

MEMORANDUM TO: All Members of the Metropolitan Council

FROM: Jon Cooper, Director
Metropolitan Council Office

DATE: November 4, 2010

RE: **Analysis For Proposed Amendments
To The Zoning Code**

ORDINANCE NO. BL2010-746 (PAGE) – This amendment to the Metro zoning code would require operators of amateur radio antennas (“ham radios”) to have a valid license issued by the federal communications commission (FCC) prior to the installation of a tower on the operator’s property. The zoning code permits amateur radio antennas in the residential and agricultural zoning districts as accessory uses provided the tower height, location, and setback requirements are met. This ordinance would add another requirement that the operator be licensed by the FCC.

The FCC requires radio operators to pass a test and obtain a license before operating on radio frequencies. However, the FCC does not regulate the radio tower the operator will use for transmission purposes. Under this ordinance, the operator would have to submit proof of a valid FCC license to the zoning administrator prior to constructing an antenna on the property. If the FCC license expires without being renewed, then the operator would have to remove the antenna at his/her expense.

This ordinance has been approved by the planning commission.

ORDINANCE NO. BL2010-753 (WILHOITE) – This zoning text change would designate restaurants, bars, and nightclubs as uses permitted with conditions (PC) and would prohibit such uses from being located within 100 feet of certain uses. The beer permit provisions in the Metro Code generally prohibit a beer permit from being issued to an establishment located less than 100 feet from a church, school, park, daycare, or one or two family residence. However, in September 2010, the council amended the code to exempt restaurants that already have a state on-premises liquor consumption license from Metro’s minimum distance requirements to obtain a beer permit upon the adoption of a resolution by the council.

This ordinance would essentially impose these distance requirements for all bars and restaurants, regardless of whether the establishment desires to sell beer. This would mean that any such establishment within Metropolitan Nashville and Davidson County that is currently located within 100 feet of a church, school, park, daycare, or residence would become a nonconforming use, and no new restaurants or bars could open in the future if they fall within the distance limitations.

The ordinance was deferred indefinitely by the planning commission at the sponsor’s request.

ORDINANCE NO. BL2010-782 (GOTTO) – This amendment to the Metro zoning code would expand the number of zoning districts in which personal care services are permitted by right. Personal care services include fitness centers, spas, tanning salons, beauty and barber care, and dry cleaning and laundry services. These uses are currently permitted by right in the ORI (office and residential intensive), mixed-use, commercial, and shopping center districts, and as an accessory use in two industrial districts. This ordinance would expand personal care services as a permitted use in the office neighborhood (ON), office limited (OL), office general (OG), and office residential (OR) zoning districts.

This ordinance has been approved by the planning commission.

ORDINANCE NOS. BL2010-783 & BL2010-784 – These two ordinances make changes to the zoning code provisions relating to nonconforming uses and structures.

Ordinance No. BL2010-783 (Cole, Claiborne & Jameson) is a substantial rewrite of the nonconforming use provisions in the code in an attempt clarify the protections afforded by state law and the zoning code. T.C.A. § 13-7-208, commonly referred to as the “nonconforming use grandfather statute”, allows certain existing nonconforming businesses to continue operation and to rebuild or expand their operations after a change in local zoning regulations. The purpose of the nonconforming use grandfathering statute is to prevent a hardship to existing property owners that were in compliance with the applicable laws at the time a new zoning restriction was enacted.

This ordinance makes a number of rather complex technical changes to the zoning code regarding how nonconforming uses and structures are to be treated. One of the more significant changes made by this ordinance is to better distinguish between nonconforming uses and nonconforming structures. Nonconforming uses are clearly protected under state law, and this ordinance recognizes that protection. However, the state law is not as clear in its application to nonconforming structures. The state law protections can be read as primarily applying to the use of the property, not the structure itself, since the state law language applies to the “activities of the industry or business”. The reason for this ambiguity likely stems from the fact that at the time the nonconforming use statute was enacted, local zoning regulations in Tennessee dealt primarily with use and bulk standards, as opposed to design and aesthetics. However, it is important to note that the Tennessee courts have interpreted the nonconforming use statute to be applicable to on-premises advertising signs, and have held that such nonconforming signs may be destroyed and reconstructed if the sign is a business necessity.

This ordinance rewrites the code provisions governing nonconforming uses and structures and adds new definitions for “industrial, commercial or business establishment”, “nonconforming residential use”, and “nonconforming residential structure”. The ordinance provides that repairs and structural alterations may be made to a nonconforming structure provided there is no increase in the degree of nonconformity. This would allow such a nonconforming structure to replace the roof and windows, for example, without meeting the new code requirements. The ordinance also allows enlargement of a nonconforming structure by twenty-five percent or less of the total floor area without meeting the new standards. Enlargements of greater than twenty-five percent must be in compliance with the existing zoning. Further, the ordinance provides that a nonconforming structure that sustains damage or destruction amounting to fifty percent or less of its floor area may be reconstructed without meeting the new zoning code requirements. The ordinance also provides that site improvements, such as streetscape, landscape, and signage, will be required in accordance with the existing zoning provisions, since these are not expressly protected by state law.

In addition to the treatment of nonconforming structures in general, this ordinance makes a significant change in the code's application to nonconforming signs. The code currently provides that a nonconforming sign must be brought into compliance with current zoning regulations if the sign is altered, repaired, restored or rebuilt (other than as a result of involuntary damage or casualty) to the extent that the cost exceeds fifty percent of the estimated replacement cost of the sign. This ordinance provides that a sign will be deemed destroyed if more than fifty percent of the surface area is altered or repaired. The board of zoning appeals has repeatedly had to make a determination in recent months regarding whether a nonconforming sign is the sign structure itself or the face of the sign. This ordinance would take that issue off the table by specifying that destruction of the sign means changing more than half of the sign surface area.

The ordinance also deletes the provisions governing the treatment of multi-tenant nonconforming signs. The code currently provides that each tenant in a multi-tenant development may replace "an associated sign of a size not to exceed fifteen percent of the facade area of the building occupied by the tenant." This provision is being deleted in lieu of the fifty percent standard. This ordinance further provides that a nonconforming sign must be brought into compliance when the principal land use on the lot is changed to a different use or when the lot has been inactive for a period of thirty months or more.

This ordinance also adds a standard for determining whether a structure containing a nonconforming use has been destroyed using the same fifty percent threshold noted above. State law allows nonconforming uses to rebuild after destruction as long as there is no change in use and the rebuilt building complies with the current setback, height, bulk, and physical location requirements of the existing zoning regulations. Since the state law does not specify what amounts to a "destruction", this ordinance would provide that a structure containing a nonconforming use that has sustained damage to fifty percent or less of its floor area may be reconstructed. However, if the damage is to more than fifty percent of the floor area, any reconstruction of the building must meet the new zoning regulations, including design. It is unclear whether a court would uphold this fifty percent standard as applied to nonconforming uses, as it has not been tested in Tennessee.

This ordinance also amends the code provisions applicable to multi-family residential structures to be consistent with a recent amendment to the state nonconforming use statute. Further, the ordinance provides that the code provisions governing the treatment of nonconforming uses must be applied uniformly in all zoning districts, including specific plan (SP) districts, overlay districts, and the downtown code district. This would effectively trump any language in an existing SP or UDO district that could be read as an attempt to treat nonconforming uses in a manner that is inconsistent with the state law protections.

Another substantial change made by this ordinance is to modify the powers of the board of zoning appeals (BZA) to provide that the BZA can determine the appropriateness of proposed changes to nonconforming uses, but not nonconforming structures. Changes to nonconforming structures would be governed solely by the provisions of this ordinance. This would essentially mean that the BZA would no longer have the authority to determine whether a nonconforming structure, including a sign, could be altered since the code would now spell out how nonconforming structures can be modified.

As indicated above, a strict reading of the nonconforming use statute by a court could result in several of the provisions in this ordinance being declared inconsistent with state law, especially the twenty-five percent expansion trigger for nonconforming structures. However, given the

amount of ambiguity in the state statute and the limited case law on the subject, the council office cannot state with any certainty that the ordinance would not be upheld.

There is a proposed substitute for this ordinance that makes a number of technical changes without altering the overall intent of the original bill.

This ordinance was deferred by the planning commission until their December 9, 2010 meeting. Thus, pursuant to the council rules of procedure, this ordinance will need to be deferred until the January public hearing.

Ordinance No. BL2010-784 (Hollin, Claiborne & Others) amends the zoning code to allow for the relocation of nonconforming uses upon approval by the BZA. The version of the bill as filed would have potentially led to a number of unintended consequences, as there was no clear guidance given to the BZA to determine whether a nonconforming use should move, and no limitation on a new nonconforming use moving to a site a previous nonconforming use had moved from. In order to address these issues, the planning department, working with Metro legal and the council office, has prepared a substitute ordinance.

The substitute ordinance provides that nonconforming uses within a zoning district requiring a final site plan (i.e., specific plan districts, downtown code district, and certain overlay districts) may be relocated elsewhere within the same zoning district if: (1) the BZA determines that the relocation is necessary to facilitate redevelopment of the current location of the nonconforming use; (2) the property owner commits to preventing any use on the current property that is not in conformance with the zoning standards in effect at the time of the relocation; (3) the new location is no less compatible with surrounding land uses than the existing location; and (4) the new location conforms to all the standards of the current zoning other than use. The property owner would be required to record a deed restriction with the register of deeds to this effect prior to the issuance of any permits.

This ordinance has been approved by the planning commission, as substituted.