

DR 73-3 Review of Non-Conforming  
Uses Ordinance - Board of City  
Commissioners

# ACTION

COMMITTEE \_\_\_\_\_ DATE \_\_\_\_\_

M.A.P.C. *Authorize to Dept 2/22/73*  
*in District*

B.C.C./B. CO. C. *See DR-78-19 Co. -*  
*\$ DR-80-20 City -*

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M.A.P.C.	<i>Authorize to draft 2/22/73 an Ordinance</i>
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WICHITA-SEDGWICK COUNTY

RE AGENDA ITEM NO. 3

DATE

METROPOLITAN AREA PLANNING DEPARTMENT

August 2, 1974

TO Wichita-Sedgwick County Metropolitan  
Area Planning Commission

FROM Robert A. Lakin, Director of Planning *RL*

SUBJECT Nonconforming Uses

One of the areas which remains to be dealt with in the new zoning ordinance is the area of nonconforming uses. Attached is a discussion paper prepared by our summer intern, LaDonna VanMeter. She is a graduate student in planning at K-State.

I think the paper is well done and covers many issues which should be discussed. There are some items contained in the paper which I may not be in whole agreement with, but in order to encourage discussion have left in. There are other items discussed, such as the "BZA variance" being used to legitimize a nonconforming use, which has a different translation in Kansas. Here "use variances" are not legal so the procedure is a change in zoning through the Planning Commission and governing body.

I would like for you to read this and hear your comments on the various theories set out in the paper.

RAL:ber  
Attachment

February 16, 1973

Wichita-Sedgwick County Metropolitan  
Area Planning Commission

Robert A. Lakin, Director of Planning

DR 73-3 - Review of Nonconforming Use Ordinance

The Board of City Commissioners, in considering the zone case on South Seneca (Z-1452), raised questions on non-conforming uses and asked for a report. A review of existing ordinance provisions and my views as to the effectiveness were provided the Board of City Commissioners by memo. Without discussion or direction as to what their position might be, the Board of City Commissioners referred the report to the MAPC for comment and recommendation.

The MAPC and Zoning Advisory Committee have reviewed the prototype zoning ordinance and proposed changes to the non-conforming use provisions which would allow expansion in certain areas. However, business uses in residential areas still could not expand. This is the major difference between my general views and the current version of the prototype. Another issue is whether complete replacements and expansions should be allowed. Once a philosophy of nonconforming uses is agreed to, then specific language for an ordinance can be developed.

RAL:ber

Attachment

cc: Jack Galbraith, Chief Planner  
Glen Lytle, Special Assistant for Zoning  
Gary Richert, Industrial Development Director  
WREAC

WICHITA-SEDGWICK COUNTY

DATE

METROPOLITAN AREA PLANNING DEPARTMENT

February 16, 1973

TO Wichita-Sedgwick County Metropolitan  
Area Planning Commission

FROM Robert A. Lakin, Director of Planning

*RAL. L.J.S.*

SUBJECT DR 73-3 - Review of Nonconforming Use Ordinance

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WICHITA-SEDGWICK COUNTY

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METROPOLITAN AREA PLANNING DEPARTMENT

January 11, 1973

TO Board of City Commissioners  
FROM Robert A. Lakin, Director of Planning  
SUBJECT Nonconforming Uses

The Commission has requested an examination of the nonconforming use provisions of the ordinances in the City of Wichita. These comments will be restricted to the zoning regulations of the City. Nonconformity includes any lot, structure, building or use which was legally established on the date of the ordinance but which does not conform to the applicable regulation of the zoning district in which it is located. This might relate to the use of the land or to off-street parking or to setbacks or to area requirements of the lot, or height, or other such parameters contained within the zoning ordinance. Attached to this memorandum is a short description of the problems of nonconformity written by Richard Babcock for the Metropolitan Area Planning Commission some years ago. In large part, these comments still apply.

There are not any good records as to how many nonconforming uses are in existence in the City of Wichita. There are, however, probably three categories of such uses in existence. One, the commercial or industrial use which is located in a residential zoning district, such as the old 20-foot grocery stores in the middle of a residential area; two, residential uses located in the industrially zoned areas; and thirdly, those uses which conform as to use, such as an old grocery store in a light commercial zone but which do not meet the rest of the standards of the zoning ordinance, such as in number of off-street parking spaces or setbacks (as along sections of 21st Street or Harry Street). There are quite few of the first, hundreds of the second, and probably an in-between number of the latter. The basic philosophy contained in the zoning ordinance first adopted in 1926 was that there are certain uses which are not appropriate and which should not be zoned for in given areas of the community. For those particular uses, because they were there prior to the zoning ordinance, a reasonable time period should be given for them to recover their investment before such uses would have to go out of existence. The theory then held that given sufficient time all areas within the City would conform to the "plan". This was developed, however, in the context of commercial intrusion into residential areas. The City ordinance provided for this by saying that these uses should have 60 years in which to recover the investment. This is applied to all types of uses, whether it was a sign board or a major brick and masonry structure.

Throughout the United States, most zoning ordinances have amortization provisions geared to the type or value of structure. Thus, a major brick building would be given a longer amortization period than a billboard. In Kansas, under county zoning laws, the County of Shawnee passed an ordinance which required junk yards to go out of existence within six months from the date that they became nonconforming. The Kansas Supreme Court upheld such a provision.

My experience in watching nonconforming uses in the City of Wichita and elsewhere has been that whenever a use needed to expand or move, or whenever there was a change in ownership and financing became a problem, that the area immediately applied for a change in zoning and such zoning is nearly always granted. Often times this began the action which precipitated a series of further changes on adjacent properties which then, in turn, changed the total zoning pattern and the character of the area itself. One can then ask if the nonconforming use had been given reasonable expansion rights on its existing site and the physical facilities improved, would have additional zoning been granted in the immediate area. It is my opinion that it probably would not have. Does the expansion of a particular use help or hinder the area involved? This is the question which cannot be answered categorically as some uses expanding, such as a tavern or private club, might further impact the area. If the use had been a grocery store and it had expanded, the same thing could happen, except probably not to the same degree. As a matter of public policy, when residences were made nonconforming in industrial areas, the City ordinances were amended to provide that residences and churches had certain expansion rights, subject to the approval of the Board of Zoning Appeals. However, in the converse, an industrial or commercial use does not have such opportunity to apply to the Board of Zoning Appeals if they are located in the residential areas. If nonconformities, both commercial and residential, are to be treated equally, then a similar provision should probably be made available in the City ordinances. One of the questions that might be asked is, Should such expansion become an automatic right or should it be approved by the Board of Zoning Appeals under some basic set of guidelines which would guide whether or not such expansion might be approved?

Although such a provision to allow expansion of nonconforming uses on sites might seem to be an easy way to solve certain zoning problems currently before the Commission, it should be pointed out that these same provisions, if made available in the ordinance, could produce certain nuisance problems similar to those also being faced by the Commission. A nonconforming tavern, if allowed to expand, could further impact an area in terms of activity, off-street parking and the other problems that sometimes are associated where alcohol is sold. Yet, a law that allowed expansion rights would be available to a tavern as well as to a drug store or florist shop if in the zoning these are considered comparable uses (they are all in the "LC" district). It is pos-

sible that such a provision in the ordinance could be written so that the Board of Zoning Appeals, or administrative official, could make a determination as to the acceptability of an expansion of a given use, provided that several conditions were met. These could include: (1) That it be for the benefit only of the use which had been in existence there for one year or more in time; (2) off-street parking would be available in sufficient amounts if the building were conforming; 3) the operation of such use has been previously conducted in such a manner as to be without nuisance value to the neighborhood, as determined by complaints or violation notices against the property, or by the testimony at a public hearing.

It should be pointed out that the Zoning Advisory Committee, in discussing the question of nonconformity at the sub-committee level, and together with such provisions as they have recommended and forwarded to the Planning Commission for their informal discussions, has concluded that amortization should be retained in the ordinance and made realistic, i.e., not just a single 60-year period for all uses. They have concluded that the expansion privileges should not be made available to non-conforming uses.

I cannot concur in these recommendations because of the experience that I have had dealing with requests for changes to a conforming status over the years and the results of those requests which, in nearly 100% of the cases, have been approved. Thus, one of two things happens. A change in zoning policy occurs in order to establish some level of "equity" for the property owner who has been "deprived" of his ability to operate on the same basis as other commercial uses. In the event such a request is denied or is not even made, the property continues to deteriorate until the place begins to affect adjacent properties which, in turn, deteriorate. Thus, it is apparent to me that the existing provisions and theories have not accomplished what they intended to accomplish over a period of years. Further, the time period (1926 to 1972) has been such that these theories have had a reasonable and fair test and are found wanting, and thus a different approach should be explored. In my view, the authorization of expansion, subject to bringing other activities up to par, such as off-street parking, setbacks, health codes, etc., are observed.

The one provision that I think is missing was contained in the recommendation for legislative program, which would have authorized the community to acquire by eminent domain those nonconforming uses which created such problems that they should be removed from the scene immediately and not be left for 30 to 40 years to create problems for an area before their amortization provisions might expire.

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January 11, 1973

The second area which should probably be explored is to provide for shorter amortization periods for those properties without substantial investment. By these I would consider to be uses of land such as salvage yards, storage of material, contractors yards and billboards. There may be other such minor uses, but these should be considered for short range amortization in the event proper legislation is secured.

RAL:ber

Attachment

EXCERPT FROM ZONING AND SUBDIVISION TECHNIQUES  
By Richard F. Babcock

NONCONFORMING USES

Definition: This term -- as it is customarily used -- needs careful explanation. It would be more accurate to speak of "nonconformities." A building may conform to the regulations applicable in the district in which it is located insofar as use is concerned but may be nonconforming with respect to the regulations for area (lot size), or bulk (height), or open space (yards). So we will define "nonconformity" as follows:

"Any lot, structure, building or use which was legally established on the date of this ordinance but does not conform to the applicable regulations of the zoning district in which it is located."

Note the words "legally established." A nonconformity is not given a special status if it was illegal even before the new regulations went into effect.

Example: A gas station or corner grocery in a single-family zone is a nonconforming use. A 30-foot wide lot in a zone requiring minimum 50-foot width is a nonconforming lot. A single-family house with only three-foot side yards in a single-family district in which five-foot side yards are required is nonconforming to that extent. A six-story apartment building in an apartment zone which limits new buildings to four stories is nonconforming as to height.

Nonconformity can mean a lot of things. The important questions are: What do you do about them? Should physical expansion of the building be permitted? Should a change from one nonconforming use to another be allowed? Should a nonconforming use be allowed to extend throughout a building? When, if ever, should nonconforming uses be eliminated? When they are destroyed, or when they are abandoned (and abandoned for how long); or when fully depreciated, as some jurisdictions have provided? (Called "amortization")

Current Practice in Sedgwick County Area: The Wichita ordinance allows existing nonconforming uses to be continued, but they cannot be enlarged, extended, or reconstructed. A nonconforming

use may be changed to any use in the same or any more restrictive classification. The right to continue a nonconformity is lost if the nonconforming use is discontinued for two years, or if it is destroyed to the extent of more than 50% of structural value. All nonconforming uses must be eliminated by January 1, 1997, or within 60 years after the use first became nonconforming, whichever is later.

The Sedgwick County ordinance permits the continuance of nonconforming uses, but it prohibits any additions to, or enlargements of, such uses unless the addition or enlargement complies with all of the height and area restrictions. Additions or enlargements may not exceed 50% of the floor area of the building and may not be built if the Board of Appeals determines that the addition or enlargement will add "undesirable features to the building." The right to continue a nonconforming use is lost if it is abandoned for one year or if the building is destroyed to the extent of more than 75% of its value at the time of destruction. The nonconforming use of open land must be discontinued in four years, and nonconforming signs and billboards must be removed in two years if three or more residences are located within 200 feet.

Limitations Under Kansas Statutes or Case Decisions: Section 12-709 of the City Zoning Act forbids the application of zoning ordinances "to existing structures [or] to the existing use of buildings." (Except for alterations that change the use.)

Thus, even the long term amortization provisions in the Wichita ordinance are probably invalid. In 1940, the Kansas Supreme Court indicated that compulsory amortization of nonconforming uses was improper. (Asmann v. Masters, 151 Kan. 381, 98 P.2d 419.)

Section 19-2930 of the County Zoning Act authorizes the adoption of "reasonable regulations . . . for the gradual elimination of nonconforming uses." The Kansas Supreme Court has approved amortization provisions adopted pursuant to Section 19-2930 on two occasions. [Spurgeon v. Board of Commissioners, 181 Kan. 1008, 317 P.2d 798 (1957); Board of Commissioners v. Brown, 183 Kan. 19, 325 P.2d 382 (1958).]

Comment: The treatment of nonconformities requires a large number of policy decisions which are interwoven with decisions on other techniques. It is easy enough to decide that it is wise to forbid a gas station located in a residence zone to expand or to change into a body repair shop. Nearly all ordinances forbid that. But if you forbid any additional residences in industrial zones -- probably a good idea -- all existing residences merely become nonconforming. Then you must decide what you will do about the homeowner already located in an industrial zone who wants to add a porch to his house. Perhaps you expressly allow this type of exception and thereby frankly distinguish between a nonconforming residence in an industrial zone and a nonconforming business or industry in a residence

zone. What about the single-family house which does not conform with the side yard requirements, yet could add a back porch and still conform to the back yard requirements? It does "nonconform" but its expansion will not add to the nonconformity. In this case, why not let the back porch go on? It can be so provided in the ordinance.

Off-street parking often creates a nonconformity. Should this prevent expansion of the store's floor area? Perhaps so, unless the owner can provide additional parking.

Generally, courts have permitted municipalities to forbid expansion or change in nonconforming uses. The difficult issue is one of policy: What additional types of controls, if any, shall be placed on a variety of nonconformities?

The elimination, or "amortization," of nonconforming uses is a venturesome area with few guideposts. Most communities which have experimented with this technique have first gone after such "unpopular" uses as billboards, gas stations and auto wrecking yards. The ordinance may provide that within two -- or five, seven or ten -- years all nonconforming billboards, gas stations and junk yards must go . . . without compensation. Surprisingly to some people, the courts of California, New York, and the Federal Court in Florida have upheld this action.

There are -- apart from legal issues -- some very difficult and practical administrative problems which must be considered before this latter technique is adopted.

January 11, 1973

Board of City Commissioners

Robert A. Lakin, Director of Planning

Nonconforming Uses

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My experience in watching nonconforming uses in the City of Wichita and elsewhere has been that whenever a use needed to expand or move, or whenever there was a change in ownership and financing became a problem, that the area immediately applied for a change in zoning and such zoning is nearly always granted. Often times this began the action which precipitated a series of further changes on adjacent properties which then, in turn, changed the total zoning pattern and the character of the area itself. One can then ask if the nonconforming use had been given reasonable expansion rights on its existing site and the physical facilities improved, would have additional zoning been granted in the immediate area. It is my opinion that it probably would not have. Does the expansion of a particular use help or hinder the area involved? This is the question which cannot be answered categorically as some uses expanding, such as a tavern or private club, might further impact the area. If the use had been a grocery store and it had expanded, the same thing could happen, except probably not to the same degree. As a matter of public policy, when residences were made nonconforming in industrial areas, the City ordinances were amended to provide that residences and churches had certain expansion rights, subject to the approval of the Board of Zoning Appeals. However, in the converse, an industrial or commercial use does not have such opportunity to apply to the Board of Zoning Appeals if they are located in the residential areas. If nonconformities, both commercial and residential, are to be treated equally, then a similar provision should probably be made available in the City ordinances. One of the questions that might be asked is, Should such expansion become an automatic right or should it be approved by the Board of Zoning Appeals under some basic set of guidelines which would guide whether or not such expansion might be approved?

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I cannot concur in these recommendations because of the experience that I have had dealing with requests for changes to a conforming status over the years and the results of those requests which, in nearly 100% of the cases, have been approved. Thus, one of two things happens. A change in zoning policy occurs in order to establish some level of "equity" for the property owner who has been "deprived" of his ability to operate on the same basis as other commercial uses. In the event such a request is denied or is not even made, the property continues to deteriorate until the place begins to affect adjacent properties which, in turn, deteriorate. Thus, it is apparent to me that the existing provisions and theories have not accomplished what they intended to accomplish over a period of years. Further, the time period (1926 to 1972) has been such that these theories have had a reasonable and fair test and are found wanting, and thus a different approach should be explored. In my view, the authorization of expansion, subject to bringing other activities up to par, such as off-street parking, setbacks, health codes, etc., are observed.

The one provision that I think is missing was contained in the recommendation for legislative program, which would have authorized the community to acquire by eminent domain those nonconforming uses which created such problems that they should be removed from the scene immediately and not be left for 30 to 40 years to create problems for an area before their amortization provisions might expire.

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RAL:ber

Attachment

**THE CITY OF WICHITA**

**OFFICE OF CITY MANAGER**

**DATE** January 23, 1973



**TO** Robert A. Lakin, Director of Planning

**FROM** Ralph Wulz, City Manager

**SUBJECT** Non-Conforming Uses

On January 11, 1973, you presented your staff study on the above subject to the City Commission.

The Commission then referred the report to the Metropolitan Area Planning Commission for review and recommendation.

Please present this matter to the MAPC for its consideration at an early date.

Ralph Wulz  
City Manager

RW:fjh



WICHITA-SEDGWICK COUNTY

DATE

METROPOLITAN AREA PLANNING DEPARTMENT

January 11, 1973

TO Board of City Commissioners

FROM Robert A. Lakin, Director of Planning *RLK*

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January 11, 1973

The second area which should probably be explored is to provide for shorter amortization periods for those properties without substantial investment. By these I would consider to be uses of land such as salvage yards, storage of material, contractors yards and billboards. There may be other such minor uses, but these should be considered for short range amortization in the event proper legislation is secured.

RAL:ber

Attachment

EXCERPT FROM ZONING AND SUBDIVISION TECHNIQUES  
By Richard F. Babcock

NONCONFORMING USES

Definition: This term -- as it is customarily used -- needs careful explanation. It would be more accurate to speak of "nonconformities." A building may conform to the regulations applicable in the district in which it is located insofar as use is concerned but may be nonconforming with respect to the regulations for area (lot size), or bulk (height), or open space (yards). So we will define "nonconformity" as follows:

"Any lot, structure, building or use which was legally established on the date of this ordinance but does not conform to the applicable regulations of the zoning district in which it is located."

Note the words "legally established." A nonconformity is not given a special status if it was illegal even before the new regulations went into effect.

Example: A gas station or corner grocery in a single-family zone is a nonconforming use. A 30-foot wide lot in a zone requiring minimum 50-foot width is a nonconforming lot. A single-family house with only three-foot side yards in a single-family district in which five-foot side yards are required is nonconforming to that extent. A six-story apartment building in an apartment zone which limits new buildings to four stories is nonconforming as to height.

Nonconformity can mean a lot of things. The important questions are: What do you do about them? Should physical expansion of the building be permitted? Should a change from one nonconforming use to another be allowed? Should a nonconforming use be allowed to extend throughout a building? When, if ever, should nonconforming uses be eliminated? When they are destroyed, or when they are abandoned (and abandoned for how long); or when fully depreciated, as some jurisdictions have provided? (Called "amortization")

Current Practice in Sedgwick County Area: The Wichita ordinance allows existing nonconforming uses to be continued, but they cannot be enlarged, extended, or reconstructed. A nonconforming

use may be changed to any use in the same or any more restrictive classification. The right to continue a nonconformity is lost if the nonconforming use is discontinued for two years, or if it is destroyed to the extent of more than 50% of structural value. All nonconforming uses must be eliminated by January 1, 1997, or within 60 years after the use first became nonconforming, whichever is later.

The Sedgwick County ordinance permits the continuance of nonconforming uses, but it prohibits any additions to, or enlargements of, such uses unless the addition or enlargement complies with all of the height and area restrictions. Additions or enlargements may not exceed 50% of the floor area of the building and may not be built if the Board of Appeals determines that the addition or enlargement will add "undesirable features to the building." The right to continue a nonconforming use is lost if it is abandoned for one year or if the building is destroyed to the extent of more than 75% of its value at the time of destruction. The nonconforming use of open land must be discontinued in four years, and nonconforming signs and billboards must be removed in two years if three or more residences are located within 200 feet.

Limitations Under Kansas Statutes or Case Decisions: Section 12-709 of the City Zoning Act forbids the application of zoning ordinances "to existing structures [or] to the existing use of buildings." (Except for alterations that change the use.)

Thus, even the long term amortization provisions in the Wichita ordinance are probably invalid. In 1940, the Kansas Supreme Court indicated that compulsory amortization of nonconforming uses was improper. (Asmann v. Masters, 151 Kan. 381, 98 P.2d 419.)

Section 19-2930 of the County Zoning Act authorizes the adoption of "reasonable regulations . . . for the gradual elimination of nonconforming uses." The Kansas Supreme Court has approved amortization provisions adopted pursuant to Section 19-2930 on two occasions. [Spurgeon v. Board of Commissioners, 181 Kan. 1008, 317 P.2d 798 (1957); Board of Commissioners v. Brown, 183 Kan. 19, 325 P.2d 382 (1958).]

Comment: The treatment of nonconformities requires a large number of policy decisions which are interwoven with decisions on other techniques. It is easy enough to decide that it is wise to forbid a gas station located in a residence zone to expand or to change into a body repair shop. Nearly all ordinances forbid that. But if you forbid any additional residences in industrial zones -- probably a good idea -- all existing residences merely become nonconforming. Then you must decide what you will do about the homeowner already located in an industrial zone who wants to add a porch to his house. Perhaps you expressly allow this type of exception and thereby frankly distinguish between a nonconforming residence in an industrial zone and a nonconforming business or industry in a residence

zone. What about the single-family house which does not conform with the side yard requirements, yet could add a back porch and still conform to the back yard requirements? It does "nonconform" but its expansion will not add to the nonconformity. In this case, why not let the back porch go on? It can be so provided in the ordinance.

Off-street parking often creates a nonconformity. Should this prevent expansion of the store's floor area? Perhaps so, unless the owner can provide additional parking.

Generally, courts have permitted municipalities to forbid expansion or change in nonconforming uses. The difficult issue is one of policy: What additional types of controls, if any, shall be placed on a variety of nonconformities?

The elimination, or "amortization," of nonconforming uses is a venturesome area with few guideposts. Most communities which have experimented with this technique have first gone after such "unpopular" uses as billboards, gas stations and auto wrecking yards. The ordinance may provide that within two -- or five, seven or ten -- years all nonconforming billboards, gas stations and junk yards must go . . . without compensation. Surprisingly to some people, the courts of California, New York, and the Federal Court in Florida have upheld this action.

There are -- apart from legal issues -- some very difficult and practical administrative problems which must be considered before this latter technique is adopted.

APPENDIX A

APPENDIX B

APPENDIX C

**THE CITY OF WICHITA**

**OFFICE OF** CITY MANAGER

**DATE** January 3, 1973



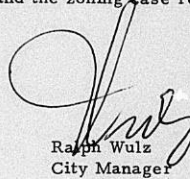
**TO** Robert A. Lakin, Director of Planning

**FROM** Ralph Wulz, City Manager

**SUBJECT** Review of Non-Conforming  
Use Ordinance

On January 2, 1973, the City Commission deferred Case No. Z-1452 for four weeks and asked that the provisions of the City Code pertaining to non-conforming uses be reviewed during the interim.

The non-conforming use ordinance will be presented for consideration on the agenda for January 16, 1973, and the zoning case returned on January 30, 1973.

  
Ralph Wulz  
City Manager

RW:fjh

