle Shop (3,427 sq ft) which was approved in 1990 based on a 1:400 parking requirement for retail uses with a GFA less than 4,000 square feet. 5 spaces are shown in front of the three separately owned businesses at this location. 9 spaces are required just for the bike shop. The parking requirements for the bike shop were satisfied via a parking lease agreement with the adjacent Catalina Movie Theater not via the variance process. The parking agreement which is still in effect is for unlimited business hour use of 227 theater parking stalls.

Cathy Appelgate Rex is the project architect and she will be submitting a site plan for a post-secondary use (beauty school) proposed in the bike shop location. She wanted clarification on whether the parking agreement could apply to the proposed 1:200 use.

Per Walter, the issue is not the parking agreement rather it is the fact that retail uses established under the old 1:400 parking ratio are grandfathered to a 1:200 ratio. New 1:200 uses going into these locations are not considered a change of use and therefore a parking variance is not required as long as the parking provided (onsite or via lease) meets the required number of spaces based on the 1:200 criteria.

CC: Bogdan, Wayne; CrexArchitect@aol.com; Tellez, Walter

11/13/2005 10:25:14 AM
2 2.4
264



MEMORANDUM

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463

DATE: March 29, 2005

TO: Zoning Administration Division
DSD Zoning Review Section

FROM: Walter Tellez
Zoning Administrator

SUBJECT: LUC 5.3.6a, Nonconforming Use, Business License
Land Use Code: Zoning Administrator Determination

Sonoran Environmental/B&R Materials wanted to use the issuance of City business license as evidence of a legal use on their property. Tucson Code Section 19-300.c states "The issuance of a privilege license by the tax collector shall in no way be construed as permission to operate a business activity in violation of any other law or regulation to which such activity may be subject." A City business license can not be used as evidence of a legal use.

s:zoning administration/za determination/LUC 5.3.6a.doc



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MEMORANDUM

DATE: March 16, 2005

TO: Zoning Administration Division
DSD Zoning Review Section

FROM: Walter Tellez
Zoning Administrator

SUBJECT: LUC 2.4.3, O-3 Zone, St. Joseph Hospital Parking Garage
Land Use Code: Zoning Administrator Determination

A parking garage is permitted provided it complies with the O-3 requirements. It would not be an expansion of the nonconforming status for the height.

s:zoning administration/za determination/LUC 2.4.3.doc

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465

From: Walter Tellez
To: Sayler-Brown, Thomas
Date: 12/17/2003 4:23:27 PM
Subject: Re: Fascinations

Thomas,

For zoning purposes, Fascinations store at Speedway and Kolb is considered nonconforming. A Restricted Adult use is not permitted in the C-1 zone. To relocate Fascinations would require C-2 and compliance with LUC requirements for Restricted Adult Use.

Let me know if you need any further information.

Walter.

>>> "Thomas Sayler-Brown" <tsaylerbrown@sbbaarch.com> 12/17/2003 9:15:38 AM >>>
Walter,

We are designing a new Lowe's Home Improvement Warehouse on the northeast corner of Speedway and Kolb. This project will completely redevelop the site, excluding the offices at north and the retail building at the southeast corner. We will be rezoning the site from C-1 to C-2 for the garden center (C9-03-023).

Fascinations is currently located on the site adjacent to the vacant grocery store. I assume that Fascinations is considered an adult retail establishment but would like your confirmation of that. They have 2 years left on a 3 year lease and do not want to leave the site. The cost to force them out is extremely high.

1. If the site is fully redeveloped, can the Fascinations still be located on the site? We show a small retail building on the north side of the Lowe's building. It is set back 143' from the Kolb Road right of way. This is the building that Fascinations would want to occupy.
2. Are there any exceptions, grandfather clauses, etc, that come into play in determining that Fascinations can remain or that it is not a technically an adult retail establishment?
3. Is there ANY WAY that Fascinations can stay on this property? (I am assuming by what I see in the code that the business must be 1,000 feet away from the residential zone to the west...is that correct?)

Thanks, Walter.

Thomas Sayler-Brown

CC: Ernie Duarte; McCrory, Michael

2 5 3: .
3 5 4:
1 3 2: ^

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466

From: Walter Tellez
To: pmayne@dot.state.az.us
Date: 12/15/2003 2:22:14 PM
Subject: Re: SR 77, Tucson Cemetery Assoc., ADOT parcel 10-1376

Mr. Mayne,

I am Walter Tellez, Zoning Administrator for the City of Tucson. You are correct that the acquisition of land from the cemetery will make the site legal nonconforming for zoning purposes. Please let me know if I can be of any further assistance.

>>> <pmayne@dot.state.az.us> 12/11/2003 3:31:44 PM >>>
Dear Mr. Glock,

The A.D.O.T. is in the process of acquiring land for a sidewalk project at the northwest corner of Miracle Mile & Oracle Rd. It's a strip take totaling 3,146 sq. ft and is around 800 ft. in length so you can see the depth isn't very great. Our take is still outside the current cemetery wall. We believe the cemetery is unreasonable in asking for a very high price per square foot. One of their arguments is that our take will put them in violation of the setback limits even though we have advised that this would be an acceptable non-conforming use.

We would like the City's concurrence on the non-conforming use issue since this has the potential of going to condemnation.

If you have any questions or need additional information, please let me know. I can be reached at (602) 712-8738 or at 'pmayne@dot.state.az.us'.

Thank You,
Pete

CC: Glock, Jim; McCrory, Michael; Rosen, Tobin

6.34.2 ...
5.3.6 ...
130



CITY OF
TUCSON

DEVELOPMENT
SERVICES
DEPARTMENT

ZONING
ADMINISTRATION

October 30, 2003

Theodore and Carmen G Downing
1436 East Edison Street
Tucson, AZ 85719

SUBJECT: 1436 E Edison Street – Enclosure Duplex Garage Space
Land Use Code (LUC) Information

Dear Mr. And Mrs. Downing:

Thank you for your letter, dated October 20, 2003, regarding the above referenced residential project. The subject property is addressed 1436 East Edison Street and zoned "R-1" Residential. The 9,000 square foot property is developed with an existing single family dwelling in the front portion of the property, and a 2-story duplex in the rear portion of the property. The duplex was constructed with two residential units on the 2nd floor and garage stalls on the 1st floor. The residential development of this property is considered nonconforming for the LUC development criteria applicable to an R-1 zoned property of this size (e.g. density, parking area, landscaping, screening, etc.) You are requesting the zoning approval necessary to fully enclose the 1st floor duplex garage area and convert its use to new storage and bedroom space (the project.)

The Zoning Administration Division, has reviewed your letter, the LUC regulations applicable to the project, and to the property's nonconforming status. It is the Zoning Administrator's determination that the enclosure and conversion of the existing garage space, as proposed, is prohibited by the LUC for the following reasons. The property's established nonconforming status allows for the three (3) residential units on the property (i.e. the single family dwelling in the front and the duplex in the rear), and not more. The duplex 1st floor garage parking and the single family dwelling surface parking together represent the approved vehicular use area for these three (3) units within the property's nonconforming status. The property's parking is nonconforming for number of spaces, surfacing, landscaping, screening, etc.

LUC regulations applicable to the property's parking or vehicular use area include Section 3.3.3.10 "Change of Approved Vehicular Use Area" which acts to prohibit any change or modification to the parking area

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1436 E Edison
10/31/03

unless that change serves to bring it closer or into LUC compliance. The LUC regulations applicable to the property's nonconforming status include Section 5.3.6.1 "Nonconforming Uses and Parking Areas" and Section 5.3.6.2 "Nonconforming Structures." These regulations act to prohibit any intensification or expansion of the property's nonconforming status, whether by the reduction in the number of approved parking spaces or by the increase of the number of onsite residential units. This determination by the Zoning Administrator considers the proposed enclosure of the duplex garage space and its conversion to other use to be such a change, intensification and/or expansion, and thus is not permitted.

This zoning determination is appealable to the Board of Adjustment provided the appeal is made in writing and filed, along with the appropriate fees and documents, within thirty (30) calendar days of the date of this letter. Board of Adjustment appeal information can be obtained by contacting either Russlyn Wells (ext. 1134) or Wayne Bogdan (ext. 1116) at (502) 791.4541. If you should require further LUC information from the Zoning Administration Division, please contact William Balak (ext. 1168) or Wayne Bogdan (ext. 1116) at (520) 791-4541.

Sincerely,


Walter Tellez
Zoning Administrator

s:zoning administration/zoning/2003/1436edison.doc

c: Ernie Duarte, DSD Director
Michael McCrory, City Attorney's Office

1:34B

467

To: Walter Teyes
City of Tucson Zoning Department
Development Services
10/20/03
From: Carmen Garcia Downing
Re: 1436 East Edison

I am writing to request permission to enclose our garages at 1436 East Edison, as you have requested. You stated it was your opinion that since this structure is a non-conforming use and we needed to make our request for an alteration in writing. You stated we needed to include the following: The reasons for the enclosing.

1. To prevent further flooding of the structure. Water seeping under the garage doors is weakening the structural integrity of the beams supporting the structure. Enclosing the garages with a masonry wall will solve this problem. Not allowing us to do so will lead to further flooding and possible litigation with the city should we not be allowed to take measures to protect the property from this potential damage. City staff in development services has seen this problem first hand and is prepared to sign off on our permit.
2. The garages are not currently used for parking.
3. The garages in question will not be turned into bedrooms as you have expressed concern over they will be used for storage purposes only.
4. We currently use the garages for storage purposes only.
5. There are a total of 7 available parking spots on the property. This is more than sufficient to meet the requirements of the code.

I hope this is sufficient to meet with your approval. Please contact my son, Demitri Downing, should you need any further information on the property. 520-909-4334.

Carmen Garcia Downing
Carmen Garcia Downing



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From: Kathleen Dunbar
To: Andy Dinauer; Carol Clark; Craig Gross; David Mann; David Rivera; Ernie Duarte; Jim Vogelsberg; Lee Gagnier; Patricia Gehlen; Walter Tellez
Date: 10/14/03 3:07PM
Subject: Re: Alert per Council Member Dunbar, Ward 3

THANK YOU!!!!

Mr. Downing is trying to pull one on all of us and he needs to be stopped.

kd

>>> Jim Vogelsberg 10/14/03 01:42PM >>>

Carol,

An update on this case:

Yesterday Mr. Downing's site plan was intercepted by our residential plan reviewer and referred to our Zoning review section. After Mr. Downing's disclosed there were three kitchens in the 'garage storage building' the improvement plans were rejected for building permits; he was directed to speak to Mr. Tellez regarding his proposed use.

No building permits were issued.

Thanks,

JPV

>>> Carol Clark 09/08/03 10:37AM >>>

Information has come to the attention of our office that Mr. Dimitri Downing, 1436 E. Edison, owner/operator of 5 bedroom rentals on his residential property, is bragging to neighbors that he will avoid city of Tucson DSD enforcement and build and additional bedroom in his garage.

I worked with several of you last week assisting Mr. Downing and his surrounding neighbors to resolve a stormwater/flooding issue in the alleyway south of his home. I understand that Streets will be grading the alley and that Mr. Downing first needs to remove the pile of concrete on the rear side of the lot.

Council Member Dunbar hopes no permits will be issued to Mr. Downing regarding his garage without the appropriate inspections to assure additional bedrooms are not added under guise of other use without providing for adequate and legal parking for his tenants. There is habitual illegal parking in the front R-O-W.

Thank you for your assistance in this matter.

Carol Clark
Aide to Council Member Kathleen Dunbar
Tucson City Council, Ward III
1510 E. Grant Rd.
Tucson, AZ 85719
Phone: (520) 791-4711
Fax (520) 791-5391
Email: cclark1@ci.tucson.az.us

CC: Chris Leighton

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From: Ernie Duarte
To: Keene, James
Date: 10/20/03 8:53AM
Subject: Information for your weekly meeting with CM Dunbar

Jim:

I thought I'd let you know of an issue in Ward 3 that's receiving CM Dunbar's attention in case she brings it up at your weekly meeting. It involves State Representative Ted Downing and his son, Dmitri. The project is in Jefferson Park.

The Downing's have an existing nonconforming development (3 units in an R-1 zone) . They're wanting to enclose the garage for floodproofing purposes. The proposed enclosure eliminates 4 parking spaces. His drawings are marginally prepared on 8 1/2x 11 graph paper and leave much to be desired. In fact, Mr. Downing cannot take on the design of the project himself because he has more than 3 units on his property and it is considered a commercial development. State Law will require the services of an architect, should he continue to pursue the project.

When we met with Rep Downing on Friday, Walter Tellez and I walked him through the process. Because his site right now is non-conforming, we need to document closely what he is proposing to do. Upon OK from the Zoning Administrator, he may pursue his project with the assistance of an architect. Rep. Downing accused us of being anti-infill and not being helpful to "the little guy".

Let me know if you have any questions.

Ernie

CC: Pesqueira, Suzette; Walter Tellez; Young, Benny

194E



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MEMORANDUM

DATE: September 29, 2003

TO: Zoning Administration Division
DSD Zoning Review Section

FROM: Walter Tellez
Zoning Administrator

SUBJECT: LUC 5.3.6, Nonconforming Status and Business Licenses
Land Use Code: Zoning Administrator Determination

The nonconforming status of a business is based upon valid approved building plans and permits, not on business licenses.

s:zoning administration/za determination/LUC 5.3.6.doc



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MEMORANDUM

DATE: May 2, 2003

TO: Zoning Administration Division
DSD Zoning Review Section

FROM: Walter Tellez
Zoning Administrator

SUBJECT: LUC 4.3.1, Lot Combo/Split
Land Use Code: Zoning Administrator Determination

Two lots combined together in the past can not be split back into the original platted lots if the original lots can not meet current LUC requirements for minimum lot size. Any rights to a nonconforming lot size was given up at the time the lots were combo'ed. Plats by themselves do not establish the right to construct.

s:zoning administration/za determination/LUC 4.3.2.doc



The Sunshine City

CITY OF TUCSON

CITY HALL
P.O. BOX 27210
TUCSON, ARIZONA 85726-7210

DEPARTMENT OF PLANNING
791-4505 • 791-4571 • 791-4541
FAX (520) 791-4130 OR 791-2663

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August 20, 2001

Carlus E. Kilgore Jr.
Profile Design, Inc.
7454 E. Broadway Boulevard, Suite 102
Tucson, AZ 85710

Subject: 3154 North Stone Avenue – The Coronado Market – Fire Reconstruction
Land Use Code (LUC) Information

Dear Mr. Le:

Thank you for your letter, dated July 27, 2001, and accompanying documentation. The property in question is the nonconforming Coronado Market at 3154 North Stone Avenue. Of concern is the market's nonconforming status. In 1997 a portion of the market was damaged by fire. In March 15, 2000 letter to the market owner (Mr. Le), staff acknowledged his continuing efforts to reconstruct the market under its nonconforming status. You are requesting staff once again acknowledge that, based on the submitted documentation, the reconstruction of the fire damage is being diligently pursued and the market's nonconforming status has not been abandoned.

The Planning Department and the City Attorney's Office have completed their review of the information you have provided. Based on this information, it is clear to staff that the owner's intent to reconstruct the damaged portion of the Market was never abandoned, and the nonconforming status of the Market remains intact. Staff has no objections should building permits be issued to rebuild the 1997 fire damaged portion of the building. Please note that a copy of this letter must be attached to any site plans submitted to the Development Services Department (DSD), 201 North Stone Avenue for the purposes of LUC compliance review. Should you have any further zoning questions concerning this matter please contact, Wayne Bogdan or myself at 791-4541.

Sincerely,

Walter Tellez
Zoning Administrator

s:zoning/2001/3154ston.doc
cc: Michael McCrory, City Attorney's Office
Tinh Huu Le, 3154 N. Stone Avenue, Tucson AZ 85705

C-2 zone = 2.5.4
Historic = 5.1.9
Non-conforming = 5.3.6

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471

From: Walter Tellez
To: Gross, Craig
Date: 08/18/2004 12:53:37 PM
Subject: Re: non-conforming use

If it is documented, you can approve.

>>> Craig Gross 08/18/2004 11:59:10 AM >>>

Property at 52 E. Roger Rd is zoned R-2 but has been used as retail food and general merchandise sales since 1954. They now want to change to selling retail antiques. Everything is in enclosed building. What do you want them to do?

Please make a note of my new e-mail address

craig.gross@tucsonaz.gov

SEARCHED
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The Sunshine City •

CITY OF TUCSON

CITY HALL
P.O. BOX 27210
TUCSON, ARIZONA 85726-7210

DEPARTMENT OF PLANNING
791-4505 • 791-4571 • 791-4541
FAX (520) 791-4130 OR 791-2663

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August 16, 2001

Richard Moore
RMM Enterprises, Inc.
10990 East Oakwood Drive
Tucson, AZ 85749

Subject: 1170 North Pantano Road, Pantano Quick Lube

Dear Mr. Moore:

Based on the information you provided in your letter dated August 2, 2001 and the regulations provided in the Land Use Code (LUC) relating to Special Exceptions and Nonconforming Uses or Structures, the use of the property at 1170 North Pantano Road is allowed to continue as previously approved. The existing use located on the property was approved in August 1995 under the Conditional Use provisions in the Zoning Code (now repealed). This use is now translated as stated in the Special Exception Land Use regulations in the C-1 zone which allow certain land uses within this zone, if approved through a Special Exception Land Use procedure. Because the Conditional Use process was replaced by the Special Exception Land Use regulations in the LUC, the Special Exception approval and conditions will be transferred to any similar uses on the property. The approval of the Special Exception land use would be subject to the existing approved site plan and any future change of use will be reviewed according to those regulations. However, an increase in intensity of the use, or expansion of the building or property, will result in the Special Exception Land Use being suspended. In that event, a rezoning application or a new Special Exception request must be submitted.

As a translation of the conditional use as a Special Exception rather than a nonconforming use, the Special Exception approval will not be rescinded if the property or building has been left vacant for six (6) months or more.

Sincerely,

Walter Tellez
Zoning Administrator

WT/at/s:zoning.2001.1170pant

C-1 zone - 2.5.3
Site plan - 4.1.2
Nonconforming - 5.3.6 90



CITY OF
TUCSON

DEVELOPMENT
SERVICES
DEPARTMENT

ZONING
ADMIN.
DIVISION

July 9, 2003

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Ron Asta
Asta Planning & Zoning Co.
3661 N. Campbell Ave. PMB108
Tucson, AZ 85719-1527

SUBJECT: 4001 N. Country Club, O-3/SR – Tucson Racquet Club Yoga Studio
Land Use Code (LUC) Information – Nonconforming Use

Dear Mr. Asta:

Thank you for your letter, dated May 23, 2003, and attached plan regarding the above referenced project. The property is the Tucson Racquet and Fitness Club located at 4001 North Country Club Road and zoned both "O-3" Office and "SR" Suburban Ranch. Your letter and attached site plan provides additional information to that project information first sent to staff on May 7, 2003. You are requesting staff find the project not to be an expansion to the existing facility based on this new information. The project which includes the new 2,500 square foot yoga studio and expanded parking area, basically replaces that existing outdoor recreation area now devoted to volleyball, basketball and a ramada for pee-wee activities.

The Zoning Administration Division, in consultation with the City Attorney's Office, has reviewed your letter, the project and the LUC regulations applicable to nonconforming use and structures. Based on your additional information staff considers the project, as proposed, to be an enclosure of existing recreational space within the facility that does not expand the use thus allowable within it's nonconforming status. Given the relatively small size of the new yoga building, staff is of the opinion that the project will have negligible impact on the overall life of the nonconforming use of the property. Please note, however, the new building must comply with LUC development criteria for building heights, setbacks and parking. The project's parking requirements can be met by providing an additional nine (9) parking spaces onsite. This number of parking spaces (9) was derived by subtracting the number of spaces that would be required for the courts (5 spaces x 5 courts=25 spaces) from the spaces required for the new studio (2,500 square feet/75=34 spaces).


O-3 = 2.43
SR = 2.24
Pac/Rac = 2.24
67

Ron Asta
07/09/03
Page 2

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Also note that a copy of this letter must be attached to the project's site plan when submitted to the Development Services Department (DSD), 1st floor, 201 North Stone Avenue for the zoning compliance review process. If you require further LUC information from the Zoning Administration Division, please contact William Balak (ext. 1168) or Wayne Bogdan (ext. 1116) at (520) 791-4541.

Sincerely,


for Walter Tellez
Zoning Administrator

s: zoning administration/zoning/2003/4001countryclub2.doc

c: Michael McCrory, City Attorney's Office
Patricia Gehlen, Zoning Plans Review Section, DSD

DEVELOPMENT SERVICES DEPARTMENT • 201 NORTH STONE AVENUE
P.O. BOX 27210 • TUCSON, AZ 85726-7210
PHONE (520) 791-4541 • FAX (520) 791-4340

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From: Walter Tellez
To: Balak, William
Date: 6/26/03 11:42AM
Subject: Re: Fwd: 1157 E. Mabel T02CM05486

We have said if condemned can be rebuilt.

>>> William Balak 06/26/03 11:32AM >>>

Trish said you determined that termite damaged structures can be torn down and replaced without losing the nonconforming status. Please let me know.

CC: McCrory, Michael

Nonconforming - 5.36
60

12/06/01 536
425

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ERNEST and DOROTHY JONES/LELAND JONES,)	
)	1 CA-CV 01-0148
Complainants-Appellees,)	
v.)	DEPARTMENT C
)	
COUNTY OF COCONINO,)	O P I N I O N
)	
Defendant-Appellant.)	Filed 12-6-01
)	

Appeal from the Superior Court in Coconino County
Cause No. CV2000-0383

The Honorable H. Jeffrey Coker, Judge

REVERSED AND REMANDED

Charles Gustafson, P.C.	Flagstaff
By Charles B. Gustafson	
Attorney for Appellees	

Terence C. Hance, Coconino County Attorney	Flagstaff
By William P. Ring and Jean E. Wilcox, Deputy County Attorneys	
Attorneys for Appellant	

E H R L I C H , Judge

¶1 In question is a Coconino County zoning ordinance that prohibits the enlargement or extension of a nonconforming use. Specifically, the issue is whether the ordinance precludes moving a structure from which hay is sold from the place the structure occupied when it became a nonconforming use to another location on the same property. Such a change in location is prohibited by the ordinance, and we therefore reverse the judgment entered in favor of the property owners.

Nonconforming Use Statute = 5.3.6
107

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BACKGROUND

¶2 Ernest and Dorothy Jones own 2.3 acres in an unincorporated area of Coconino County east of Flagstaff. On their property is a store from which they sell a variety of items and animal feed, including hay. The property is zoned Commercial General, for which a conditional-use permit is required for feed stores.

¶3 In 1999, a Coconino County zoning enforcement officer saw on the Joneses' property a small trailer and signs advertising hay for sale as well as a semi-tractor and trailer loaded with hay. She cited the Joneses for operating a feed store without a conditional-use permit.

¶4 At the hearing on the citation, it was undisputed that hay had been sold from the property before the County's 1981 zoning ordinance was adopted and continuously since then. The procedure always had been that the customer paid for the hay in the store and then picked it up at a trailer parked on the property. Hay had been loaded from trailers at the east side of the back of the property from approximately 1965 to 1990, when it was moved to trailers at the center of the back of the property. In 1993 or 1994, the hay was moved to pallets behind a storage building toward the east front of the property, and, approximately four years later, the hay again was moved, this time to a trailer on the northwest corner of the property at a roadway intersection. The Joneses asserted that the sale of hay thus was a legal nonconformity.

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¶5 The County Zoning Enforcement Hearing Officer found that a feed-store business had been operated on the property since the 1920s and that the use had become a legal nonconformity with the adoption of the County zoning ordinance in 1981. However, the officer further found that the delivery of the hay from the north-west corner of the parcel since 1997 constituted an enlargement of the nonconforming use because the sales occupied an area not previously utilized in that manner. The officer ordered the Joneses to end their operation of the outdoor hay sales on May 1, 2000, unless an application for a conditional-use permit to operate a feed store was submitted before then.

¶6 The Joneses appealed to the Coconino County Board of Supervisors. Following a hearing, the Board affirmed the decision.

¶7 The Joneses filed a complaint for judicial review of the administrative decision. ARIZ. REV. STAT. ("A.R.S.") §§ 12-901 et seq. (1990) (Arizona Administrative Review Act); see A.R.S. § 11-808(G) (1990).¹ The trial court ruled that the fact that the Joneses had moved the hay trailers did not cause the loss of the legal nonconforming-use status because the sales still were made from the store. It added that there had been no expansion of use because the volume of hay sales had decreased over the years. In

¹Coconino County contended in its opening brief that the superior court lacked subject-matter jurisdiction. In its reply brief, however, its counsel conceded that, because the decision of the Board was rendered pursuant to A.R.S. § 11-808, the court possessed jurisdiction. Ms. Wilcox is to be commended for her candor.

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the court's opinion, "[t]o the extent that the zoning regulation tries to restrict a reasonable change in the simple location of the storage of items sold out of a central, unchanging location on the property, it is overly broad and an unlawful taking." The court reversed the administrative decision, and Coconino County appealed.

DISCUSSION

¶8 Coconino County Ordinance No. 81-1 ("Ordinance"), § 18.2 (1991), permits a nonconforming use that was lawful when created or established to continue after the adoption of a zoning ordinance precluding the use. However, there can be no extension or enlargement of the nonconformity, no "creeping nonconformity."

A. Except as otherwise specifically allowed in this Section, no increase in the extent of nonconformity of a nonconforming situation is permitted. In particular, *no nonconforming use shall be enlarged or extended in such a way as to occupy any part of the structure or site or another structure or site which it did not occupy at the time it became a nonconforming use, or in such a way as to displace any conforming use occupying a structure or site, except as permitted in this Section.*

* * *

D. Pursuant to Arizona Revised Statutes § 11-830, within any zoning district, subject to the granting of a conditional use permit, a nonconforming business use may expand if such expansion does not exceed one hundred percent of the area of the original business. Such expansions shall be limited to uses of the same basic nature and character. Expansion shall be limited to the original parcel on which the use was located at the time it became nonconforming. For uses within a structure, the expansion shall be measured by floor area. For business uses not involving a structure, for example junk yards, truck yards, or contractors' yards, area shall be strictly construed to mean the square footage or acreage of the use at the time it became nonconforming.

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Ordinance § 18.7 (emphasis added).

¶9 The County argues that an outside, nonconforming use not involving a permanent structure must remain on the same square footage or acreage that it occupied when it became nonconforming. It contends that the placement of the hay trailers could not be changed so as to be situated on any part of the Joneses' site that the trailers did not occupy when they were deemed a nonconforming use by passage of the ordinance - unless the Joneses are granted a conditional-use permit. As the County states it, the issue is whether a nonconforming use can "creep" across the property to occupy an area it did not occupy when it became nonconforming.

¶10 This matter began as an administrative action. The superior court could and did reverse the administrative decision because, as the court held, the administrative decision was illegal, arbitrary or capricious, or involved an abuse of discretion. *Berenter v. Gallinger*, 173 Ariz. 75, 77, 839 P.2d 1120, 1122 (App. 1992). When further consideration of the administrative decision involves the legal interpretation of a statute or an ordinance, this court reviews *de novo* the decisions reached by the administrative officer and the superior court. *Whiteco Outdoor Adver. v. City of Tucson*, 193 Ariz. 314, 316-17 ¶7, 972 P.2d 647, 649-50 (App. 1998); *Siegel v. Arizona State Liquor Bd.*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (App. 1991).

¶11 A nonconforming land use is "a lawful use maintained

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after the effective date of a zoning ordinance prohibiting such use in the applicable district." *Rotter v. Coconino County*, 169 Ariz. 269, 271, 818 P.2d 704, 706 (1991) (citing 1 R. Anderson, *AMERICAN LAW OF ZONING* § 6.01 at 446, 447 n.2 (3^d ed. 1986)). To some extent, the Arizona statutory scheme protects existing, nonconforming uses. A.R.S. § 9-462.02(A) (Supp. 2000). Nevertheless,

[a]lthough nonconforming uses are constitutionally protected from the retroactive effect of zoning regulations, such uses are not favored by the law, primarily because they detract from the effectiveness of comprehensive land use regulation, often resulting in lower property values and blight.

Rotter, 169 Ariz. at 272, 818 P.2d at 707. For these reasons, public policy favors the elimination of nonconforming uses "within the limits of fairness and justice." *Id.*; see *Gannett Outdoor Co. of Ariz. v. City of Mesa*, 159 Ariz. 459, 461, 768 P.2d 191, 193 (App. 1989). Thus, while in general a court will strictly construe a zoning ordinance in favor of the property owners, based on the policy of eliminating nonconforming uses, regulations governing nonconforming uses are exempt from this general rule. *Outdoor Sys., Inc. v. City of Mesa*, 169 Ariz. 301, 304, 307, 819 P.2d 44, 47, 50 (1991).

¶12 Section 18.7(A) of the Coconino County Ordinance states that a nonconforming use shall not be "enlarged or extended in such a way as to occupy any part of the structure or site or another structure or site which it did not occupy at the time it became a nonconforming use" Strictly construed, "enlarge" means "to

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make larger: increase in quantity or dimensions: extend in limits" and "extend" means "to cause to be of greater area or volume ***: increase the size of: ... make greater in extent." *Ariz. Found. Neurology & Psychiatry v. Sienerth*, 13 Ariz. App. 472, 477, 477 P.2d 758, 763 (1970) (quoting MERRIAM-WEBSTER'S NEW INTERNATIONAL DICTIONARY (3^d ed. 1965)). Using this definition, the Joneses argue that moving the hay to various places on the property neither enlarged nor extended the nonconforming use.

¶13 The County responds, however, that the intent of the Ordinance is to limit nonconforming situations to the "footprint" on the site that it occupied at the time it became nonconforming. We agree.

¶14 In *Rotter*, the issue was whether the statute allowing a nonconforming business use to expand by 100 percent of the original area also granted the right to expand the nonconforming use onto an adjoining parcel acquired after the passage of the ordinance. The Arizona Supreme Court held that the landowner did not have a right to expand his nonconforming use onto such an adjacent parcel. 169 Ariz. at 279, 818 P.2d at 714. Although the court dealt with the expansion of a use onto another parcel rather than with moving the use to a different place on the same parcel, there are analogies between *Rotter* and this case.

¶15 First, in *Rotter*, the court concluded that an ordinance pertaining to an expansion or change of a nonconforming use must be

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construed to further the public policy goal of eliminating non-conforming uses. *Id.* at 276-77, 818 P.2d at 711-12. Then the court noted that "[i]n accordance with ... the restrictive policy that governs interpretation of nonconforming use statutes, most American jurisdictions hold that a nonconforming use is limited to the site or area that was nonconforming when the ordinance was enacted." *Id.* at 277, 818 P.2d at 712 (citing *Norton Shores v. Carr*, 265 N.W.2d 802, 805 (Mich. Ct. App. 1978) (nonconforming use restricted to area not conforming when ordinance enacted)).

¶16 Given the policy favoring the elimination of nonconforming uses, we agree with the County that Ordinance § 18.7 prohibits a nonconforming use from moving to a place on the site other than the location of the use when the use became nonconforming.² By precluding the extension of a nonconforming use to any part of the site that it did not occupy at the time it became a nonconforming use, the ordinance declares that the use must stay where it was when it gained the exceptional status of a nonconforming use.³ Thus, moving the hay trailer to portions of the site it did not occupy when it became a nonconforming use was prohibited.

²Although the administrative interpretation of an ordinance is not binding on the court, such an interpretation should be accorded some weight in determining the proper meaning and application of the ordinance. *Sienerth*, 13 Ariz. App. at 475, 477 P.2d at 761.

³"Site" is defined in Ordinance § 8 as "a parcel of land, subdivided or unsubdivided, occupied or to be occupied by a use or structure."

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¶17 Second, limiting a moveable structure to the location it occupied when it became a nonconforming use has practical implications that support the policy against nonconforming uses. For example, the location of the hay trailer when it became a nonconforming use apparently was an inconspicuous place at the back of the property. Later the trailer was moved to the front of the property at an intersection. Such a change arguably contributes to the type of unsightliness and negative effect to which the court in *Rotter* referred as a rationale for eliminating nonconforming uses as quickly as possible. 169 Ariz. at 272, 818 P.2d at 707.

¶18 This conclusion is in accord with the holdings of the courts in other jurisdictions that have decided similar issues. For example, in *Chizum v. Elkhart County Plan Commission*, 263 N.E.2d 654 (Ind. Ct. App. 1970), the court held that cattle feeding, which was a legal nonconforming use where it had been done before the effective date of the zoning ordinance, could not be moved to a different portion of the owner's property. The applicable zoning ordinance did not specifically prohibit the relocation of a nonconforming use, but it allowed any legal nonconforming building or structure to continue in use provided that there was no physical change other than necessary maintenance and repair; normal maintenance was not to extend or intensify the nonconforming use. *Id.* at 655.

¶19 The landowner in *Bachman v. Zoning Hearing Board of Bern*

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Township, 494 A.2d 1102 (Pa. 1985), had a number of buildings on two of his forty acres that were permitted as a nonconforming use. When he conveyed almost thirty-two acres of his land to the United States government, he moved some of the buildings to the remaining eight acres. The court held that he violated the township's zoning ordinance when he moved the buildings to a portion of the property that previously had no structures. *Id.* at 1106; see also Kenneth B. Young, 1 ANDERSON'S AMERICAN LAW OF ZONING § 6.39 at 610 (4th ed. 1996) (absent unusual circumstances, nonconforming building may not be moved from one part of lot to another); 83 AM. JUR. 2D *Zoning and Planning* § 656 (1981) (same).

¶20 The administrative hearing officer correctly found that moving the hay delivery trailer to the northwest corner of the Joneses' property violated Ordinance § 18.7. The superior court erred in overturning the administrative decision. Accordingly, we reverse the judgment in favor of the Joneses and remand this matter for the entry of a judgment affirming the administrative decision.

SUSAN A. EHRLICH, Presiding Judge

CONCURRING:

REBECCA WHITE BERCH, Judge

MICHAEL D. RYAN, Judge

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From: Walter Tellez
To: Gross, Craig; McCrory, Michael
Date: 11/26/01 12:43PM
Subject: Re: Another subdivision question

Remember when we did away with PUD's, they had 5 years to start construction or they lost the PUD. They need an RCP.

>>> Craig Gross 11/26/01 12:37PM >>>
OK, two in the same day. Way more than I need!

I have an old PUD (C12-87-17A) for Bellevue Townhomes lots 1 - 10 and Common Area zoned R-2 (not a rezoning). A final plat was recorded in 1985. However, absolutely no development has ever occurred. They have no problem with the front and rear setbacks, but the side setbacks on the PUD are only 7 foot. In transferring it to an RCP the side setbacks increase to 10 feet or 3/4 height. If we redo the tentative plat to an RCP he would need a variance to reduce the setbacks and open space? He would also have to comply with the new parking requirements for multi-family? He doesn't want to change the final plat if at all possible.



The Sunshine City •

CITY OF TUCSON

CITY HALL
P.O. BOX 27210
TUCSON, ARIZONA 85726-7210

DEPARTMENT OF PLANNING
791-4505
791-4571
791-4541
FAX (520) 791-4130

538
427

February 22, 2000

Catherine Applegate Rex
PO Box 27658
Tucson AZ 85726

Subject: 3225 North Martin Avenue

Dear Ms. Rex:

The zoning information you requested, in your letter dated January 25, 2000, is as follows. Based on our records, the current or most recent use of the property is a school with grades K through 10. You are proposing to replace the existing use with a proposed school for grades 9 – 12. The existing use of the property, and the building setbacks, are legal nonconforming for the requirements for educational uses adopted by Mayor and Council in 1998. To replace the existing use requires submittal and approval of a substitution of nonconforming use (SNU). Because both the existing and proposed land use are within the same land use class, educational use, the SNU can be processed administratively. I have enclosed a brochure briefly explaining the SNU process.

The drawing attached to your letter indicates future classroom buildings. Because the minimum setbacks for the property are based on the educational use, any expansion of the educational use would extinguish the existing nonconforming status. Therefore, any expansion of the use is subject to compliance with the *Land Use Code*. This would have the effect of requiring approval of a Special Exception (a public hearing process) for any expansion. Should you require further zoning information, please contact Glenn Moyer, Wayne Bogdan or me at 791-4541.

Sincerely


Walter Tellez
Zoning Administrator

Enclosure: SNU and Sp. Ex Pamphlets

s:\zoning\3225 North Martin Avenue.doc

RECEIVED
FEB 25 2000

AX-1 Zone: 2.3.1
C-1 Zone: 2.5.3
Civic & Educ - Elem + 2nd = 6.3.4.6.9.14

CATHERINE APPLGATE REX, Architect

2455 E. Speedway, Suite 103, Tucson, AZ 85719
Mailing Address: P.O. Box 27658, Tucson, AZ 85726
E-mail: capple@aol.com

(520) 322-0315
Fax (520) 322-5880

January 25, 2000

Walter V. Tellez
Zoning Administrator
City of Tucson Department of Planning
P.O. Box 27210
Tucson, AZ 85726-7210

RE: Existing Non-Conforming Use
Presidio High School
3225 N. Martin Ave.
Tucson, Arizona

Dear Mr. Tellez,

This written request, on behalf of the Presidio High School, is being forwarded to you upon the recommendation of Mr. David Rivera at the Pre-submittal Conference meeting on January 25, 2000. The site is currently being used as a Seventh Day Adventist school and Presidio High School, a charter school for grades 9-12, is considering purchasing the property.

The attached site plan from the Pre-submittal Conference has been included for your reference. The site is zoned C-1. There is an RX-1 zone adjacent to the property on the north. The Perimeter Yard Indicator "DD" requires a 20' setback but the existing building is only 15' from the north property line. The Presidio School is requesting that they be allowed to maintain the existing building as an approved nonconformance status of a legal structure.

Your assistance in this request is greatly appreciated. Please call me at (520) 322-0315 if you have further questions. You may also call Mr. Thomas Drexel who is the Principal of Presidio High School at (520) 320-9131.

Sincerely,

Catherine Applegate Rex
Architect

1 attachment
cc: Thomas J. Drexel w/o attachment

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