

Government of the District of Columbia

ZONING COMMISSION



ZONING COMMISSION ORDER NO, 403
Case No. 81-17
(Non-Conformity Provisions of the Regulations)
July 18, 1983

Pursuant to notice, a public hearing of the District of Columbia Zoning Commission was held on February 22, March 1, 8, & 29, July 19, and August 19, 1982. At those hearing sessions, the Zoning Commission, on its own initiative, considered a proposal to amend the Zoning Regulations of the District of Columbia relative to the treatment of all aspects of non-conformity, pursuant to Section 9101 of the Zoning Regulations. The hearing was conducted in accordance with the provisions of Chapter 5 of the Rules of Practice and Procedure before the Zoning Commission.

The provisions of the Zoning Regulations regarding non-conformity apply to those uses and structures which were initiated or constructed before the Zoning Regulations became applicable and which the Regulations now no longer permit. The recognition of the concept of non-conforming uses and structures is essentially an attempt to balance the rights and interests of property owners who established uses or built buildings at a time when they were free to do so with the overall public policy perspectives of **the** community which suggest that such uses or buildings would no longer be appropriate if they were started today.

The original concept of protecting non-conforming rights was established in the first Zoning Regulations adopted in 1920. The initial imposition of Regulations on a city that was in many areas already developed without any land-use control created the first non-conforming uses. The adoption of the revised Regulations in 1958, and the subsequent major revisions that that have occurred since that time, have created additional non-conforming uses and structures. The Zoning Commission will continue to amend the Regulations to reflect changing policy concerns of the District of Columbia, and there will thus continue to be additional areas of non-conformity created. Those parts of the Zoning Regulations that deal with and control non-conforming uses and structures are thus of great significance.

The present Zoning Regulations dealing with non-conforming uses are generally contained in Article 71. Those Regulations establish two classes of non-conforming uses, control the circumstances where a non-conforming use may be changed or extended, describe what kinds of alterations or enlargement may be made to buildings that are non-conforming or house non-conforming uses, describe the situations in which damaged non-conforming structures may be restored, set out criteria for the Board of Zoning Adjustment to consider in applications regarding changes or extensions of non-conforming uses, and provide for registration of non-conforming uses. In general the thrust of all these Regulations, as set forth in Sub-section 7101.1 is "to provide for strict regulation of non-conforming uses and non-conforming structures."

There are also several other provisions of the Regulations which exempt from the strict control of Article 71 uses and buildings which would otherwise be non-conforming. There are sections in the Regulations applicable to the Special Purpose, Waterfront, Mixed Use and Commercial Districts that allow for more liberal treatment, than Article 71, of uses or buildings that would not be fully permitted if they were to be proposed today. These sections have been added to the Zoning Regulations by the Zoning Commission to cover special situations that have arisen from time to time.

At the request of the Zoning Commission, the Office of Planning and Development (now the Office of Planning) undertook a comprehensive study and review of all of the provisions of the Zoning Regulations concerning non-conforming uses and structures. As a result of that study and recommendation from the Office of Planning, the Zoning Commission advertised for hearing and considered a broad variety of proposed changes to the Regulations, The major changes proposed by these amendments were as follows:

1. The classes of non-conforming uses would be eliminated, to be replaced by a three-part distinction for regulating non-conformity: use of land, structure devoted to conforming use, and use within a structure.
2. A procedure for determining costs and values in relation to whether a damaged structure may be restored would be established. Historic structures would be exempt from the percentage limitations on damage so as to more freely encourage their retention and restoration.
3. The limits applicable to non-conforming uses would apply only to that portion of a building devoted to the use, and would not adversely affect the portion of the building used for conforming purposes,

4. Changes of non-conforming uses would be more limited. In one alternative advertised, only changes to a permitted use would be allowed. Under a second alternative, in residence districts, new uses would have to be neighborhood convenience establishments, drawing clientele primarily from within one-half mile of the premises.
5. Extension of non-conforming uses would be prohibited,
6. A discontinuance clause would be established, so that premises which previously contained a non-conforming use and which remain vacant for an extended period cannot have the use reopened.
7. The definition of non-conforming use would be amended, to provide that a use now permitted as a special exception but which exists without BZA approval would be considered as conforming, rather than non-conforming.
8. All of the special provisions concerning the SP, W, CR and C Districts would be eliminated, with the uses rendered non-conforming otherwise regulated. by the revised Article 71.

The Zoning Commission held six days of public hearings on the proposed changes, In addition to the specific text changes proposed, the Commission also invited comments from the public on certain general issues. At the hearings, the Commission explored at great length many issues concerning the subject of non-conformity. The testimony reflected many different viewpoints, with both more restrictive and less restrictive regulations being urged upon the Commission.

In formulating the changes to the Regulations to be adopted by this order, the Commission operated with two general principles in mind:

1. The Regulations should be consolidated, simplified, clarified and rationalized. The Commission determined that some of the distinctions that exist between the treatment of non-conformity in one zone as opposed to another zone should be eliminated. The Commission desired to place all of the Regulations governing non-conformity in one place in the Regulations, that is in Article 71. The Commission attempted to simplify some of the the language, to clarify ambiguities that had arisen over the years, and to create a rational whole out of a variety of parts that had been grafted onto a much simpler regulation.

2. The general public interest in eventually affecting the withering-away of non-conforming uses should be the major policy control, with the result that the Regulations should strictly and rigidly control non-conforming uses and structures to the maximum extent possible under the Zoning Act. The Commission recognizes that it is precluded by the Zoning Act from forcing the termination of non-conforming uses. The Commission believes that the Regulations should limit the rights associated with non-conformity, to make it less desirable for such uses and structures to continue, and to increase the likelihood that such uses and structures will be voluntarily eliminated in the future.

In determining the appropriate Regulations to be adopted based on these two general principles, the Zoning Commission followed generally the outline of the proposal as recommended by the Office of Planning and as specified earlier in this order. In arriving at this decision, the Commission notes the following major points:

1. Deletion of the special provisions in SP, W, CR and C Districts: These special provisions were originally added following consideration by the Commission of the rezoning of several specific areas, including Friendship Heights, the West End, Georgetown Waterfront and Dupont Circle, as well as the major text amendments changing the SP District. While there may have been individual reasons for adopting those sections, upon consideration of the non-conforming provisions across the board, the Commission believes there is no reason to continue to treat uses in these zones differently from the way other uses are treated under the revised Article 71. The Commission notes particularly that the Regulations regarding uses in W and CR Districts are not significantly changed by these amendments, The changes that are made, those which result in limiting expansion and rebuilding rights, are consistent with the policy of strict regulation set forth earlier. The Commission specifically determined however not to change the Regulations concerning existing hotels in R-5 Districts, and to leave hotels as conforming uses. The Commission reaffirms the decision made on that matter in 1980, "recognizing the substantial investment in place already committed for existing hotels."
2. Restriction on change of use: The Commission determined not to adopt either of the alternatives advertised. However, the Commission believes that the present Regulations for Residential Districts, allowing a change to any use which is not objectionable, even if it is not a neighborhood facility, is too liberal. Those uses located in Residential Districts should

relate to the area in which they are located. The BZA should not be able to permit a change of a non-conforming use to a new use which has no relation to an area where people reside.

Consequently, the neighborhood facility test in the existing Regulations would be retained for Residential Districts and the ability to change to any other use would be eliminated. The neighborhood facility test would not apply to zones other than Residential Districts.

3. Change in the definition of non-conforming use: The change in the definition affects only those uses which are now permitted only with BZA approval. Previously, those uses which require BZA approval but did not have such approval were considered as non-conforming. Under the new Regulations, such uses would be considered conforming. The affect of this change is to create certain benefits and add certain restrictions. Uses that would otherwise be non-conforming and require variances to accomplish structural alterations would now be conforming and could modernize within an existing building as a matter-of-right. Those uses would also lose any rights accorded under the revised Article 71. Expansion of such uses would be governed by the normal special exception process. The Commission believes this to be an appropriate balance of all the interests concerned.

Advisory Neighborhood Commissions 2A, 2B, and 3E supported the concept of the proposal but expressed the following concerns:

1. That the definition of "neighborhood convenience establishment" be deleted,
2. That the "Statement of Purpose" be strengthened and made clear that the survival of non-conformity was to be discouraged,
3. That enlargement or additions to structures be permitted if such structure conforms to all zoning criteria for that district,
4. That the destruction of non-conforming structures by fire require public hearing before reconstruction was permitted, that the reconstruction of non-conforming structures that were damaged by arson, or the owner or agent of the owner, be prohibited, and that the restoration after damages to a non-conforming use be permitted, subject to the cause of the damage,
5. That change of non-conforming use be permitted for uses

permitted in the district in which the property was located,

6. That the extension of non-conforming use be prohibited,
7. That a six-month discontinuance use of non-conforming structures and/or land is reasonable, after which any form of non-conformity would not be permitted,
8. That the existing related definitions be retained,
9. That existing hotels in Residential Districts be made non-conforming and subject to non-conformity regulations,
10. That the restoration of damaged non-conforming structures devoted to conforming uses be permitted as a matter-of-right where conformity is not possible, and
11. That Article 54 be deleted.

In response to the specific issues and concerns of the ANC's, the Zoning Commission notes the following:

1. The definition of "Neighborhood convenience establishment" has been deleted. The Commission retained the concept of "neighborhood facility" which has been in the Regulations and which the BZA is able to interpret and apply.
2. The language of Sub-section 7101.1 has been revised to indicate that the Regulations are to be strict and rigid "to the extent permitted by the Zoning Act."
3. Enlargements or additions to a structure would be permitted if the structure conforms to all the applicable Zoning Regulations, including the use provisions. Extension of a non-conforming use is not permitted.
4. The new Regulations specify procedures for computing costs and values regarding the destruction of non-conforming structures or structures devoted to non-conforming uses, The procedures are sufficiently specific that no public hearing will ordinarily be required, An aggrieved party still has the right to appeal any decision of the Zoning Administrator to the BZA. The determination of the cause or origin of a fire is beyond the scope of the Commission's authority.
5. The standards applicable to changes in non-conforming uses and the changes in the definition have been discussed earlier in this order.

- 6, As noted, extension of a non-conforming use is not permitted by the revised Regulations.
7. A six month discontinuance period is too short a period-of-time, given the delays a property owner is likely to experience in attempting to rent, renovate and/or occupy a premise.
8. No change is warranted in the treatment of existing hotels in Residential Districts. No such proposal was advertised, and the Commission believes there is no reason to change the Regulations in that regard at the present time.
9. Article 54 has been deleted in the revised Regulations.

The proposed amendments to the Zoning Regulations were referred to the National Capital Planning Commission (NCPC) under the terms of the District of Columbia Self Government and Governmental Reorganization Act. The NCPC, by letter dated May 1.0, 1983, found that the proposed amendments would not adversely affect the Federal Establishment and other Federal interests in the National Capital nor be inconsistent with the Comprehensive Plan for the National Capital.

The Zoning Commission published a notice of proposed rulemaking in the D.C. Register on May 20, 1983 and solicited written comments from interested individuals. The significant issues raised in the response received are addressed in the order.

The Commission believes that the amendments to the Zoning Regulations contained herein are in the best interest of the District of Columbia and are consistent with the intent and purpose of the Zoning Regulations and Zoning Act. The Commission in making its decision in this case, has accorded to the three ANC's, which submitted reports, the "great weight" to which they are entitled.

In consideration of the reasons set forth herein, the Zoning Commission of the District of Columbia hereby orders APPROVAL of the following amendments to the Zoning Regulations of the District of Columbia.

1. In Section 1202, delete the existing definition for "nonconforming use" and replace it with the following new definition:

Nonconforming use: Any use of land or of a structure **or** of a structure and land in combination, lawfully in existence at the time these regulations or any amendment thereto become effective, which does not conform to the use provisions for the district in

which such use is located. A use lawfully in existence at the time of adoption or amendment of these regulations which would thereafter require special exception approval from the Board of Zoning Adjustment shall not be deemed a nonconforming use. Such a use shall be considered a conforming use, subject to the further provisions of Paragraph 8207.21,

2. In section 1202, delete the existing definition for "nonconforming structure" and replace it with the following new definition:

Nonconforming structure: A structure, lawfully existing at the time these regulations or any amendment thereto become effective, which does not conform to all provisions of these regulations or such amendment other than use, parking, loading and roof structure requirements. Regulatory standards which create nonconformity of structures include but are not limited to height of building, lot area, width of lot, floor area ratio, lot occupancy, yard, court and residential recreation space requirements.

3. Delete all of existing Article 71, regarding nonconforming uses and Structures, and replace it with a new Article 71, as follows:

ARTICLE 71

NONCONFORMING USES AND NONCONFORMING STRUCTURES

SECTION 7101 - STATEMENT OF PURPOSE

7101.1 These regulations establish separate districts, each of which is an appropriate area for the location of uses and structures permitted therein. Within the districts established by these regulations, or amendments that may later be adopted, there exist structures, uses of land, and uses of structures, which were lawful before these regulations were adopted or amended, but which would be prohibited, regulated, or restricted under the terms of these regulations or future amendments thereto. It is the intent of these regulations that nonconformities shall not be enlarged upon, expanded or extended, nor be used as a basis for adding other structures or uses prohibited elsewhere in the same district. It is necessary and consistent with the establishment of these districts that all uses and structures incompatible with permitted uses or structures be regulated strictly and permitted only under rigid controls, to the extent permitted by the Zoning Act of June 20, 1938, as amended.

SECTION 7102 - APPLICATION OF PROVISIONS

7102.1 Any nonconforming use of a structure or of land, or any nonconforming structure lawfully existing on the effective date of these regulations which remains nonconforming and any use or structure lawfully existing which becomes nonconforming on the effective date of these regulations or any subsequent amendment thereto, may be continued, operated, occupied, or maintained subject to the provisions of this Article,

SECTION 7103 - USE CLASSIFICATION

7103.1 Nonconformities are regulated in the following categories:

7103.11 Nonconforming use of land, including land use with a structure incidental to the use of the land.

7103.12 Nonconforming structure devoted to conforming use.

7103.13 Nonconforming use within a structure, whether the structure is conforming or non-conforming,

SECTION 7104 - NONCONFORMING USE OF LAND

7104.1 A nonconforming use of land or of Land with structures incidental to the use of the land, may neither be extended in Land area nor changed to any use except a use permitted in the district in which the property is located.

SECTION 7105 NONCONFORMING STRUCTURES DEVOTED TO CONFORMING USES

7105.1 The following restrictions apply to a nonconforming structure devoted to a conforming use.

7105.11 Ordinary repairs, alterations and modernizations, including structural alterations, are permitted to such structure.

7105.12 Enlargements or additions may be made to such structure provided such structure is conforming as to percentage of lot occupancy, and further provided that the addition or enlargement itself is conforming as to use and structure, does not increase or extend any existing nonconforming aspect of the structure, and does not create any new nonconformity of structure and addition combined.

7105.13 Should a nonconforming structure be destroyed by fire, collapse, explosion, or Act of God to an extent of more than seventy-five percent of the cost of reconstructing the entire structure, such nonconforming structure shall not be restored or reconstructed except in conformity with all provisions of the Zoning Regulations, provided that:

7105.131 If such casualty or Act of God results in damage to an extent of more than seventy-five per cent, and if the structure is nonconforming only as to percentage of lot occupancy, lot area and/or width of lot the structure may be reconstructed or restored to its previous condition or to a more conforming condition, even if that condition does not comply with the applicable percentage of lot occupancy, lot area and/or width of lot requirements.

7105.132 If such casualty or Act of God results in damage to an extent of seventy-five per cent or less of the cost of reconstructing the entire structure, such structure may be restored or reconstructed to its previous condition or to a more Conforming condition, provided that such reconstruction or restoration is started within twenty-four months of the date of the destruction and is diligently continued to completion.

7105.133 In the event that there is a dispute between the property owner and the Zoning Administrator as to whether the structure has been destroyed to the extent of seventy-five percent of reconstruction cost, the costs of restoration and of reconstruction shall be determined by the average of the estimates furnished by three independent qualified contractors, one of whom shall be selected by the owner, one of whom shall be selected by the Zoning Administrator, and one of whom shall be selected by the first two mentioned contractors. Such estimates shall be prepared and submitted according to a standard procedure and format established by the Zoning Administrator and the cost of estimates shall be at the expense of the property owner,

7105.134 Notwithstanding the restrictions of Paragraph 7105.13, a nonconforming structure which is a historic landmark or which is certified by the State Historic Preservation Officer to be a structure which contributes to the character of the historic district within which it is located, may be restored or reconstructed regardless of the extent of destruction of the structure, subject to the provisions of the Historic Landmark and Historic District Protection Act and all other municipal laws and regulations.

7105,135 The twenty-four month period provided in Sub-paragraph 7105,132 may be extended for as long as it takes to apply for and receive any governmental approvals necessary to accomplish the reconstruction or restoration, including but not limited to approvals from the Board of Zoning Adjustment, the Historic Preservation Review Board and the Mayor's Agent for the Historic Landmark and Historic District Protection Act,

SECTION 7106 - NONCONFORMING USES WITHIN STRUCTURES

7106.1 The restrictions of this Section apply to nonconforming uses within structures, whether the structure is conforming or nonconforming. Where the nonconforming use occupies only a portion of the structure the restrictions of this Section shall apply only to that part of the structure devoted to the nonconforming use,

7106.11 If approved by the Board of Zoning Adjustment as authorized in Section 8207 and subject to the conditions enumerated in the following Subparagraphs, a nonconforming use may be changed to a use which is permitted as a matter of right in the most restrictive district in which the existing nonconforming use is permitted as a matter-of-right, provided that:

7106.111 The proposed use will not adversely affect the present character or future development of the surrounding area in accordance with these regulations. Such surrounding area shall be deemed to encompass the existing uses and structures within at least 300 feet in all directions from the nonconforming use.

7106.112 The proposed use will not create any deleterious external effects, including but not limited to noise, traffic, parking and loading considerations, illumination, vibration, odor, and design and siting effects.

7106.113 When an existing nonconforming use has been changed to a conforming or more restrictive use, it shall not be changed back to a nonconforming use or less restrictive use.

7106.114 In Residential Districts, the proposed use shall be either a dwelling, flat, apartment house or a neighborhood facility.

7106.115 For the purpose of this Paragraph the districts established by these regulations are listed in the following order of decreased use restriction: R-1-A, R-1-B, R-2, R-3, R-5-A, R-4, R-5-B, R-5-C,

R-5-D, SP-1, SP-2, C-1, C-2-A, C-2-B, C-2-C, C-3-A, C-3-B, C-3-C, C-4, C-5 (PAD), W-1, W-2, W-3, CR, C-N-1, C-M-2, C-M-3, M.

- 7106.116 The Board may require the provision of or direct changes, modifications, or amendments to any design, plan, screening, landscaping, type of lighting, nature of any sign, pedestrian or vehicular access, parking and loading, hours of operation, or any other restriction or safeguard it may deem necessary to protect the value, utilization, or enjoyment of property in the neighborhood.
- 7106.12 A nonconforming use may not be extended to portions of a structure not devoted to such use at the time of enactment or amendment of these regulations, or to another structure.
- 7106.13 Ordinary repairs, alterations or modernizations may be made to a structure or portion thereof devoted to a nonconforming use. Structural alterations are not allowed except those required by other municipal law or regulations, provided that structural alterations are permitted to a lawfully existing non-conforming flat or apartment house located within a Residential District.
- 7106.14 A structure devoted to a nonconforming use may not be enlarged, except if such enlargement is to be devoted to a conforming use. A new structure may not be erected to house a nonconforming use.
- 7106.15 Should a structure devoted to a nonconforming use be destroyed by fire, collapse, explosion, or Act of God to an extent of more than fifty percent of the cost of reconstructing the entire structure, it shall not be restored or reconstructed except in conformity with all provisions of the Zoning Regulations, provided that:
- 7106.151 If such casualty or Act of God results in damage to an extent of fifty percent or less of the cost of reconstructing the entire structure, such structure may be restored or reconstructed to its previous condition or to a more conforming condition, provided that such reconstruction or restoration is started within twenty-four months of the date of the destruction and is diligently continued to completion,
- 7106.452 In the event that there is a dispute between the property owner and the Zoning Administrator as to whether the structure has been destroyed to the extent of fifty percent of reconstruction cost, the costs of restoration and of reconstruction shall be determined by the average of the estimates furnished by three independent qualified contractors, one of whom shall

be selected by the owner, one of whom shall be selected by the Zoning Administrator, and one of whom shall be selected by the first two mentioned contractors. Such estimates shall be prepared and submitted according to a standard procedure and format established by the Zoning Administrator and the cost of estimates shall be at the expense of the property owner.

7106.153 Notwithstanding the restrictions of Paragraph 7106.15, a structure devoted in whole or in part to a nonconforming use and which is also a historic landmark or which is certified by the State Historic Preservation Officer to be a structure which contributes to the character of the historic district within which it is located, may be restored or reconstructed regardless of the extent of destruction, subject to the provisions of the Historic Landmark and Historic District Protection Act and all other municipal laws and regulations. The nonconforming use may be resumed and continued as before.

7106.154 The twenty-four month period provided in Sub-paragraph 7106.151 may be extended for as long as it takes to apply for and receive any governmental approvals necessary to accomplish the reconstruction or restoration, including but not limited to approvals from the Board of Zoning Adjustment, the Historic Preservation Review Board and the Mayor's Agent for the Historic Landmark and Historic District Protection Act.

SECTION 7107 - DISCONTINUANCE

7107.1 Discontinuance for any reason of a nonconforming use of a structure or of land, except where governmental action impedes access to the premises, for a period of more than three years, shall be construed as prima facie evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the district in which the use is located,

4. Add a new Paragraph 8207.21, as follows:

8207.21 In the case of a use that was originally permitted and lawfully established as a matter-of-right and for which the regulations now require special exception approval from the Board of Zoning Adjustment, any extension or enlargement of such use shall require special exception approval from the Board of Zoning Adjustment. In determining whether to approve any extension or enlargement, the

Board shall apply the standards and criteria of the Zoning Regulations to the entire use, rather than just the proposed extension or enlargement.

5. Delete from the SP District regulations all of existing Sub-section 4101.7 and all of existing Section 4307.
6. Delete from the W District regulations all of existing Sub-sections 4402.5 and 4402.6.
7. Delete from the CR District regulations all of existing Sub-sections 4502.5 and 4502.6.
8. Delete from the Commercial District regulations all of existing Article 54,

Vote of the Commission taken at the public meeting on April 18, 1983: 5-0 (Commissioners Walter B. Lewis, George M. White, John G. Parsons, Maybelle T. Bennett, and Lindsley Williams, to approve).

Vote of the Commission taken at the public meeting on July 18, 1983: 4-0 (Commissioners Walter B. Lewis, George M. White, John G. Parsons, and Lindsley Williams, to adopt as amended - Maybelle T. Bennett, not present not voting).

In accordance with Section 4.5 of the Rules of Practice and Procedure before the Zoning Commission, this order is final and effective upon publication in the D.C. Register, specifically on AUG - 5 1983

Lindsley Williams

LINDSLEY WILLIAMS
Chairman
Zoning Commission

Steven E. Sher

STEVEN E. SHER
Executive Director
Zoning Secretariat