



King County

Department of Development and Environmental Services

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REGULATORY REVIEW COMMITTEE

- MINUTES -

MEETING DATE: May 22, 2008

TO: Building Services Division Staff
Jim Chan, Manager
Chris Ricketts
Mark Bergam
Jarrod Lewis

Land Use Services Division Staff
Randy Sandin, Manager
Lisa Dinsmore
Deidre Andrus
Steve Bottheim
Doug Dobkins
Pesha Klein

Fire Marshal Division Staff
John Klopfenstein, Fire Marshal

Stephanie Warden, Director
Joe Miles, Deputy Director
Harry Reinert, Special Projects Manager and RRC Co-Chair
Cass Newell, Prosecuting Attorney's Office

FM: Harry Reinert, Co-Chair

Present: Mark Bergam, Mark Mitchell, Joelyn Higgins, Lisa Dinsmore, Deidre Andrus, Steve Bottheim, Jarrod Lewis, Cass Newell, Dave Baugh, and Harry Reinert

- 1. Under K.C.C. 25.32.060, may a nonconforming use be expanded by up to 10% as provided in K.C.C. 21A.42.030?**

Background

K.C.C. 25.32.060 defines the circumstances under which a nonconforming use located within the shoreline may be modified. K.C.C. Chapter 21A.32 establishes standards for nonconforming uses or structures under the Zoning Code.

K.C.C. 25.32.060 reads:

A. Applications for substantial development or building permits to modify a nonconforming use or development may be approved only if:

1. The modifications will make the use or development less nonconforming; or
2. The modifications will not make the use or development more nonconforming.

B. A use or development, not conforming to existing regulations, which is destroyed, deteriorated, or damaged more than fifty percent of its fair market value at present or at the time of its destruction by fire, explosion, or other casualty or act of God, may be reconstructed only insofar as it is consistent with existing regulations.

C. The review of applications for the modification of a nonconforming use or development shall be subject to the guidelines enumerated in K.C.C. 21A.32 (General Provisions-Nonconformance, Temporary Uses, and Re-Use of Facilities).

Under this provision, modifications are allowed only if the modification will make the use less nonconforming or will not make it more nonconforming. The provision also directs that the review be subject to the guidelines in K.C.C. 21A.32.

K.C.C. 21A.32.055 in the zoning code includes limitations similar to those in K.C.C. 25.32.060 and limits modifications to nonconforming uses to those modifications that do not expand an existing nonconformance or create a new type of nonconformance.

K.C.C. 21A.32.065 allows expansion of nonconforming uses under limited circumstances:

A nonconforming use, structure, or site improvement may be expanded as follows:

A. The department may review and approve, pursuant to the code compliance process of K.C.C. 21A.42.030, an expansion of a nonconformance only if:

1. The expansion conforms to all other provisions of this title, except that the extent of the project-wide nonconformance in each of the following may be increased up to ten percent:

- a. building square footage,
- b. impervious surface,
- c. parking, or
- d. building height; and

2. No subsequent expansion of the same nonconformance shall be approved under this subsection if the cumulative amount of such expansion exceeds the percentage prescribed in subsection A.1;

B. A special use permit shall be required for expansions of a nonconformance within a development authorized by an existing special use or

unclassified use permit if the expansions are not consistent with subsection A. of this section;

C. A conditional use permit shall be required for expansions of a nonconformance:

1. Within a development authorized by an existing planned unit development approval; or

2. Not consistent with the provisions of subsections A. and B. of this section; and

D. No expansion shall be approved that would allow for urban growth outside the urban growth area, in conflict with King County Comprehensive Plan rural and natural resource policies and constitute impermissible urban growth outside an urban growth area.

This provision does allow for expansions of a nonconforming use or structure, even if the expansion does increase the nonconformance. This issue has been addressed in Code Interpretation L07CI002.

The question here is whether the reference in K.C.C. 25.32.060 to K.C.C. Chapter 21A.32 means that a nonconforming use in the shoreline may be expanded as provided for in K.C.C. 21A.32.065.

Discussion.

When K.C.C. 25.32.060 was first adopted in 1978, it read as follows:

(a) Applications for substantial development or building permits to modify a nonconforming use or development may be approved only if:

(1) The modifications will make the use or development less nonconforming; or

(2) The modifications will not make the use or development more nonconforming.

(b) The review of applications for the modification of a nonconforming use or development shall be subject to the guidelines enumerated in chapter 21.51 [sic]¹ (Nonconforming Buildings and Uses).

K.C.C. 25.32.060 has been amended four times since its initial adoption. In 1981, subsection B was added to address uses or structures that are destroyed. In 1995 and 1996, the cross reference to the new zoning code was updated, but no substantive changes were made to its provisions.

At the time K.C.C. 25.32.060 was first adopted, K.C.C. Chapter 21.52 included several sections regulating nonconforming uses. K.C.C. 21.52.030 made clear that a validly established use was not nonconforming merely because a code changes required a conditional use permit for that use. K.C.C. 21.52.030 described the rules for determining when a use or structure was destroyed or abandoned. K.C.C. 21.52.060 and 21.52.070 allowed expansion of a use within an existing

¹ The reference should have been to K.C.C. 21.52.

structure, but required conformance with parking, outdoor storage, and landscaping requirements within two years after notice.

K.C.C. 21.52.050 established the standards for structural alterations or expansions. Alterations or expansions were generally allowed only if the change did not make the structure more nonconforming or was required by law.

K.C.C. 21.52 was recodified into K.C.C. chapter 21A.32 in 1997, but no substantive changes were made to its provisions at that time. In 1998, K.C.C. 21A.32 was subject to several amendments, including the provision now codified at K.C.C. 21A.32.065 that allows for expansion of up to ten percent of a non-conforming structure.

Several principles lead to the conclusion that K.C.C. 21A.32.065 does not apply to proposed expansions in the shoreline environment.

One rule of statutory construction is that the more specific provision controls over the more general. K.C.C. 25.32.060 is more specific in that it applies only to the shoreline jurisdiction.

Title 25 also includes a provision that directs that the shoreline regulations are "to be liberally construed to give full effect to the objectives and purposes" for which they were enacted. K.C.C. 25.04.040. The shoreline code clearly limits the expansion of nonconforming uses. Allowing expansions of nonconforming uses in the shoreline jurisdiction because they are allowed under K.C.C. 21A.32 would run counter to this rule of liberal construction.

Another rule of statutory construction attempts to ensure that all provisions of an ordinance are given meaning. This could suggest that in order to give meaning to the cross-reference in K.C.C. 25.32.060, expansions under K.C.C. 21A.32.065 should be permitted. However, the legislative history described previously suggests that at the time K.C.C. (needs citation) was originally adopted and the cross-reference was included, the reference did make sense and was consistent with K.C.C. 25.32.060. It was later amendments to 21A.32 that created the potential inconsistency between the two provisions.

Conclusion.

Under K.C.C. 25.32.060, non-conforming uses in the shoreline jurisdiction may not be expanded up to ten percent, as allowed under K.C.C. 21A.32.065. Non-conforming uses may only be modified if the modification will reduce the nonconformance or will not make the use more nonconforming.

2. Does K.C.C. 21A.38.100 limit the height of structures within 50 feet of the special district overlay zone to 30 feet? Is the height limit setback measured from the property boundary or from the opposite side of the alley?

Background

Mr. Todd Lawson requested a Code Interpretation of K.C.C. 21A.38.100C.8 relating to building heights in the special district overlay. Mr. Lawson posed two questions relating to this section:

1. Is it required to lower the height within 50 feet of the SO-100 boundary edge if the project does not use the incentive to increase height?
2. Is the height setback of 50 feet from the perimeter measured from the far side of the alley or from the subject parcel's property line?

Discussion

1. Is it required to lower the height within 50 feet of the SO-100 boundary edge if the project does not use the incentive to increase height?

K.C.C. 21A.38.100 states the purpose of the special district overlay as follows:

A. The purpose of the commercial/industrial special district overlay is to accommodate and support existing commercial/industrial areas outside of activity centers by providing incentives for the redevelopment of underutilized commercial or industrial lands and by permitting a range of appropriate uses consistent with maintaining the quality of nearby residential areas.

K.C.C. 21A.38.100C.8 provides:

C. The standards of this title and other county codes shall be applicable to development within the commercial/industrial special district overlay except as follows:

...

8. The building height limits of this title shall be waived, provided that the height limit within 50 feet of the perimeter of the overlay district shall be 30 feet.

The base height in NB, RB, and CB zones is 35 feet. K.C.C. 21A.12.040A. The question posed by the code interpretation request is whether the provisions of K.C.C. 21A.38.100C.8 apply if a development proposal does not propose to exceed the base height limits of the zone.

The introductory clause of K.C.C. 21A.38.100C states that the standards of K.C.C. 21A apply "except as follows," making clear that each of the subsections under C. are exceptions to the general standards of Title 21A.

Each of the subsections establishes an alternative development standard that applies to developments in the overlay zone. The "provided that" language included in C.8 does not mean that the 30 foot height limit applies only if a development proposal chooses to exceed the maximum heights established in K.C.C. 21A.12.040A. Rather, it limits heights in the fifty feet adjacent to the perimeter of the overlay zone because there are no height limits in the remainder of the zone.

It is also significant that K.C.C. 21A.38.100C.8 states that the height limits "shall be waived." K.C.C. 1.02.030B. states that for purposes of interpreting the King County Code "'May' is permissive. 'Shall' and 'will' are mandatory." If the King County Council had intended to make

the waiver of building heights optional, the Council would have stated that the height limits "may be waived."

2. *Is the height setback of 50 feet from the perimeter measured from the far side of the alley or from the subject parcel's property line?*

The code interpretation request asks whether the height setback is measured from the property line or from the far side of the alley. The request suggests that there would be "same quality of transition as when two properties are immediately adjacent to each other but in different zones."

Although from a design standpoint whether the height setback is measured from the property line or from the far side of the alley may not matter, the code clearly states that the measurement should be made from "the perimeter of the overlay district." In this instance, the overlay district follows the property lines, not the alley. Therefore, the 30 foot limit on building height is measured from the edge of the overlay district, not the far edge of the alley.

Conclusion

K.C.C. 21A.38.100 establishes development standards for a special district in order to encourage redevelopment of commercial and industrial areas. K.C.C. 21A.38.100C.8. waives building heights in the overlay district "provided that the height limit within 50 feet of the perimeter of the overlay district shall be 30 feet."

A code interpretation request has posed two questions relative to interpretation of this provision:

1. Is it required to lower the height within 50 feet of the SO-100 boundary edge if the project does not use the incentive to increase height?

The answer to this question is yes. K.C.C. 21A.38.100C.8. establishes a development standard for building heights in the overlay district. In the overlay district, there are no building heights, except within 50 feet of the overlay district perimeter, where building heights are limited to 30 feet.

2. Is the height setback of 50 feet from the perimeter measured from the far side of the alley or from the subject parcel's property line?

K.C.C. 21A.38.100C.8 provides that building heights are limited to 30 feet "within 50 feet of the perimeter of the overlay district." In this case, the overlay district coincides with the parcel boundaries. Therefore, the measurement is made from the parcel boundary, not from the far side of the alley.