

AGENDA

Finance and Economic Development Committee Meeting

Thursday September 17, 2015

5:30 p.m. – 6:50 p.m.

South Conference Room

- 1. Call to Order**
- 2. Approval of the July 9, 2015 meeting minutes**
- 3. Approval of the August 13, 2015 meeting minutes**
- 4. Temporary Homeless Encampment Ordinance**
Staff will provide an update on the Draft Ordinance related to Temporary Homeless Encampments.
- 5. Adult Entertainment Ordinance**
Staff will provide an update on the Draft Ordinance related to Adult Entertainment locations.
- 6. Roof Top Structures**
Staff will provide a discussion on the City Council's Direction related to roof top structures on buildings located along Marine View Drive and seek further direction from the Committee.
- 7. Non Conformance Code**
Staff will provide a discussion on issues with the current Non-Conformance code, and seek direction from the Committee on a Draft Ordinance.
- 8. Marina/Port Options**
Staff will provide an update on Marina/Port Options.

MINUTES

MINUTES FINANCE & ECONOMIC DEVELOPMENT COMMITTEE MEETING Thursday, July 9, 2015 South Conference Room

Council Members

Chair Matt Pina
Jeremy Nutting
Vic Pennington

City Staff

Tony Piasecki - City Manager
Michael Matthias – Asst. City Manager
Dan Brewer – PBPW Director
Pat Bosmans – City Attorney
Tim George – Assistant City Attorney
Denise Lathrop – Community Development Mgr.
Autumn Lingle- Exec. Admin. Asst.

1. Call to Order

Chair Matt Pina called the meeting to order at 5:34 p.m.

2. Approval of the May 14, 2015 meeting minutes

Minutes approved as submitted.

3. Approval of the June 11, 2015 meeting minutes

Minutes approved as submitted.

4. Nuisance Update

Assistant City Attorney Tim George presented a chart explaining the status of nuisance properties.

- Chair Pina requested research be done on the cost for maintenance of nuisance properties and specifically how the City could recover those costs.
- Abatement fund had collected approximately \$2000 in fines.
- Prepare a resolution for a law suit against a specific nuisance property owner.
- Committee will be updated in September.

5. Junk Vehicle Code Update

Assistant City Attorney Tim George discussed various surrounding cities junk vehicle codes. Many cities reference Washington State RCW regarding junk vehicles.

- Staff responds when Council forwards complaints to them. Filtering complaints through City Manager.
- Put an article regarding junk vehicles in City newsletter.
- Complaints surrounding some vehicles are not applicable.
- Staff would continue to be diligent regarding junk vehicles.

6. Homeless Encampment Ordinance

Community Development Mgr Denise Lathrop provided an update on the previous discussion of the Draft Ordinance on Homeless Encampments. This is related to a 2014 Land Use Audit by WCIA.

- CD Mgr. Lathrop has been editing proposed legislation relating to temporary encampments for the homeless.
- Committee member Nutting addressed the ratio of people per square footage.
- Chair Pina requested specific measurement ratios of person to sanitation requirements.
- How many allowed per specific location and year?
- Direct Police Chief to contact peers regarding their perspective and experience
- Require a posting a bond for cleanup
- Bring back for committee discussion August 13, 5:00-6:00pm.
- Set a public hearing to the consent calendar
- Move the public hearing to September 24

7. Adult Entertainment Ordinance

Assistant City Attorney Tim George discussed goals and direction.

He noted the need to substantiate information for the legislative record.

- Work with the police department regarding number of calls, crimes
- Limit to the Pacific Ridge area
- Change how close this type of business should be to each other
- Chair Pina stated ordinance should be specific as to where this is allowed.
- Add to the September 10 committee meeting for further discussion

Chair Pina requested that the Councilmember Comments section be removed from agenda.

Committee members Nutting and Pennington supported the Chair's request.

The next meeting is scheduled for August 13, 2015 from 5:00-6:00p.m. in the South Conference room.

Adjourned at 6:50 p.m.

Respectfully submitted by,

Autumn Lingle, Executive Administrative Assistant

MINUTES FINANCE & ECONOMIC DEVELOPMENT COMMITTEE MEETING
Thursday, August 13, 2015
South Conference Room

Council Members

Chair Matt Pina
Jeremy Nutting
Vic Pennington

City Staff

Tony Piasecki - City Manager
Michael Matthias – Asst. City Manager
Dan Brewer – PBPW Director
Tim George – Assistant City Attorney
Denise Lathrop – Community Development Mgr.
Autumn Lingle- Exec. Admin. Asst.

Citizens/Guests:

Nancy Uhrich

1. Call to Order

Chair Matt Pina called the meeting to order at 5:05pm.

2. Homeless Encampment Ordinance

Community Development Manager Denise Lathrop and Assistant City Attorney Tim George discussed changes to Draft Ordinance 15-030.

The topics discussed;

- Amount of encampments per year
- Bonding
- Code Enforcement
- Code of Conduct notice time lines and procedures
- Duration of each encampment
- Fire, safety and health codes
- Impact fees
- Occupant to square feet ratio
- Parking
- Property line distance
- Property owner permission
- Proximity to public schools
- Quiet hours
- Transit accessibility

Committee directed staff to return with revised ordinance on September 10, with a Public Hearing to be held on September 24.

3. Economic and Development Update

Planning, Building and Public Works Director Dan Brewer provided an update on economic development efforts and the status of development projects throughout the City. He distributed maps and bar charts (see packet) illustrating time lines and the progress of each construction site.

Finance and Economic Committee Meeting
August 13, 2015

The next meeting is scheduled for September 10, from 5:30-6:50p.m. in the South Conference room.

Adjourned at 6:10 p.m.

Respectfully submitted by,

Autumn Lingle, Executive Administrative Assistant

Memo



Date: September 10, 2015

To: Council Finance and Economic Development Committee (F&EDC)

From: Denise Lathrop, AICP – Community Development Mgr.

RE: *Homeless Encampments*

Purpose

The purpose of this agenda item is to continue the F&EDC's discussion on proposed legislation related to Temporary Encampments for the Homeless.

Background

In June 2014, Washington Cities Insurance Authority (WCIA) completed their 2014 Land Use Liability Audit of the City's land use practices. One of the audit findings related to Des Moines compliance with legislation on Temporary Encampments for the Homeless, pursuant to RCW 35.21.915, RCW 35A.21.360 and RCW 36.01.290.

Q1.22: *Do your code and practices comply with current legislative enactments governing temporary encampments for the homeless?*

At the May 14, 2015 F&EDC meeting, staff discussed the WCIA audit findings and the State legislation that authorize religious organizations to host temporary encampments for homeless persons on property owned or controlled by a religious organization (RCW 36.01.290). In summary, the legislation grants broad authority to religious organizations to provide shelter or housing to homeless persons on property owned or controlled by such organizations. It prohibits local governments from enacting an ordinance or regulation that imposes conditions other than those necessary to protect the public health and safety and that do not substantially burden the decisions or actions of a religious organization with respect to the provision of homeless housing. It also prohibits the imposition of permit fees in excess of the actual costs associated with the review and approval of the required permit applications for homeless housing encampments.

In preparing Draft Ordinance No. 15-030, staff reviewed information from other agencies that have dealt with temporary encampments in the past including King County and the Cities of Seattle, Redmond, and Sammamish. The draft ordinance would amend DMMC 18.01.050 to add new definitions, and add new sections to Chapter 18.170 Temporary Uses. Specific amendments would address frequency and duration of the use, noticing requirements, and options for modifying standards.

At the conclusion of the May 14th meeting the Committee requested that staff revised Draft Ordinance No. 15-030 to ensure the regulations are as stringent as possible within the confines of State law. The revisions to Draft Ordinance No. 15-030 reflect additional language that add definitions and review criteria related to site requirements and off-street parking.

Discussion

Based on feedback received at the August 13th Council Finance and Economic Development Committee meeting, Draft Ordinance No 15-030 (Attachment 1) was further revised to incorporate information related to:

- Added references to South King Fire and Rescue for inspections;
- Removed language indicating “daily” inspections;
- Changed the setback limits from 20 feet (per model ordinance) to 40 feet from all zones;
- Added quiet time of 10 pm to 6 am;
- Changed violation notice time from 7 days to 5 days;
- Limited the number of encampment within the City to two (2) per 365 days;
- Removed language related to notice requirements for “new locations”; and
- Added information requiring noticing of properties within 600 feet of a proposed encampment.

The draft ordinance is in track changes with staff comments in the margin. In addition to the ordinance, staff created a map showing the proximity of churches to schools (see Attachment 2).

If the committee concurs with the proposed legislation, staff will bring Draft Ordinance No. 15-030 before the full Council for consideration at a public hearing that is currently scheduled for November 5, 2015.

CITY ATTORNEY'S FIRST DRAFT 05/07/2015

DRAFT ORDINANCE NO. 15-030

AN ORDINANCE OF THE CITY OF DES MOINES, WASHINGTON relating to zoning and the regulating of temporary homeless encampments, amending DMMC 18.01.050 by adding definitions, amending DMMC 18.20.080A project review chart, and adding and codifying new sections to chapter 18.170 DMMC.

WHEREAS, there are many homeless persons in our region that are in need of shelter and other services that are not being provided by the state and local governments, and

WHEREAS, in many communities, religious organizations play an important role in providing needed services to the homeless, including the provision of shelter upon property owned by the religious organization, and

WHEREAS, establishing temporary use provisions that allow temporary homeless encampments enable religious institutions in our community to perform a valuable public service that, for many, offers a temporary, stop-gap solution to the larger social problem of increasing numbers of homeless persons, and

WHEREAS, Draft Ordinance No. 15-030 provides guidance in regulating temporary homeless encampments and provides the City with broad discretion to protect the health and safety of our citizens; now therefore,

THE CITY COUNCIL OF THE CITY OF DES MOINES ORDAINS AS FOLLOWS:

Sec. 1. The following definitions shall be added to DMMC 18.01.050 and section 5 of Ordinance No. 1591:

"Religious organization" means the federally protected practice of a recognized religious assembly, school, or institution that owns or controls real property.

"Temporary Homeless encampment" means a group of homeless persons temporarily residing out of doors on a site with services provided by a sponsor and supervised by a managing agency.

"Temporary homeless encampment managing agency" means an organization that has the capacity to organize and manage a temporary homeless encampment. A managing agency may be the same entity as the sponsor.

"Temporary homeless encampment sponsor" means an entity that has an agreement with the managing agency to provide basic services and support for the residents of a temporary homeless encampment and liaison with the surrounding community and joins with the managing agency in an application for a temporary use permit. A sponsor may be the same entity as the managing agency.

NEW SECTION. **Sec. 2.** A new section is added to chapter 18.170 DMMC to read as follows:

Temporary homeless encampment use permit. Temporary homeless encampments are allowed pursuant to a temporary homeless encampment use permit, which shall be a Type I land use decision reviewed and issue pursuant to chapter 18.20 DMMC and the following conditions:

(1) An application for a temporary homeless encampment use permit shall include a religious organization as a sponsor or managing agency and must be located on real property owned or controlled by the religious organization. The managing agency shall be responsible for complying with the following conditions:

(a) The managing agency and temporary encampment sponsor shall submit a complete application for a temporary encampment permit at least 75 days before any occupancy by the temporary encampment.

(b) The managing agency shall ensure compliance with Washington State and City codes concerning but not limited to drinking water connections, human waste, solid waste disposal, electrical systems, and fire resistant materials;

(c) The managing agency shall take all reasonable and legal steps to obtain verifiable identification from prospective encampment residents and use the identification

to obtain sex offender and warrant checks from the appropriate agency. All requirements by the Des Moines Police Department related to identified sex offenders or prospective residents with warrants shall be met; and

(d) The managing agency shall permit daily inspections by the City, fire department and/or health department to check compliance with the standards for temporary homeless encampments; and

Commented [DL1]: Edit per 8/13 F&EDC mtg.

(e) The managing agency and temporary encampment sponsor shall sign a hold harmless agreement for the temporary encampment.

Formatted

(2) Site requirements. All temporary homeless encampments shall comply with the following site requirements:

(a) The encampment shall be located a minimum of ~~twenty (20)~~ forty (40) feet from the property line of abutting properties ~~containing residential uses;~~

Commented [DL2]: Edit per 8/13 F&EDC mtg.

(b) Sight-obscuring fencing shall be required around the perimeter of the temporary homeless encampment unless the Planning, Building and Public Works Director determines that there is sufficient vegetation, topographic variation, or other site conditions such that fencing would not be needed;

(c) Exterior lighting shall be directed downward and contained within the temporary homeless encampment;

(d) Tents, membrane structures, or canopies in excess of 400 square feet as defined by the International Fire Code, shall require a permit and approval from the fire marshal;

(e) A designated smoking area shall be provided on site and in a location that results in the least impact on neighboring properties;

(f) Garbage and recycling containers shall be provided on site and each site shall be cleared of debris, litter when the temporary homeless encampment moves from the site; and

(g) Temporary homeless encampments shall comply with all applicable standards of the Seattle-King County public health department.

(3) The maximum number of residents within a temporary homeless encampment is one hundred (100). The city may further limit the number of residents as site conditions dictate.

(4) Parking:

(a) Parking for a minimum of five (5) vehicles and vehicle maneuvering area shall be provided; and

(b) Parking of vehicles associated with a temporary homeless encampment, and the Temporary Homeless Encampment itself, shall not displace the sponsor's off-street parking in such a way that the sponsor's site no longer meets the minimum or required parking of the principal use as required by Chapter 18.210 DMMC or previous approvals, unless an alternative parking plan is approved by the City Manager or the City Manager's designee.

(5) Transportation plan. A transportation plan shall be submitted with the permit application demonstrating:

(a) Reasonable access to methods of communication and services such as groceries, supplies and medical care; and

(b) Access to public transit services and any alternative means of transportation such as private or volunteer shuttle service and reasonable bicycle and pedestrian paths.

(c) The temporary homeless encampment shall be located within one-half (1/2) mile of transit service.

(6) No children under eighteen (18) years of age are allowed in the temporary homeless encampment. If a child under the age of eighteen (18) attempts to stay at the temporary homeless encampment, the managing agency shall immediately contact the Washington State Department of Social and Health Services Child Protective Services.

(7) No animals shall be permitted in encampments except for service animals.

(8) A code of conduct is required to be enforced by the managing agency. The code shall contain the following as a minimum:

- (a) No illegal drugs or alcohol.
- (b) No weapons.
- (c) No violence.
- (d) No open flames.
- (e) No loitering in the surrounding neighborhood.

(f) No trespassing into private property in the surrounding neighborhood is permitted.

(g) No littering on the temporary encampment site or in the surrounding neighborhood is permitted.

(h) No convicted sex offender shall reside in the temporary encampment.

(i) Quiet hours shall be from 10 p.m. to 6 a.m.

(9) The fire department shall do an initial fire inspection and safety meeting at the inception of the temporary encampment.

(10) Upon determination that there has been a violation of any condition of approval, the code official may give written notice to the permit holder describing the alleged violation. Within five days of the mailing of notice of violation, the permit holder shall show cause why the permit should not be revoked. At the end of the seven-day period, the code official shall sustain or revoke the permit. When a temporary encampment permit is revoked, the code official shall notify the permit holder by certified mail of the revocation and the findings upon which

Commented [DL3]: Edit per 8/13 F&EDC mtg.
Formatted: Font: Bold

Commented [DL4]: Changed from 7 to 5 per 8/13 F&EDC meeting.

revocation is based. Appeals of decisions to revoke a temporary encampment permit will be processed pursuant to Chapter 36.70C RCW.

NEW SECTION. Sec. 3. A new section is added to chapter 18.170 DMMC to read as follows:

Temporary homeless encampment frequency and duration of temporary use. The City may not grant a temporary homeless encampment use permit ~~at the same site to each~~ religious organization or managing agency more frequently than once in every 365-day period. The City may only grant a temporary homeless encampment use permit for a specified period of time, not to exceed 92 days. Only two homeless encampments shall be permitted within the City in a 365-day period.

Commented [DL5]: Edit per 8/13 F&EDC mtg.

NEW SECTION. Sec. 4. A new section is added to chapter 18.170 DMMC to read as follows:

Notice requirements for temporary homeless encampments in new locations.

(1) Applicability. The following notice requirements apply ~~only to new all~~ locations for temporary homeless encampments. ~~If an encampment has previously located at the site, the provisions of [redacted] shall apply.~~

(2) Public meeting. A minimum of fourteen (14) calendar days prior to the anticipated start of the encampment, the sponsor and/or managing agency shall conduct a public informational meeting by providing mailed notice to owners of property within six hundred (600) feet of the subject property and residents and tenants adjacent to the subject property. The purpose of the meeting is to provide the surrounding community with information regarding the proposed duration and operation of the temporary homeless encampment, conditions that will likely be placed on the operation of the temporary homeless encampment, requirements of the written code of conduct, and to answer questions regarding the temporary homeless encampment.

(3) A Notice of Application for Temporary Homeless Encampment shall be provided prior to the Planning, Building and

Public Works Director's decision. The purpose of the notice is to inform the surrounding community of the application. Due to the administrative and temporary nature of the permit, there is no comment period. The notice shall contain at a minimum the date of application, project location, proposed duration and operation of the temporary homeless encampment, conditions that will likely be placed on the operation of the temporary homeless encampment, requirements of the written code of conduct, and how to get more information (i.e., City website). The Planning, Building and Public Works Department shall distribute this notice as follows:

(a) The notice, or a summary thereof, will be published in the official newspaper of the City at least seven (7) calendar days prior to the Planning, Building and Public Works Director's decision.

~~(b) The notice, or a summary thereof, will be distributed to owners of all property within six hundred (600) feet of any boundary of the subject property and residents and tenants adjacent to the subject property at least fourteen (14) calendar days prior to the Planning, Building and Public Works Director's decision.~~ Additional Mailed Notice. The requirements for mailed notice of the application set forth in DMMC 18.20.130 shall be expanded to include owners of real property within 600 feet of the project site. Prior to the decision of the Director on a Temporary Encampment Permit, the Encampment Host, Encampment Sponsor, or Encampment Manager shall meet and confer with the administration of any public or private elementary, middle, junior high or high school within 600 feet of the boundaries of the proposed Temporary Encampment site, and shall meet and confer with the operators of any known child care service within 600 feet of the boundaries of the proposed Temporary Encampment site. The Encampment Host and the school administration and/or child care service operator shall make a good faith effort to agree upon any additional conditions that may be appropriate or necessary to address school and/or child care concerns regarding the location of a Temporary Encampment within 600 feet of such a facility. Any such conditions agreed upon between the parties shall be submitted to the Director for consideration for inclusion within the Temporary Encampment Permit. In the event the parties fail to agree on any conditions, either party may provide the Director with a written summary of the parties' discussions, which the Director may consider in evaluating whether the criteria for the Temporary

Encampment Permit are met, or the need for additional conditions upon the Temporary Encampment Permit based on the applicable decision criteria.

Commented [DL6]: Edit from 8/13 F&EDC meeting. Not sure if this is the intended location.

(c) The notice will be posted on the City's website.

(4) A Notice of Decision for Temporary Homeless Encampment, or summary thereof, shall contain the decision of the Planning, Building and Public Works Director and appeal procedure and be distributed as required for notice of application within four (4) business days after the decision.

NEW SECTION. Sec. 5. A new section is added to chapter 18.170 DMMC to read as follows:

Option to Modify Standards for Temporary Homeless Encampments. The applicant may apply for a temporary homeless encampment use permit that applies standards that differ from those in DMMC [redacted]. If a modification is proposed, then the application will be processed according to **Process [redacted] DMMC**, including a comment period and appeal to the Hearing Examiner. In addition to all other permit application requirements, the applicant shall submit a description of the standard to be modified and shall demonstrate how the modification will result in a safe temporary homeless encampment under the specific circumstances of the application. In considering whether the modification should be granted, the Planning, Building and Public Works Director shall consider the effects on health and safety of residents and the community.

~~**NEW SECTION. Sec. 6.** A new section is added to chapter 18.170 DMMC to read as follows:~~

~~**Notice Requirements for Temporary Homeless Encampments at Repeat Locations.**~~

~~(1) A minimum of fourteen (14) calendar days prior to the anticipated start of the encampment, the sponsor and/or managing agency shall provide mailed notice to owners of property within six hundred (600) feet of the subject property and residents and~~

~~tenants adjacent to the subject property. The purpose of the notice is to inform the surrounding community of the proposed duration and operation of the temporary homeless encampment, applicable standards, requirements of the written code of conduct, and how to get more information.~~

~~(2) A minimum of fourteen (14) calendar days prior to the anticipated start of the encampment, the City shall update the City's website with the date of application, project location, proposed duration and operation of the temporary homeless encampment, the conditions that will be placed on the operation of the temporary homeless encampment, requirements of the written code of conduct and how to get more information.~~

Sec. 76. Codificaton. Sections 2 through 6 of this Ordinance shall be codified as a new section in chapter 18.170 DMCC entitled "*Temporary Homeless Encampments.*"

Sec. 87. Severability - Construction.

(1) If a section, subsection, paragraph, sentence, clause, or phrase of this Ordinance is declared unconstitutional or invalid for any reason by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance.

(2) If the provisions of this Ordinance are found to be inconsistent with other provisions of the Des Moines Municipal Code, this Ordinance is deemed to control.

Sec. 98. Effective date. This Ordinance shall take effect and be in full force five (5) days after its passage, approval, and publication in accordance with law.

PASSED BY the City Council of the City of Des Moines this ____ day of _____, 2015 and signed in authentication thereof this ____ day of _____, 2015.

M A Y O R

Ordinance No. _____
Page 10 of 10

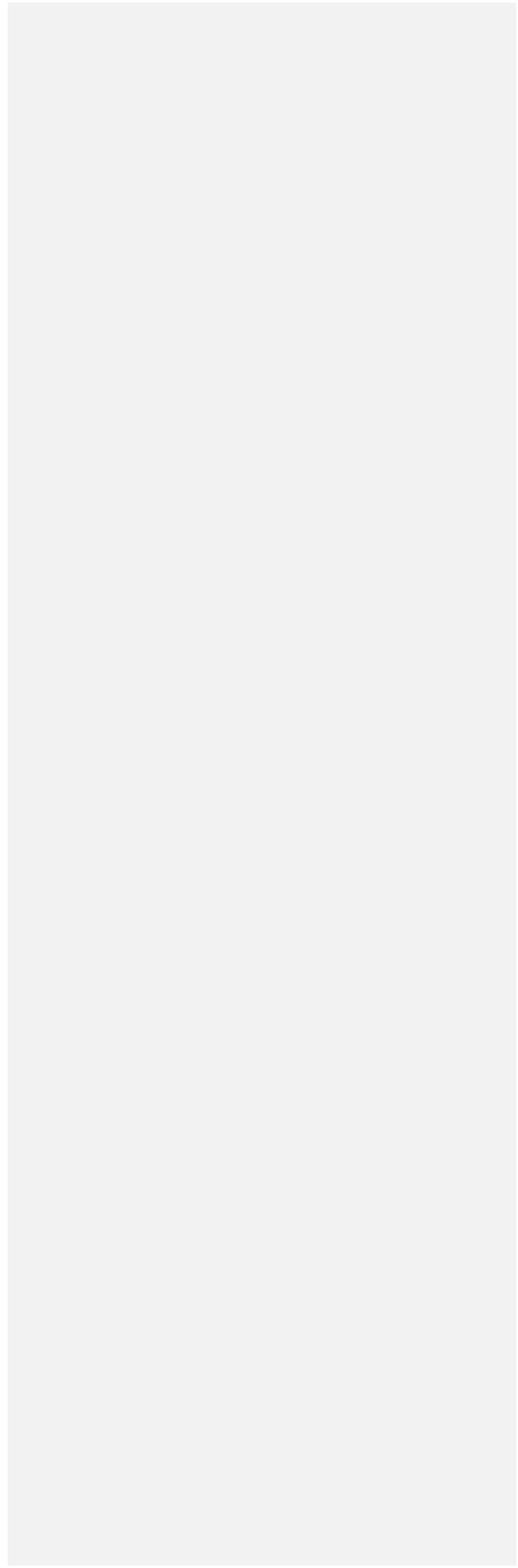
APPROVED AS TO FORM:

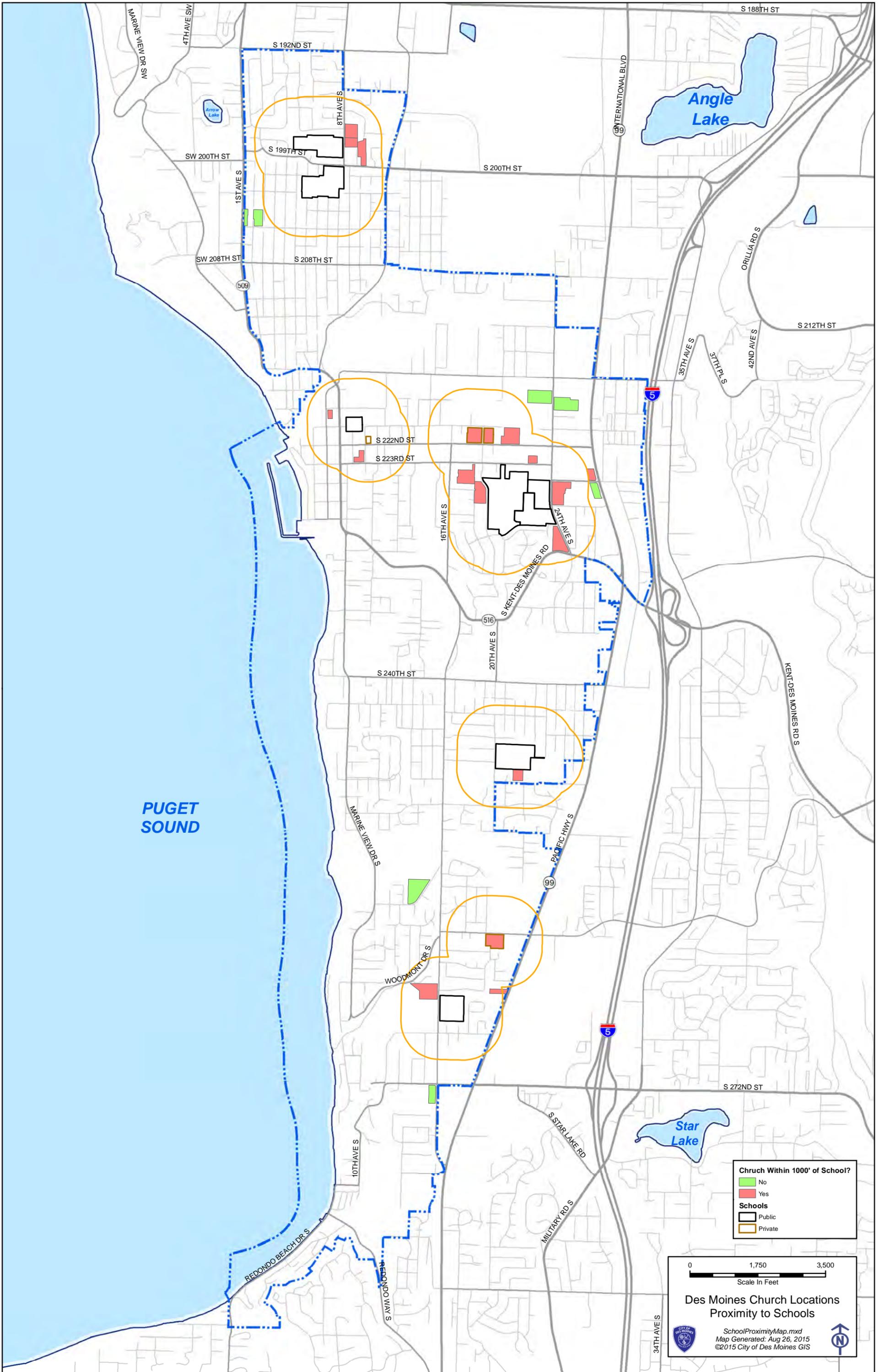
City Attorney

ATTEST:

City Clerk

Published: _____





Church Within 1000' of School?

- No
- Yes

Schools

- Public
- Private

0 1,750 3,500
Scale In Feet

Des Moines Church Locations Proximity to Schools

SchoolProximityMap.mxd
Map Generated: Aug 26, 2015
©2015 City of Des Moines GIS

Tim George, Assistant City Attorney
21630 11th Avenue So., Suite C
Des Moines, WA 98198
206.870.6553
Fax: 206.870.6872

**OFFICE OF THE
DES MOINES
CITY ATTORNEY**

Memo

Date: September 9, 2015
To: Council Finance & Economic Development Committee
From: Tim George, Assistant City Attorney
Re: Adult Entertainment

Introduction

Local governments regulation of sexually-oriented businesses and services, including movie theaters, bookstores, video stores, adult-only hotels/motels, massage parlors, peep shows, and erotic dancing establishments must be carefully considered in light of federal and state constitutional guarantees regarding freedom of expression.

Regulations imposed on sexually-oriented businesses have been challenged in the courts over many years. The result of these challenges is a body of court decisions that conclude that *local governments may impose reasonable time, place, and manner regulations on adult businesses as long as a substantial public interest in regulating the use (in a way that does not suppress speech) is demonstrated, and as long as reasonable alternative locations are provided for the use.* While it is established that local governments may not totally ban sexually-oriented businesses, location and licensing restrictions may be imposed since the courts recognize that communities are entitled to protect themselves against the "secondary effects" of such businesses.

Washington cities and counties have enacted a variety of regulatory approaches for adult entertainment businesses. The primary focus has been on zoning and licensing regulations. These regulations help facilitate enforcement of legitimate location and distance requirements and help law enforcement monitor potential criminal activity. The issuance of adult business licenses is generally contingent on compliance with regulations regarding interior illumination, floor plan, distance between performers and patrons,

physical contact between employees and patrons, stage height, door height, sight lines, and so forth. According to the courts, licensing requirements must establish clear guidelines and standards which limit the discretion of the licensing official, and must expressly limit the time a locality has to act on a license application.

Court Decisions

The cases listed below are "settled law" for purposes of municipal regulation of adult entertainment in Washington State. There have been no major challenges to local government ordinances in the past few years.

- *Acorn Investments v. City of Seattle*, 887 F.2d 219 (1989) - Cannot require identities of owners of adult video booths

In this decision the 9th Circuit Court of Appeals struck down as unconstitutional a Seattle city ordinance that required applicants for businesses with adult video viewing booths to also provide the identities of all owners.

- *Adult Entertainment v. Pierce County*, 57 Wn. App. 435 (1990) - Licenses must be processed quickly; open booths okay

This case is important because it requires that a license to engage in adult business be issued or denied within a period that is reasonable brief under the circumstances. It also held that open booth requirements for businesses displaying sexually explicit videotapes are valid.

- *BSA, Inc. v. King County*, 804 F.2d 1104 (1984) - Topless dancing okay as free expression

Complete ban on topless dancing directly suppresses free expression and is unconstitutional.

- *City of Everett v. Heim*, 71 Wn. App. 392, 859 P.2d 55 (1993) - Touching patrons not allowed

Ordinance forbidding entertainers from touching, fondling, or caressing patrons, sitting on a patron's lap, or separating a patron's legs is constitutional.

- *City of Los Angeles v. Alameda Books, Inc.*, 122 S.Ct. 1728, 70 USLW 4369 (2002) - No multiple adult businesses in one building

The U.S. Supreme Court upheld the city's ordinance which prohibited the establishment or maintenance of more than one adult entertainment business in

the same building. The court held that the city could reasonably rely on a study it conducted some years before enacting the present version of the ordinance to demonstrate that its ban on multiple-use adult establishments served its interest in reducing crime.

- Colacurcio v. City of Kent, No. 9636197, ___ F. 3d ___ (1998, 9th Cir.) - Ten-foot rule for nude dancers okay

Ordinance requiring nude dancers to maintain 10 foot distance from patrons is permissible under the First Amendment because it is justified without reference to the content of the regulated speech, prevents public sexual contact, and leaves open alternative channels for the protected speech.

- D.C.R. Entertainment v. Pierce County, 55 Wn. App. 505, 778 P.2d 10 (1989) - Must issue AE license within reasonable time

County auditor has no discretion to deny an adult entertainment license; issuance of license is mandatory when grounds for denial are not present. A county may deny a license only if ordinance violations are so pervasive that denying a license is the only practical remedy.

- Ino Ino, Inc. v. Bellevue, 132 Wn.2d 103 (1997) - Background checks, distance rules, illumination, hours of dancing, secondary impacts

Upheld city's right to (1) require an applicant for a nude dancer's license to disclose recent criminal convictions and employment history; (2) require nude or semi-nude erotic dancers to stay four feet away from their patrons; (3) require specific level of illumination where nude or semi-nude erotic dancing may be performed; (4) restrict times when erotic dancing may be performed (not during early morning hours); (5) prohibit outdoor performances or depictions of performances of nude or semi-nude erotic dancing; and (6) rely on the experiences of other jurisdictions to establish that legislation restricting expressive conduct furthers substantial interest in curbing secondary unlawful behavior.

- KEV, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986) - Right to license both owners/operators and dancers; no touching rule okay; unreasonable delay in granting license not okay

Upheld an ordinance regulating "erotic dance" facilities which required licenses for both operators and dancers. Upheld provisions which prohibited touching and require dancers to perform on a two-foot high stage 10 feet away from patrons. A

provision requiring a five-day delay period between a dancer's filing an application and the granting of the license was found to be unreasonable.

- Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) - Adult motion pictures; secondary effects; zoning restrictions

Zoning restrictions on adult motion picture theatres based on secondary effects of such businesses in other cities. No new studies required if previous studies are relevant. Allowed zoning restrictions in certain areas.

- Spokane Arcade, Inc. v. City of Spokane, 75 F.3d 663 (1996) - Video arcade booths must be observable

Upheld the validity of requiring video arcade booths to be visible to employees in adjacent public rooms and requiring an employee to be on duty in the public room whenever a customer is present. Regulations which increase the cost of doing business but do not prohibit businesses from engaging in protected speech are constitutional.

- World Wide Video v. City of Tukwila, 117 Wn.2d 382, 816 P.2d 18 (1991) - Adult video stores; secondary effects

Permitting adult uses to locate only within a heavy industrial zone violates the First Amendment because the ordinance's definition of "adult use" includes adult businesses with predominantly take-home merchandise which are not shown to cause the harmful secondary effects traditionally associated with adult movie theaters and peep shows.

Chapter 18.160 ADULT ENTERTAINMENT FACILITY ZONING

Sections

- 18.160.010 Title.
- 18.160.020 Findings of fact.
- 18.160.030 Adult entertainment facilities prohibited in certain areas.
- 18.160.040 Amortization of any nonconforming use.
- 18.160.050 Conflicts.

18.160.010 Title [SHARE](#)

This chapter shall be entitled "Adult Entertainment Facility Zoning." [Ord. 1591 § 352, 2014.]

18.160.020 Findings of fact [SHARE](#)

- (1) The City Council is committed to protecting the general welfare of the City through the enforcement of laws prohibiting obscenity, indecency, and sexual offenses while preserving constitutionally protected forms of expression.
- (2) The City has made a detailed review of the national record, including studies from the cities of New York, Indianapolis, and Los Angeles, the police records of various cities, and court decisions regarding adult entertainment uses, including adult retail establishments. The City Council finds that adult entertainment uses, including adult retail establishments, require special supervision from public safety agencies in order to protect and preserve the health, safety, and welfare of the patrons and employees of said business as well as the citizens of the City.
- (3) The City Council finds that concerns about crime and public sexual activity generated and/or occurring within or near adult entertainment and adult retail establishments are legitimate, substantial and compelling concerns of the City which demand reasonable regulation.
- (4) The City Council finds that adult entertainment and adult retail establishments, due to their nature, have secondary adverse impacts upon the health, safety, and welfare of the citizenry through increases in crime and opportunity for spread of sexually transmitted diseases.
- (5) There is convincing documented evidence that adult entertainment and adult retail establishments have a detrimental effect on both the existing businesses around them and the surrounding residential areas adjacent

to them, causing increased crime, the downgrading of quality of life and property values and the spread of urban blight. Reasonable regulation of the location of these facilities will provide for the protection of the community, protect residents, patrons, and employees from the adverse secondary effects of such facilities.

(6) The City recognizes that adult entertainment and adult retail establishments, due to their very nature, have serious objectionable operational characteristics, particularly when located in close proximity to residential neighborhoods, day care centers, religious facilities, public parks, schools, and public facilities open to families, such as post offices and medical clinics, and thereby having a deleterious impact upon the quality of life in the surrounding areas. It has been acknowledged by courts and communities across the nation that state and local governmental entities have a special concern in regulating the operation of such businesses under their jurisdiction to ensure the adverse secondary effects of the establishments are minimized.

(7) This chapter is intended to protect the general public health, safety, and welfare of the citizenry of the City through the regulation of the location of adult entertainment and adult retail establishments. The regulations set forth herein are intended to control health, safety, and welfare issues, the decline in neighborhood conditions in and around adult entertainment and adult retail establishments, and to isolate dangerous and unlawful conduct associated with these facilities.

(8) It is not the intent of this chapter to suppress any speech activities protected by the First Amendment to the United States Constitution, or Article 1, Section 5 of the Washington State Constitution, but to enact content-neutral legislation which addresses the negative secondary impacts of adult entertainment and adult retail establishments.

(9) It is not the intent of the City Council to condone or legitimize the distribution of obscene material, and the City Council recognizes that state and federal law prohibits the distribution of obscene materials.

(10) The City Council, at its duly advertised public hearing on September 13, 2001, considered the subject matter of adult entertainment and adult retail establishments, at which public hearing the City Council received comments from the public on that subject matter, which the City Council believes to be true, and which, together with the findings heretofore set forth, form the basis for the adoption of the ordinance codified in this chapter. [Ord. 1591 § 353, 2014.]

18.160.030 Adult entertainment facilities prohibited in certain areas. SHARE

(1) Adult entertainment facilities as defined in this Title are prohibited:

(a) Within 1,000 feet of any Residential Zone or any single-family or multiple-family residential use;

(b) Within 1,000 feet of any public or private elementary or secondary school;

(c) Within 1,000 feet of any day care center for children, nursery, or preschool;

(d) Within 1,000 feet of any church or other facility or institution used primarily for religious purposes;

(e) Within 1,000 feet of any public park or public facility open to families, including post offices, City Hall, and medical clinics; and

(f) Within 1,000 feet of any other adult retail use.

As used herein, the distances shall mean the straight-line distance between the edge or corner of the property on which the adult retail use is located to the nearest edge or corner of the property of another adult retail use or any of the sensitive uses set forth above.

(2) Exception. Adult entertainment facilities, as defined in this Title, shall be permitted within the PR-C Zone:

(a) So long as such uses are located within a building that fronts Pacific Highway South and obtains its access exclusively from such highway; and

(b) So long as such uses are located no less than 500-1000 feet from any other adult entertainment or adult retail use. [Ord. 1591 § 354, 2014.]

18.160.040 Amortization of any nonconforming use. SHARE

Any adult entertainment, activity, use, or retail use located within the City limits on the effective date of the ordinance codified in this section that is made nonconforming by this chapter shall be terminated within one year; provided, however, that such termination date may be extended upon the approval of an application filed with the City within 120 days of the effective date of the ordinance codified in this section requesting an extension of such one-year amortization period. The decision on whether or not to approve any extension period and the length of such period shall be based upon the applicant clearly demonstrating extreme economic hardship based upon an irreversible financial investment or commitment made prior to the effective date of the ordinance codified in this section, which precludes reasonable alternative uses of the subject property. [Ord. 1591 § 355, 2014.]

18.160.050 Conflicts.  [SHARE](#) 

In the event of a conflict between this chapter and any other provision of this code, this chapter applies and supersedes. [Ord. 1591 § 356, 2014.]

DRAFT

Memo



Date: September 10, 2015

To: Council Finance and Economic Development Committee (F&EDC)

From: Dan Brewer, PE, PTOE – Planning, Building and Public Works Director

RE: NonConformance Code

Purpose

The purpose of this agenda item is to introduce the issues with our existing nonconformance code (Chapter 18.15 DMMC), and to begin the discussion of a Draft Ordinance to update this section of our code.

Background

This spring, an issue came to light relating to our code for nonconforming Buildings and Uses. This section of our code is contained in Chapter 18.15 DMMC. A copy is provided as Attachment 1. Staff received a request from Mr. Mike Huseby (through his agent Sam Warren) to essentially reconstruct his existing nonconforming residence located in Redondo. On May 6, 2015 I issued a decision on an interpretation of our nonconformance code, consistent with long standing past practice on our application of this code. My letter on this topic is provided as Attachment 2, which outlines the specific problems at issue. On June 16, 2015 we received a letter from James Handmacher, an attorney representing Mr. Huseby, requesting that we reconsider our decision. A copy of that letter is provided as Attachment 3. I asked our City Attorney's office to review this letter in conjunction with my May 6, 2015 decision. The decision was made not to revise the decision, but rather begin work on potential amendments to this section of the DMMC.

Discussion

The language in this section of our Code is outdated and confusing at best. This code was originally enacted in 1964, and adopted by reference King County code that was in place at that time. Over the last several months, I have been reviewing codes from other cities on the topic of nonconformance, and most, if not all, cities have updated this code. In several other cities, the project as proposal by Mr. Huseby could have been easily approved.

Recommendation

I recommend that this code be updated by repealing and replacing the existing code in its entirety. I've considered similar codes from Federal Way, Kent, Tukwilla, Burien, Renton, and many others. I've begun to put together a Draft Ordinance as it would appear in our code. The current working draft is included as Attachment 4. There is still some work to do on this draft, but the clarity comes by segregating the areas of nonconformance into the difference topic areas below, and updating the language to be consistent with our surrounding cities:

- Substandard lots
- Nonconforming uses
- Nonconforming building, structure, or site development

Direction Requested

If the committee concurs with the general direction of the working draft ordinance, staff requests that the Committee direct staff to complete the Draft Ordinance, and bring this directly to the City Council when completed.

As this ordinance is within the Zoning Code, a SEPA decision will have to be issued (non-project action), and the Department of Commerce will have to review the Ordinance.

Attachment #1

**Chapter 18.15
NONCONFORMING BUILDINGS AND USES**

Sections

- 18.15.010 Title.
- 18.15.020 Application.
- 18.15.030 Purpose.
- 18.15.040 Authority.
- 18.15.050 Effect of removal or destruction of nonconforming buildings.
- 18.15.060 Reconstruction of buildings partially destroyed or damaged.
- 18.15.070 Structural alteration or enlargement of nonconforming buildings.
- 18.15.080 Required conformance of existing uses required to be in entirely enclosed building.
- 18.15.090 Required conformance to exterior improvements.
- 18.15.100 Continuation of nonconforming use in a nonconforming building.
- 18.15.110 Abatement of nonconforming uses.
- 18.15.120 Nonconforming churches may alter or expand.
- 18.15.130 Residences and dwelling units in Commercial Zones nonconforming.
- 18.15.140 Dwelling units in Commercial Zones nonconforming.

18.15.010 Title.

This chapter shall be entitled "Nonconforming Buildings and Uses." [Ord. 1591 § 37, 2014.]

18.15.020 Application.

(1) The foregoing regulations set forth in this Title shall be subject to the general provisions, conditions, and exceptions contained in this chapter.

(2) The provisions of this chapter shall apply to buildings, structures, land, and uses which become nonconforming as a result of the application of this Title to them, or from classification or reclassification of the property under this Title or any subsequent amendments thereto. If a use originally authorized by a variance, conditional use permit, or other valid use permit prior to August 3, 1964, is located within a zone in which such use is not permitted by the terms of this Title, such use shall be a nonconforming use. Uses validly established prior to August 3, 1964, shall not be deemed nonconforming only because of failure to secure a conditional use permit required under this Title. [Ord. 1591 § 38, 2014.]

18.15.030 Purpose.

This chapter regulates legal nonconforming lots, structures, uses, and other development situations, which were made nonconforming through the adoption of, or amendments to, this code. This chapter also specifies those circumstances, conditions, and procedures under which such nonconformities may be permitted to continue, expand, or be modified. [Ord. 1591 § 39, 2014.]

18.15.040 Authority.

This chapter is adopted pursuant to the authority set forth in DMMC 18.01.040. [Ord. 1591 § 40, 2014.]

18.15.050 Effect of removal or destruction of nonconforming buildings.

(1) Except as provided in subsection (2) of this section, if any nonconforming building is, in the judgment of the Planning, Building and Public Works Director, removed, destroyed by means to an extent of more than 50 percent of its replacement cost at time of destruction, every future building constructed, reconstructed or otherwise permitted to remain on the land on which the building was located shall conform to the provisions of this Title. The Planning, Building and Public Works Director may issue written notice to owners of property deemed to be subject to the provisions of this section. The Planning, Building and Public Works Director's determination to the extent of removal or destruction shall be considered a Type I land use action, which is subject to appeal to the Hearing Examiner as provided in DMMC 18.20.150.

(2) Reconstruction Conditions for Nonconforming Single-Family and Condominium-Residential Buildings. In any Residential Zone, nonconforming single-family residential buildings and condominiums destroyed by catastrophe or disaster such as fire, explosion, earthquake, flooding, etc., may be reconstructed as existed prior to the catastrophic event, subject to the following limitations:

(a) This subsection (2) shall not apply to reconstruction necessitated by a criminal act involving the property owner, including but not limited to arson.

(b) Reconstructed building height and lot coverage shall not exceed preexisting height and lot coverage or the provisions of this Title, whichever is greater.

(c) Reconstructed yard areas shall not be less than preexisting yards or the provisions of this Title, whichever is less.

(d) When new building area is proposed in addition to reconstruction of a nonconforming building, the new building area shall conform to the provisions of this Title.

(e) Reconstructed building area shall conform to the requirements of Title 14 DMMC, Buildings and Construction. [Ord. 1591 § 41, 2014.]

18.15.060 Reconstruction of buildings partially destroyed or damaged.

(1) Except as provided in subsection (2) of this section, a nonconforming building damaged or partially destroyed to the extent of not more than 50 percent of its market value at the time of its destruction by fire, explosion, or other casualty or act of God or the public enemy, may be restored and the occupancy or use of such building or part thereof which existed at the time of such partial destruction or damage may be continued subject to all other provisions of this chapter.

(2) In a Single-Family Residential Zone, nonconforming single-family residential buildings partially destroyed by catastrophe or disaster such as fire, explosion, earthquake, flooding, etc., may be reconstructed as existed prior to the catastrophic event, subject to the following limitations:

(a) This subsection shall not apply to reconstruction voluntarily initiated by the property owner.

(b) Reconstructed building height and lot coverage shall not exceed preexisting height and lot coverage or the provisions of this Title, whichever is greater.

(c) Reconstructed yard areas shall not be less than preexisting yards or the provisions of this Title, whichever is less.

(d) When new building area is proposed in addition to partial reconstruction of a nonconforming building, the new building area shall conform to the provisions of this Title.

(e) Reconstructed building area shall conform to the requirements of Title 14 DMMC, Buildings and Construction. [Ord. 1591 § 42, 2014.]

18.15.070 Structural alteration or enlargement of nonconforming buildings.

(1) Unless otherwise specifically provided in this Title, nonconforming buildings may not be enlarged or structurally altered unless an enlargement or structural alteration makes the building more conforming, or is required by law; however, where a building or buildings and customary accessory buildings are nonconforming only by reason of substandard yards, open spaces, area, or height, the provisions of this Title prohibiting structural alterations or enlargements shall not apply; provided, any structural alterations or enlargements of an existing building under such circumstances shall not increase the degree of nonconformity and any enlargements or new buildings and structures shall observe the yards and open spaces required.

(2) Structural alterations may be permitted if necessary to adapt a nonconforming building to new technologies or equipment pertaining to uses housed in such building. Any enlargement necessary to adapt to new technologies shall be authorized only by a variance.

(3) Upkeep, repairing, and maintenance of nonconforming buildings is permitted. [Ord. 1591 § 43, 2014.]

18.15.080 Required conformance of existing uses required to be in entirely enclosed building.

Where this Title requires a use to be contained within an entirely enclosed building as such term is defined in this Title, and a use existing on August 3, 1964, is not in an entirely enclosed building, the building or structure containing such use shall be made to conform to the requirements of this Title with respect to such enclosure within a period of not more than three years from the date of notification as required in DMMC 18.15.110. [Ord. 1591 § 44, 2014.]

18.15.090 Required conformance to exterior improvements.

Where a use exists on August 3, 1964, and such use is nonconforming only because it does not meet the requirements of this Title with respect to improvement of outside areas used for storage, parking, or outside activities, or if the property on which any use is located has a property line common with residential property and no wall, fence, or hedge exists on such property line where required by this Title, such use shall be made to conform to the requirements of this Title with respect to such features within a period of not to exceed two years from the date of notification as required in DMMC 18.15.110. [Ord. 1591 § 45, 2014.]

18.15.100 Continuation of nonconforming use in a nonconforming building.

(1) A nonconforming use in a nonconforming building may be continued, and may be expanded or extended throughout such building so long as such nonconforming building remains nonconforming; provided, no structural alterations or additions are made except those that may be required by law or which are specifically permitted in this chapter. A nonconforming use in a nonconforming building may be changed to another use of the same or more conforming zone.

(2) The permission to continue the nonconforming use in a nonconforming building shall not apply where the building is nonconforming only by reason of substandard yards, open space, area, or height, in which case the use shall be abated in the same manner as provided in DMMC 18.15.110. [Ord. 1591 § 46, 2014.]

18.15.110 Abatement of nonconforming uses.

Nonconforming uses of land, buildings, or structures shall be subject to abatement as follows:

(1) By resolution of the City Council, the Hearing Examiner shall be directed to conduct a public hearing, which shall be evidentiary in nature, to take testimony relative to abatement schedules for any class of nonconforming use. The Hearing Examiner shall schedule a public hearing within 45 days of receipt of such resolution. Notice of the public hearing shall be given by publication in the official newspaper of the City not less than 15 days prior to the scheduled hearing date and by mailing an appropriate notice, by certified mail, within 15 days of the hearing date to the owner of record and to the occupant/tenant of real property which may be affected by the proceedings. Thereafter, the Hearing Examiner shall conduct a public hearing and evidentiary hearing in general conformity with the Hearing Examiner code. At the conclusion of the hearing, the Hearing Examiner shall transmit findings and recommendations to the City Council. Such findings and recommendations shall be based on the factors described in subsection (3) of this section.

(2) Upon receipt of the findings and recommendations of the Hearing Examiner, the City Council shall set a public hearing to consider the issue, giving again such public notice as is described in subsection (1) of this section. Abatement proceedings shall not be subject to the one open record public hearing requirement for a proposed land use action specified in chapter 18.20 DMMC, Land Use Review Procedures. All persons wishing to be heard shall be heard; provided, however, testimony and evidence may not go beyond the scope of that presented to the Hearing Examiner. Following such public hearing, the City Council shall adopt by ordinance an appropriate abatement period for the nonconforming use.

(3) The period of abatement for a nonconforming use shall be determined by providing a sufficient residue of reasonable use through "amortization of nonconforming uses." Factors that may be considered in establishing the abatement period through amortization are investment of the property owner, estimated remaining economic life of investment, depreciated value from federal income tax records, value and condition of the improvement, nature of the use, possibility of alternative uses that conform or that are more conforming, degree of incompatibility of the use with current zoning, impact of the use on other uses in the area where it is located, existence or nonexistence of a lease and contingency clauses permitting lease termination, and such other factors that tend to permit the nonconforming user to amortize investment during the period of permitted nonconformity, bearing in

mind that the public interest in eliminating undesirable nonconforming uses is sufficient to justify the reduction of property value. [Ord. 1591 § 47, 2014.]

18.15.120 Nonconforming churches may alter or expand.

Nonconforming churches may be structurally altered or enlarged; provided, the requirements of this Title for off-street parking shall be met and maintained for any seating capacity in excess of that which existed immediately prior to the alterations or additions whether provided by additional seats in the nave or by additional floor space to be used simultaneously for assembly purposes if there are no fixed seats. [Ord. 1591 § 48, 2014.]

18.15.130 Residences and dwelling units in Commercial Zones nonconforming.

Residential buildings and buildings containing dwelling units on the ground floor existing in Commercial Zones on August 3, 1964, shall be considered as nonconforming buildings but, as such, shall be subject only to those provisions of this chapter pertaining to abatement which provide that a nonconforming building removed or destroyed shall not be replaced by other than a conforming building, that the nonconforming building may not be enlarged or expanded unless such enlargement or expansion makes the building more conforming, and that the degree of nonconformity may not be increased by changing to a less restrictive residential use. [Ord. 1591 § 49, 2014.]

18.15.140 Dwelling units in Commercial Zones nonconforming.

Dwelling units in Commercial Zones existing on February 4, 1985, shall be considered nonconforming uses and shall be subject to DMMC 18.15.130, governing nonconforming residential uses in Commercial Zones; provided, however, should any dwelling unit or building containing a dwelling unit be damaged or destroyed by fire, explosion, or other casualty or act of God or the public enemy, it may be restored and the occupancy or use which existed at the time of such damage or destruction may be continued. [Ord. 1591 § 50, 2014.]

The Des Moines Municipal Code is current through Ordinance 1618-A, passed March 12, 2015.

Disclaimer: The City Clerk's Office has the official version of the Des Moines Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.



City of Des Moines

Attachment #2

PLANNING, BUILDING AND PUBLIC WORKS
www.desmoineswa.gov
21650 11TH AVENUE SOUTH
DES MOINES, WASHINGTON 98198-6317
(206) 870-6522 FAX (206) 870-6596



May 6, 2015

Mr. Michael Huseby
28448 Redondo Beach Drive South
Des Moines, WA 98198

Re: 28448 Redondo Beach Drive, Des Moines WA 98198

Dear Mr. Huseby:

On March 12, 2015, Sam Warren submitted a building permit application for the renovation of the existing residence on the property referenced above. I understand that you are frustrated with the time it has taken to get a decision on your application. I have been working with Mr. Warren in an effort to seek a solution that would allow the plans submitted for the proposed renovations of your home to be compliant with the Des Moines Municipal Code (DMMC). Unfortunately, for the reasons outlined herein that is not possible.

Over the last several weeks, I have been reviewing the applicability of DMMC 18.15.050 – Nonconforming Buildings and Uses, with Mr. Warren in relation to the construction activity proposed in your application. DMMC 18.15.050(1) states:

Except as provided in subsection (2) of this section, if any nonconforming building is, in the judgment of the Planning, Building and Public Works Director, removed, destroyed by means to an extent of more than 50 percent of its replacement cost at time of destruction, every future building constructed, reconstructed or otherwise permitted to remain on the land on which the building was located shall conform to the provisions of this Title. The Planning, Building and Public Works Director may issue written notice to the owners of property deemed to be subject to the provisions of this section. The Planning, Building and Public Works Director's determination to the extent of removal or destruction shall be considered a Type I land use action, which is subject to appeal to the Hearing Examiner as provided in DMMC 18.20.150.

Based on an initial review of your proposed plans, it seemed to me that the 50% threshold identified in DMMC 18.15.050 was more than likely exceeded. This matter was brought to the attention of Mr. Warren, who has contended that the proposed

Mr. Michael Huseby
28448 Redondo Beach Drive South

renovation is less than 50% of the current building replacement cost. Mr. Warren submitted additional information that he felt justified that the proposed renovations were below the 50% threshold. I reviewed that information, and also met with Mr. Warren on April 21, 2015 to discuss the information.

The City hired an independent Architect, Dave Clark Architects, PLLC, to prepare an estimate of the cost to rebuild the existing residence, and compare that to the cost to complete the construction of the renovations as indicated in the proposed drawings. Calculations provided by Mr. Clark show that the extent of the proposed renovations are approximately 79% of the replacement cost of the residence. The findings of Mr. Clark have been accepted by the City and are attached for your reference.

In my discussions with Mr. Warren, questions were raised about the applicability of Chapter 18.15.070 Des Moines Municipal Code (DMMC) – Structural alteration or enlargement of nonconforming buildings in relation to the construction activity proposed in your application. DMMC 18.15.070(1) states:

Unless otherwise specifically provided in this Title, nonconforming buildings may not be enlarged or structurally altered unless an enlargement or structural alteration makes the building more conforming, or is required by law; however, where a building or buildings and customary accessory buildings are nonconforming only by reason of substandard yards, open spaces, area, or height, the provisions of this Title prohibiting structural alterations or enlargements shall not apply; provided, any structural alterations or enlargements of an existing building under such circumstances shall not increase the degree of nonconformity and any enlargements or new buildings and structures shall observe the yards and open spaces required.

Mr. Warren has stated that he thinks that because the existing building is nonconforming by reason of substandard yards that the provisions in DMMC 18.15.050(1) do not apply. I disagree with this conclusion and have determined that the conditions contained within DMMC 18.15.070(1) apply to DMMC 18.15.070(1) itself. The basis for my determination is the fact that there are no provisions in 18.15.050(1) prohibiting structural alterations or enlargements. The prohibition is contained in the first sentence of DMMC 18.15.070(1) (emphasis added):

Unless otherwise specifically provided in this Title, nonconforming buildings may not be enlarged or structurally altered unless an enlargement or structural alteration makes the building more conforming, or is required by law;

DMMC 18.15.070(1) must be read in context of the entire chapter. Therefore, when a nonconforming building is renovated to an extent less than 50% of the replacement cost of the building (DMMC 18.15.050(1)), any structural alterations or enlargements made to the nonconforming building may not increase the degree of nonconformity (DMMC 18.15.070(1)), and when a nonconforming building is renovated to an extent more than 50% of the replacement cost of the building (DMMC 18.15.050(1)), every future building

Mr. Michael Huseby
28448 Redondo Beach Drive South

constructed, reconstructed or otherwise permitted to remain on the land on which the building was located shall conform to the provisions of the zoning code.

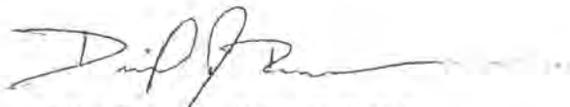
Based on my review of the proposed work indicated on the submitted plans, together with estimates prepared by Dave Clark Architects, I have determined that the proposed renovations exceed 50% of its replacement cost. Therefore, this letter constitutes written notice pursuant to DMMC 18.15.050(1) that the proposed construction activities related to this building must demonstrate compliance with current building, zoning, environmentally critical area, and floodplain codes.

This determination is considered a Type I land use decision (DMMC 18.20.150) and may be appealed provided a proper and complete appeal is submitted that meets all requirements of DMMC 18.20.160 is filed with the City Clerk at 21630 11th Avenue South, Suite A, Des Moines, WA 98198, within 10 days of the receipt of this letter. I am enclosing a copy of the Hearing Examiner code (DMMC Chapter 18.20) and the fee schedule for your reference.

I have also discussed other options with Mr. Warren including modifications to the existing foundation and footings that would address setback requirements, as well as the potential to seek a variance. I have enclosed a copy of the Waiver of Zoning Requirements and Variances Code (chapter 18.35 DMMC).

Please contact Nikole Coleman, Land Use Planner II, at 206-870-6551 or ncoleman@desmoineswa.gov if we can be of further assistance.

Sincerely,



Dan Brewer, P.E., P.T.O.E.
Planning, Building and Public Works Director

Encl: Huseby Residence Cost Analysis – Dave Clark Architects
DMMC 18.15
DMMC 18.20
DMMC 18.35
Fee Schedule



MORTON
McGOLDRICK
ATTORNEYS AT LAW

PS JUN 16 2015
BY: *Volin*

Attachment #3

820 "A" Street, Suite 600
P.O. Box 1533
Tacoma, Washington 98401
Phone: 253.627.8131
Toll Free from Western WA: 888.423.4083
Facsimile: 253.272.4338
Web Site: www.bvmm.com

James V. Handmacher
jvhandmacher@bvmm.com

June 16, 2015

Daniel J. Brewer, P.E.
Planning, Building and Public Works Director
City of Des Moines
2150 11th Avenue South
Des Moines, WA 98198-6317

Re: 28448 Redondo Beach Drive

Dear Mr. Brewer,

I represent Mike Huseby, the owner of the above-referenced property. I am writing to respectfully request that you reconsider your letter of May 6, 2015.

Your letter states that it constitutes written notice pursuant to DMMC 18.15.050(1) that the proposed construction activities related to the building on the site must demonstrate compliance with current building, zoning, environmentally critical area, and floodplain codes. However, it does not appear that DMMC 18.15.050 applies to the pending building permit application.

The applicable code section is DMMC 18.15.070(1). Mr. Huseby's building permit proposes to structurally alter the existing building by replacing the upper floor and remodeling the first floor within the existing footprint. DMMC 18.15.070(1) starts out by stating that nonconforming buildings may not be enlarged or structurally altered unless an enlargement or structural alteration makes the building more conforming, or is required by law. It then states:

however, where a building or buildings and customary accessory buildings are nonconforming only by reason of substandard yards, open spaces, area, or height, the provisions of this Title prohibiting structural alterations or enlargements shall not apply; provided, any structural alterations or enlargements of an existing building under such circumstances shall not increase the degree of nonconformity and any enlargements or new buildings and structures shall observe the yards and open spaces required

It is my understanding that the existing house is nonconforming only by reason of substandard yards. In this circumstance, no provision in Title 18 prohibiting structural alterations or enlargements will apply, as long as the alterations and enlargements do not make the increase the degree of nonconformity.

Letter to Daniel J. Brewer, P.E.

June 16, 2015

Page 2

Your letter states that if the cost of the proposed alteration exceeds 50% of the replacement cost of the original structure, then it would be barred by DMMC 18.15.050(1). That section states that if any nonconforming building that is either removed or destroyed to an extent more than 50% of its replacement cost, every future building on the site must conform to the code. You state that DMMC 18.15.050(1) does not prohibit alteration or enlargement of a structure, and thus is not superseded by the exception in DMMC 18.15.070(1). That interpretation defies the broad language in DMMC 18.15.050(1) which applies to "every future building constructed, reconstructed or otherwise permitted to remain on the land." Reconstruction clearly encompasses alterations and enlargements.

Furthermore, if DMMC 18.15.050(1) does not prohibit alteration or enlargement, then it does not apply to Mr. Huseby's building permit application, which only seeks to alter the existing building. If DMMC 18.15.070(1) prohibits Mr. Huseby's permit application, then by definition it prohibits alteration or enlargement of a structure and is superseded by the exception in DMMC 18.15.070(1). Logically, the City cannot interpret DMMC 18.15.050(1) to prohibit the alteration of Mr. Huseby's house at the same time the City asserts that "there are no provisions in 18.15.050(1) prohibiting structural alterations or enlargements."

Your letter states that the exception in DMMC 18.15.070(1), allowing alteration or enlargement of a building that is nonconforming only by reason of substandard yards, only applies to the preceding language in DMMC 18.15.070(1) itself. That conclusion is inconsistent with the language used in DMMC 18.15.070(1). It says where a building is nonconforming only by reason of substandard yards, the provisions of "this Title" prohibiting structural alterations or enlargements shall not apply, not the provisions of "this section". Obviously, something other than the provisions of DMMC 18.15.070(1) was intended to be included by using the phrase "this Title." By using the language "this Title," the exception for buildings that are nonconforming only by reason of substandard yards supersedes any other provision of Title 18 that may prohibit altering or enlarging a structure.

The City's review of this building permit application has been a long process and Mr. Huseby has expressed his frustration. However, there is a logical and well-reasoned basis to interpret the City code to allow this remodeling project that will provide a benefit to the neighborhood and the City. On behalf of Mr. Huseby, I request that you reconsider your letter and allow his project to proceed under the exception in DMMC 18.15.070(1). If you decide not to allow the project to proceed under that section, I request that you issue your response to this request as a Type I land use decision to allow Mr. Huseby to appeal the issue to the Hearing Examiner.

Very truly yours,



James V. Handmacher

**Chapter 18.15
NONCONFORMANCE**

Sections

- [18.15.010](#) Title.
- [18.15.020](#) Application.
- [18.15.030](#) Purpose.
- [18.15.040](#) Authority.
- [18.15.050](#) Abatement of illegal uses, structures or site development
- [18.15.060](#) Special provisions for compliance with governmental regulations.
- [18.15.070](#) Substandard lots.
- [18.15.080](#) Nonconforming uses.
- [18.15.090](#) Nonconforming buildings, structures, or site development
- [18.15.100](#) Appeals.

18.15.010 Title.

This chapter shall be entitled "Nonconformance".

18.15.020 Application.

(1) All nonconformance issues including, but not limited to, buildings, structures, lands, and uses shall be subject to the general provisions, conditions, and exceptions of this chapter.

(2) Nothing in this chapter in any way supersedes or relieves the applicant from compliance with the requirements of the city's building codes, the International Building Code, the International Fire Code, and other construction-related codes as adopted and amended from time to time by the city.

(3) Nothing in this chapter shall be deemed to prevent the strengthening or restoring to a safe condition of any nonconforming building, structure, or site development declared to be unsafe by order of any City official charged with protecting the public safety.

(4) The provisions of this chapter shall apply to buildings, structures, land, and uses which become nonconforming as a result of the application of this Title to them, or from classification or reclassification of the property under this Title or any subsequent amendments thereto. If a use originally authorized by a variance, conditional use permit, or other valid use permit prior to August 3, 1964, is located within a zone in which such use is not permitted by the terms of this Title, such use shall be a nonconforming use. Uses

validly established prior to August 3, 1964, shall not be deemed nonconforming only because of failure to secure a conditional use permit required under this Title.

Comment [D1]: How or should we modify this section?

18.15.030 Purpose.

The purpose of this chapter is to establish the legal status of a nonconformance by creating provisions through which a nonconformance may be established, maintained, altered, reconstructed, expanded or terminated, and the circumstances in which a nonconformance must be brought into compliance with the provisions of this Title. In particular, the intent of this chapter is to:

- (1) Ensure a reasonable opportunity for use of legally created lots which do not meet the minimum code requirements for the zone in which they are located.
- (2) Ensure a reasonable opportunity for use, maintenance and minor improvement of legally constructed buildings, structures and site development features, encourage a reasonable opportunity for a change of tenants using such buildings, structures, or features, even where those building, structures and features do not comply with development regulations prescribed by this Title, and provide more flexibility relative to structures and developments that were built in accordance with the codes and laws in effect at the time of construction.
- (3) Ensure a reasonable opportunity for continuation of legally established uses which do not conform to use regulations for the zone in which they are located.
- (4) Encourage the replacement of nonconforming uses having potentially undesirable impacts on conforming uses.
- (5) Encourage the upgrading of nonconforming buildings, structures, and site development features which do not comply with development regulations prescribed by this Title.

18.15.040 Authority.

This chapter is adopted pursuant to the authority set forth in DMMC [18.01.040](#).

18.15.050 Abatement of illegal uses, structures, or site development.

Any use, structure or site improvement that did not comply with the Zoning Code requirements in effect at the time it was established or constructed, and does not comply with the provisions of this Title, is illegal and shall be discontinued, terminated or brought into conformance with the provisions of this Title.

18.15.060 Special provisions for compliance with government regulations.

The provisions of this section will be followed regardless of any conflicting regulations of this chapter. Any regulations of this chapter which do not conflict with the provisions of this section are unaffected by this section.

(1) *Oil tanks.* Any excavation, development activity or construction performed to comply with the "Underground Storage Tanks; Technical Requirements and State Program Approval; Final Rules" ([40 CFR 280](#) and [281](#)), as now existing or as hereafter amended or with the provisions of Chapter [90.76](#) RCW, or any regulations adopted thereunder, may not be used as the basis, or part of the basis, for requiring that nonconformance on the subject property be corrected.

(2) *Governmental acquisition of property for right-of-way expansion.* A proposal for structural alterations or change in use shall not trigger a requirement otherwise applicable under [DMMC XX.XX.XXX \(FWRC 19.30.090\)](#) that an applicant correct an existing nonconformance as to lot coverage, minimum lot size, parking, landscaping, or setback requirements, if the nonconformance was created solely by a local, state, or federal government acquisition of property for right-of-way expansion, and if the proposal meets the following requirements:

(a) The nonconformity is not, in any way, enlarged, expanded, increased, intensified, compounded, or in any other way made greater;

(b) The applicant is making any alterations or changes or doing any work, other than tenant improvements, and the fair market value of the alteration, change or other work, in any one consecutive 12-month period, does not exceed 75 percent of the assessed or appraised value of the improvement. The appraisal must be from a state-certified real estate appraiser. For purposes of determining value under this subsection, improvements required pursuant to [DMMC XX.XX.XXX FWRC 19.30.090 \(nonconforming development\) and/or DMMC XX.XX.XXX \(19.30.110\) \(street/sidewalk improvements\)](#) shall not be counted towards the 75 percent threshold which would trigger application of this subsection; and

(c) The proposal is otherwise consistent with the public health, safety, and welfare.

18.15.070 Substandard lots.

A. A lot, as defined in **DMMC XX.XX.XXX (TMC 18.06.500)**, which does not meet the minimum standard for average lot width for the zone in which it is located, may still be developed as a separate lot if the proposed use is one which is permitted in the zone, and the proposed development can comply with the remaining requirements of this Title regarding basic development standards for the applicable zone and other applicable land use and environmental requirements.

B. A lot, as defined in **DMMC XX.XX.XXX (TMC 18.06.500)**, which cannot meet the basic development standards (other than lot width) for the applicable zone and other applicable land use and environmental requirements, may be developed only if it is combined with adjacent lot(s) in a manner which allows the combined lots to be developed in a manner which does comply with the basic development standards for the applicable zone and other applicable land use and environmental requirements. In the event lots are combined in order to comply with the requirements of this subsection, a boundary line adjustment shall occur so that the combined lots are henceforth considered a single lot.

C. Nothing in this subsection shall be deemed to prevent the owner of a sub-standard lot from applying for or receiving approval of variances pursuant to **DMMC XX.XX.XXX (TMC Chapter 18.72)**.

18.15.080 Nonconforming uses.

Any preexisting lawful use of land made nonconforming under the terms of this Title may be continued as a nonconforming use, defined in **DMMC XX.XX.XXX (TMC Chapter 18.06)**, so long as that use remains lawful, subject to the following:

1. No such nonconforming use shall be enlarged, intensified, increased or extended to occupy a greater use of the land, structure or combination of the two, than was occupied at the effective date of adoption of this Ordinance;
2. No nonconforming use shall be moved or extended in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of adoption of this Ordinance;
3. If any such nonconforming use ceases for any reason for a period of more than six consecutive months, any subsequent use shall conform to the regulations specified by this Title for the zone in which such use is located;
4. No existing structure devoted to a use not permitted by this Title in the zone in which it is located shall be structurally altered, except in changing the use of the structure to a use permitted in the zone in which it is located; except where minor alterations are made, pursuant to **DMMC XX.XX.XXX (TMC 18.70.050(1), TMC 18.70.060)**;
5. If a change of use is proposed to a use determined to be nonconforming by application of provisions in this Title, the proposed new use must be a permitted use in its zone or a use approved under a Conditional Use or Unclassified Use Permit process. For purposes of implementing this section, a change of use constitutes a change from one Permitted, Conditional or Unclassified Use category to another such use category as listed within this Title.
6. Any structure, or structure and land in combination, in or on which a nonconforming use is superseded by a permitted use, shall thereafter conform to the regulations for the zone in which such structure is located, and the nonconforming use may not thereafter be resumed.
7. If a use existed on August 3, 1964, and such use is nonconforming only because it does not meet the requirements of this Title with respect to improvement of outside areas used for storage, parking, or outside activities, or if the property on which any use is located has a property line common with

residential property and no wall, fence, or hedge exists on such property line where required by this Title, such use shall be made to conform to the requirements of this Title with respect to such features within a period of not to exceed two years from the date of notification as required in DMMC [18.15.110](#).

Comment [D2]: Should we include this or not?

What about churches, schools, and other public uses - like in a commercial zone Are there "use" exceptions to the this rules?

18.15.090 Nonconforming building, structure, or site development.

Where a lawful building, structure or site development exists at the effective date of adoption of this Ordinance that could not be built under the terms of this Title by reason of restrictions on area, lot coverage, height, yards or other characteristics of the structure, it may be continued so long as the structure remains otherwise lawful, subject to the following provisions:

1. No such building, structure, or site development may be enlarged or altered in such a way that increases its degree of nonconformity.
2. Alterations to such building, structure or site development may be permitted, except as prohibited by subsection 6 of this section; provided that the alteration does not increase the area, height, or degree of an existing nonconformity. Complete plans shall be required of all work contemplated under this subsection.
3. Ordinary maintenance of a nonconforming building, structure, or site development is permitted, including but not limited to painting, roof repair and replacement, plumbing, wiring, mechanical equipment repair/replacement and weatherization. These and other alterations, additions or enlargements may be allowed as long as the work done does not extend further into any required yard or violate any other portion of this Title. When applicable, complete plans shall be required of all work contemplated under this section.
4. Should such building, structure, or site development be destroyed by any means to an extent of more than 50% of the King County assessed value of the improvements at the time of destruction, it shall not be reconstructed except in conformity with provisions of this Title.
 - a) This subsection shall not apply to reconstruction necessitated by a criminal act involving the property owner, including but not limited to arson.
5. Should such building, structure, or site development be moved for any reason or any distance whatsoever, it shall thereafter conform to the regulations for the zone in which it is located after it is moved.
6. Except for ordinary maintenance, as described in subsection 3 of this section, no structural alterations shall be made to a building, structure, or site development occupied by a nonconforming use except when made:
 - A. In order to comply with requirements of law; or
 - B. In order to accommodate a conforming use.

18.15.100 Appeals.

Notwithstanding and other provision of this Title, a decision of the Planning, Building and Public Works Director with respect to the application of any provision of this chapter shall be considered a Type 1 land use action, which is subject to appeal to the Hearing Examiner as provided in DMMC [18.20.150](#).