

MEMORANDUM TO: All Members of the Metropolitan Council

FROM: Jon Cooper, Director
Metropolitan Council Office

DATE: March 1, 2011

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

ORDINANCE NO. BL2010-783 (COLE, CLAIBORNE & JAMESON) – This ordinance is a substantial rewrite of the nonconforming use provisions in the code in an attempt to 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 make an express distinction 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”. A structure housing a nonconforming use can certainly be expanded or rebuilt even if the structure itself does not conform to the existing zoning. However, an ambiguity arises when the use of the property conforms to the zoning code but the existing structure does not. 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. 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 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, as 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 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 more than fifty percent of the floor area has been damaged, 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 trigger provisions for nonconforming structures and uses. However, given the amount of ambiguity in the state statute and the limited case law on the subject, the council office cannot opine that the ordinance would not be upheld.

This ordinance has been referred to the planning commission. Since the planning commission still has not made a recommendation, the council would need to suspend Rule 20 of the council rules of procedure in order to hold the public hearing on March 1st.

ORDINANCE NO. BL2010-827 (HOLLIN) – This ordinance amends the zoning code to delete the definitions for “check cashing”, “title loan”, “pawnshops”, and “cash advance” establishments. The zoning code was amended in 2008 to add definitions for these establishments. Prior to the 2008 ordinance, the zoning code made no distinction between these uses. Rather, check cashing, title loan, and cash advance establishments were all considered “financial institutions”, and pawn shops were considered retail establishments.

The planning commission deferred this text change indefinitely at the request of the sponsor. Since the planning commission has yet to make a recommendation on this ordinance, no public hearing can be held pursuant to Rule 20 of the council rules of procedure. Thus, the rules would need to be suspended in order to proceed with the public hearing on March 1st.