



MEMORANDUM

Date: October 10, 2024

To: Honorable Mayor and Commissioners

Via: Todd Stoughton
City Manager

From: Katie Halloran,
Planning Director

Subject: **File 24-5587 Text Amendment of the Land Development Regulations** – An ordinance to the City Commission to amend Chapter 122, entitled “Zoning,” Article II, entitled “Nonconformities,” Section 122-26, entitled “Definitions,” Section 122-27, entitled “Intent,” Section 122-28, entitled “Replacement or Reconstruction,” and Section 122-29, entitled “Repairs and Maintenance”; providing for concurrent and conditional adoption upon adoption of Comprehensive Plan amendments; providing for severability; providing for repeal of inconsistent provisions; providing for an effective date.

Introduction

The proposed text amendment involves the adoption of new definitions for the terms “reconstruction,” “replacement,” and “repairs and maintenance” within Article II, Nonconformities of the Zoning Code (Chapter 122). These discrete amendments of the Land Development Regulations have broad implications for the regulation of Nonconformities under Chapter 122 – Zoning and for the administration of the Development Review Process under Chapter 108 – Planning and Development.

Background

The proposed amendment involves a somewhat complex history. The measure was originally sponsored by Commissioner Carey and drafted by the Building Department. It was recommended for approval by the Planning Board on December 12, 2023. Subsequently, the City Commission considered the amendment on January 11, 2024 and voted to postpone the matter until concerns between the Planning and Building Departments could be resolved.

The Planning, Building and Legal Departments then proposed a revised amendment which involved a re-

write of Article II – Nonconformities. This modified approach was presented to the Planning Board on March 12, 2024. The Planning Board voted to recommend approval of the revised amendment. Following the Planning Board hearing the City Commission recommended that the proposed amendment be postponed at the April 11, 2024 and September 12, 2024 City Commission meetings.

The current proposal involves a request to reconsider the original amendment drafted by the Building Department and sponsored by Commissioner Carey. In order to comply with Section 90-518, the measure has been sponsored by the City Manager’s Office.

Analysis

The Building Department has proposed the draft amendments to the Land Development Regulations noted above. The amendments include new or modified definitions for “reconstruction,” “replacement,” and “repairs and maintenance,” all of which are contained within Chapter 122 (Zoning) of the City Code of Ordinances. These terms impact both the manner in which “Nonconformities” are regulated and, more generally, the administration of the Development Review process contained within Chapter 108 of the City Code. Building Department staff have stated that clear definitions of the terms “replacement” and “reconstruction” are needed to avoid conflicting interpretations.

Planning Department staff concur that simple and clear definitions for the terms (1) reconstruction, (2) replacement, and (3) repairs and maintenance would help to clarify the administration of the Code for both City staff and members of the public. However, as proposed, the draft code amendments would lead to further confusion and result in significant changes to the spirit and intent of the Nonconformities and development review provisions contained within the Land Development Regulations (“LDRs”). As noted below, Planning Department staff respectfully recommend that the City Commission NOT adopt these provisions and direct the Planning Department, Building Department, HARC, and other involved City Departments to collaborate on a revised proposal that better addresses existing ambiguities within the Code.

The proposed amendments include the following modifications to the Land Development Regulations (added language is UNDERLINED; Deleted language is ~~STRUCK THROUGH~~):

Section 122-26. – Definitions

Reconstruction means the act or process of erecting by means of new construction the form of a vanished or non-surviving building or structure as it appeared at a particular period of time and in its original footprint.

Replacement means the act or process of rebuilding a portion of a building or structure as it appeared at a particular period of time and in its original footprint. Should the entirety of a building or structure be vanished, demolished, or destroyed, the act or process of replacing shall be considered reconstruction.

In addition to the regulations specified herein, any voluntary or involuntary reconstruction or replacement of a dwelling unit or other structure must be within the nonconforming density, location, or three-dimensional building envelope existing at the time of demolition. The voluntary reconstruction or replacement of a dwelling unit or other structure must commence within 24 months following demolition.

Section 122-29. – Repairs and Maintenance

(a) *Generally.* Any building or structure devoted in whole or in part to a nonconforming density or nonconforming use may be repaired and maintained so long as the repairs or maintenance do not constitute replacement or reconstruction of the building or structure as governed by Section 122-

~~28, as provided in this section. If repair or maintenance shall exceed the criteria set forth in this section, renovation of the building or structure shall be governed by section 122-28.~~

~~(b) *Residential or transient dwelling units.* For residential or transient dwelling units, work may be done in any period of 12 consecutive months for repairs and maintenance to an extent not exceeding 66 percent of the current assessed or appraised value.~~

~~(c) *Property without dwelling units or mixed use (commercial).* For property without dwelling units or mixed use (commercial), work may be done in any period for 12 consecutive months on ordinary repairs and maintenance to an extent not exceeding 50 percent of the current assessed or appraised value.~~

Specifically, as drafted, the proposed changes represent several significant concerns including:

(1) Confusion with the proposed terms “reconstruction,” “replacement” and “repairs and maintenance.” The terms “reconstruction” and “replacement” are used more than 125 times across 26 Chapters of the City Code and within multiple elements of the comprehensive plan. The definitions, as proposed, are inconsistent with their use elsewhere in the Code. Rather than clarifying the Code, the amendments will add to what is already a confusing regulatory environment. The proposed definition for repairs and maintenance is also inconsistent with the definition contained in the Florida Building Code, which defines repair as the *“reconstruction or renewal of any part of an existing building for the purpose of its maintenance or to correct damage.”*

Under the proposed amendments, “reconstruction” involves a 100% redevelopment or reconstruction of a building or structure and “replacement” involves up to 99% reconstruction of the building or structure. This represents a distinction without a difference as virtually no amount of “replacement” will trigger reconstruction.

In addition, the definition for “repairs and maintenance” has been modified to blur the lines between “repairs and maintenance” and reconstruction or replacement. Currently “repairs and maintenance” are limited by both time and the percentage of work associated with the project. Specifically, existing guidelines limit repairs and maintenance to work which *“may be done in any period of 12 consecutive months...not to exceed 66% (residential or transient dwelling units) or 50% (commercial properties) of the current assessed or appraised value.”* However, the proposed amendments eliminate any restriction on the construction period or the percentage of value that the work represents. Thus, 100% of a noncomplying structure could be “repaired” without the need for Planning Board review or any public notice. The effect of the modification of the definition for “repairs and maintenance” is to render the definition meaningless and indistinguishable from both reconstruction and replacement.

Rather than clarifying the standards under the Code, the proposed changes further confuse the regulatory environment and blur the lines between reconstruction, replacement, and repairs and maintenance.

(2) Inconsistency with the Comprehensive Plan. Florida Statute requires that the City Land Development Regulations be consistent with the Comprehensive Plan. In addition, both the Comprehensive Plan and Land Development Regulations are required to be consistent with the Guiding Principles contained within the State-designated Area of Critical State Concern (ACSC).

The Comprehensive Plan defines reconstruction as *“alteration of the size, or material change in the external appearance of a structure on land.”* This is in direct conflict with the proposed definition of reconstruction which is described as: *“the act or process of erecting by means of new construction the form of a vanished*

or non-surviving building or structure as it appeared at a particular period of time and in its original footprint.”

Additionally, the comprehensive plan states that the “*City shall maintain and enforce Land Development Regulations...*” Rather than encouraging property owners to come into compliance with the Comprehensive Plan and Land Development Regulations, the proposed amendments, instead, create a process whereby

property owners may simply bypass the development review process under the guise of reconstruction, replacement, or repairs and maintenance.

Finally, as noted above, the City Land Development Regulations are required by Florida Statute to be consistent with the State-designated Area of Critical State Concern (ACSC). As proposed, the amendments would violate the guiding principles within the ACSC, which seek to “*strengthen local government capabilities for managing land use and development*” and to promote developments which “*shall conform to appropriate setback and open space requirements, stringent landscaping and land use compatibility requirements.*”

The City has previously been cited by the State Department of Commerce (formerly the Department of Economic Opportunity) for the failure to maintain a Comprehensive Plan in accordance with the State-designated Area of Critical State Concern (ACSC). Rather than *strengthening local governments capabilities for managing land use and development* in accordance with the ACSC, the proposed amendments allow an applicant to avoid the Development Review Process entirely. Planning Department staff are concerned that adoption of these amendments could illicit concern by the state regarding conflict between the City’s LDRs and state regulating documents.

(3) Inconsistency with the spirit and intent of Chapter 122 (Zoning), Article II (Nonconformities).
Pursuant to Sec. 122-30 of the City Code:

“If a nonconforming use ceases, ...any and every future use of the building or structure and/or premises shall be in conformity with the use sections of the land development regulations.” Additionally, *“No new structure or addition that does not conform to the requirements of this article shall be erected in connection with such nonconforming use. A nonconforming use shall be considered abandoned when such use has ceased for a period of 24 months.”*

In general, nonconforming use provisions are designed to gradually bring nonconforming sites into compliance with current code provisions, while also providing property owners with limited protection for those improvements that were legally constructed prior to the establishment of the code.

However, the proposed amendments would not only permit an applicant to maintain a nonconforming use or structure, they would also provide the ability to *reconstruct any building or structure as it appeared at any point in history*. Under the draft amendments, a property owner could reconstruct any building or structure that was involuntarily destroyed, regardless of when it was destroyed or if it was ever legally constructed in the first instance. In addition, if the building or structure was “voluntarily” destroyed, the same rules would apply providing it was done within two (2) years of demolition. Thus, a property owner would be permitted to rebuild any structure by the mere fact that it existed at one point in time – regardless of whether it was ever a legal structure or use or whether it was destroyed 2 months ago or 20 years ago.

Nonconforming provisions were never intended to promote the retention of nonconforming, noncompliant or illegally constructed buildings and structures in perpetuity. The City no longer permits outhouses or the occupancy of residential units that don’t provide sufficient light, air, ventilation and privacy in accordance

with basic health standards. These types of nonconformities were phased out over time in order to protect public health, safety, and welfare. The proposed amendments would reverse the process of gradually bringing properties into greater compliance with public health, safety, and welfare standards. They would, instead, facilitate the reconstruction of nonconforming and noncompliant buildings in perpetuity – regardless of their legal status at the time of construction. This approach is inconsistent with any other local approach to nonconformities including Monroe County, the City of Marathon and the Village of Islamorada.

(4) Inconsistency with the spirit and intent of the development review process contained in Chapter 108 (Planning and Development).

Planning Department staff are concerned that these code amendments will affect which projects receive development plan review pursuant to Section 108-91. All staff involved with land development review should carefully consider any modifications to this process. The major and minor development plan review process is the primary method by which the City requires new and redeveloped sites to comply with modern land development regulations related to affordable housing, environmental resource protection, stormwater management, concurrency management, and landscaping. These minimum standards help reduce neighborhood flooding, protect nearshore water quality, improve aesthetics through landscaping, and help provide housing units. Collectively, these elements represent sound planning practice and statutory obligations under the Area of Critical State Concern and the City’s own Comprehensive Plan.

The Development Review Process is not intended as a punishment for applicants but, rather, as a means of protecting the property rights of adjoining neighbors. As the City has increased in development density and population, regulatory standards, dimensional requirements, and mitigation measures were adopted to both improve the quality of life of local residents and to ensure that individual development projects did not adversely impact surrounding property values and over all community character.

The Development Review Process is instrumental in helping to mitigate the impacts associated with development over time. The proposed amendments create a process that allows individual property owners to bypass the Development Review Process. This is inconsistent with the Land Development Regulations, the spirit and intent of the Comprehensive Plan, and the stated purpose of the Development Review Process – *“to ensure that development of individual sites is consistent with all applicable development standards.”*

(5) Implications for Historic Preservation.

Chapter 102 of the City Code establishes regulatory controls for the preservation of historic properties. Key West has the largest historic district in the state, and it is arguably a foundation for the Key West tourism economy. Planning Department staff are concerned that these code amendments would facilitate destruction of portions of homes and other structures in the Key West Historic District in that variances would no longer be triggered. These code amendments would also conflict with historic preservation guidelines which differentiate between renovations and new additions.

It is imperative that the proposed amendments be modified to include explicit language clarifying that a property owner may not circumvent the regulatory controls contained within Chapter 102 – Historic Preservation. Staff recommends these code amendments be denied, rewritten, or augmented, to ensure that historic preservation staff review requests to partially or fully demolish historic homes and buildings in the historic district and determine standards for repair, maintenance, and reconstruction.

Procurement

There is no financial component to these proposed code amendments.

Recommendation

- The Planning Board recommended approval of this text amendment at their December 12, 2023, meeting through Resolution No. 2023-031.
- The Planning Department fully supports the clarification of the Code as it relates to (1) reconstruction, (2) replacement, and (3) repairs and maintenance. However, as proposed, the changes will lead to greater confusion, not clarity. In addition, as these terms are used across more than 26 Chapters of the City Code and Comprehensive Plan, the proposed changes would result in a series of unintended consequences for Housing (Chapter 3), Public Facilities (Chapter 4), Conservation (Chapter 6), Capital Improvements (Chapter 9), Administration (Chapter 90), Concurrency Management (Chapter 94), Signs (Chapter 114), Historic Preservation (Chapter 102), ...etc.

Adoption of the proposed amendments will both enable and facilitate the reconstruction of former illegal and non-compliant structures by the mere fact that they existed “*at a particular period of time.*” This is inconsistent with every other local or regional approach to the regulation of nonconformities. In addition, as proposed, the changes are inconsistent with the stated purpose of the Land Development Regulations, Development Review Process and individual Elements of the Comprehensive Plan.

The Planning Department respectfully recommends that the City Commission NOT adopt these provisions and direct the Planning Department, Building Department, HARC, and other involved City Departments to collaborate on a revised proposal that better addresses existing ambiguities within the Code. It is also recommended that any amended proposal be subject to public input.