

MEMORANDUM

Date: November 27, 2018
To: City Council
From: Christy Carr, AICP, Senior Planner
Subject: **SMP Amendment – Nonconforming Structures**

Introduction

This memorandum provides additional background information for City Council consideration related to nonconforming structures within the shoreline jurisdiction. Specifically, staff input on the Planning Commission's rationale of their recommendation and a summary of how other jurisdictions regulate nonconforming structures, in comparison to Bainbridge Island, are provided.

There is no required nonconforming language in the SMA or SMP Guidelines and the Department of Ecology will approve a wide array of approaches and provisions. The City Council may choose to keep the City's nonconforming provisions the same, adopt the Planning Commission's recommendations, or adopt their own approach.

Planning Commission Rationale

At its October 16, 2018 meeting, the City Council asked that the Planning Commission to provide a rationale for its recommendation related to rebuilding and expansion of nonconforming structures, specifically in relation to how their recommendation results in more permissive standards within the shoreline jurisdiction than in other parts of the island, regulated by the critical areas ordinance and zoning code.

The Planning Commission's original recommendation included:

- Eliminating the distinction between unintentionally destroyed and intentionally demolished nonconforming structures
- Allowing landward expansion of a nonconforming single family primary structure within the shoreline buffer with no maximum (no "cap" or limit to the amount/area of footprint expansion)

The Planning Commission, in providing a rationale for its recommendation, **changed its recommendation related to expansion of nonconforming single family primary structures to include a maximum landward footprint expansion within the shoreline buffer of 500 square feet over the lifetime of the structure.**

The Planning Commission’s rationale states that their recommended revisions “would make the treatment of nonconforming structures within the jurisdiction of the SMP consistent with the treatment of nonconforming structures within the jurisdiction of the Critical Areas Ordinance. This is not entirely accurate. Regulations applicable to nonconforming structures in critical areas also include:

- If a building is harmed or destroyed by more than 50 percent of its square footage, the building must be reconstructed in compliance with the requirements of the critical areas ordinance
- Expansion limited to indoor living area or as needed to accommodate accessibility
- One expansion within the lifetime of the structure

The Planning Commission’s rationale states that the intent of eliminating the distinction between intentional and unintentional destruction or demolition and allowing rebuilding is to “simplify the SMP and make clear that elimination of nonconforming residential structures is not intended under the SMP.” As previously conveyed to the City Council, the Washington Department of Ecology, through implementation of the Shoreline Management Act (SMA), does not expect, nor is it requiring, local governments to eliminate legal, existing nonconforming structures and uses from shorelines. **Legal, existing nonconforming development may continue, and nonconforming structures may be repaired, maintained, and remodeled.** This is clear in both the SMA and the City’s existing SMP. The City’s existing SMP includes language related to **eliminating nonconforming uses and commercial structures – not nonconforming single family residential structures. This is an important distinction.** Elimination of nonconforming residential structures is not intended under the existing SMP, and specific language is provided for rebuilding unintentionally destroyed nonconforming primary structures:

If an existing primary structure is damaged or destroyed by fire, explosion, earthquake, flooding or other casualty, it may be reconstructed to the bulk dimension existing immediately prior to the catastrophic event...” (SMP 4.2.1.6.1(2))

The Planning Commission’s rationale includes the following inaccuracy (emphasis added):

“Currently, SMP Section 4.2.1.6.3 allows a nonconforming primary single family residential structure that is unintentionally damaged or destroyed to be altered or expanded (1) one time within the life of the structure; (2) the alteration must occur landward of the existing footprint if the alteration is within the Shoreline Buffer; and (3) the expansion must not exceed 25% of the existing footprint.”

The Planning Commission’s statement above is inaccurate because allowances for expansion, contained in SMP Section 4.2.1.6.3(2-4), apply to **both intentionally and unintentionally damaged or destroyed structures, as stated in SMP Section 4.2.1.6.3.1:**

If an existing primary residential structure is damaged or destroyed as described in **Section 4.2.1.6.1(2)**, the existing primary residential structure configuration may be altered or expanded pursuant to subsections 4.2.1.6.3(2-4).

Nonconforming Structures – Is Bainbridge Island an Outlier?

The purpose of including provisions for nonconforming structures is to allow reasonable accommodation for existing structures that do not meet current regulations. There is a wide variety of approaches to allowing repair, maintenance, and expansion of nonconforming structures. Bainbridge Island’s approach is not an outlier in this mix since almost every jurisdiction approaches it a bit differently based on local conditions and community preferences.

Replacement/Rebuilding

The “tipping point” for replacing nonconforming structures is essentially the question of if and when they lose their nonconforming status. Replacement in this context is within the original building footprint (replacing the structure in a different location would be considered redevelopment). Nonconforming provisions are intended to allow reasonable accommodation (such as repair, maintenance, safety upgrades, minor expansion) for structures that were legally built prior to adoption of current regulations. Nonconforming provisions, then, should allow this reasonable accommodation, but stop short of allowing redevelopment of a site inconsistent with current regulations.

The City uses an “up to 50 percent rule” in its shoreline master program. If a structure is intentionally demolished by over 50 percent of its square footage, then the ability to reconstruct is no longer a nonconforming accommodation, it is redevelopment, and the new structure must comply with current regulations. In other words, the structure has lost its nonconforming status. As noted previously, if a structure is unintentionally demolished, it may be reconstructed to the bulk dimension existing immediately prior to the catastrophic event.

Other cities and counties have a range of ways to regulate replacement. Most jurisdictions do not differentiate between unintentional and intentional destruction; however, such jurisdictions as described below do not allow rebuilding if 100 percent of the structure is demolished or destroyed:

- Structure may be replaced if damaged up to 75 percent of replacement cost of original structure (Snohomish County, Bremerton, Edmonds)
- Structure may be replaced if damaged by not more than 50 percent of replacement cost of original structure (Port Townsend)
- Structure may be replaced if the cost does not exceed 50 percent of the replacement cost of the structure or constructing a new primary structure (Kirkland)
- If a structure experiences substantial destruction it shall constitute a discontinuation of the nonconforming structure and have its nonconforming status terminated. Any repair or reconstruction of the structure shall comply with the requirements of the Shoreline Master Program and the Zoning Code. "Substantial destruction" means the repair or replacement of a building or structure which exceeds 75 percent of the assessed value of the structure, including all repair and maintenance work conducted within a five (5) year period (Bremerton)

Alternatively, other jurisdictions differentiate, like Bainbridge Island does, between unintentional damage and intentional demolition. See, for example, Island County’s separate provisions:

If a nonconforming development is unintentionally damaged to an extent not exceeding seventy-five percent (75%) of its real valuation exclusive of foundations, it may be reconstructed to those configurations existing immediately prior to the time the structure was damaged.

If a nonconforming structure is intentionally modified and the cost of the proposed development exceeds sixty percent (60%) of the fair market value of the replacement cost of the original structure, it shall be required to meet all applicable standards in the SMP.

Other jurisdictions do not differentiate between unintentional damage and intentional demolition and have no limit on the amount of damage or destruction. For example, San Juan County's nonconforming provisions simply state:

Any structure may be moved, replaced, redeveloped, expanded, or otherwise modified on the same parcel provided this work is consistent with the provisions of this section. (Note: the modification cannot result in a new or increased nonconformity.)

Expansion

As previously discussed, structures can be nonconforming to one or more bulk or dimensional standards, including: location in the shoreline buffer, height, and yard and view setbacks. In most cases, nonconforming structures on Bainbridge Island are nonconforming to the required shoreline buffer; however, it is not uncommon to also be nonconforming to the view setback or shoreline side yard setback if a house is located in the shoreline buffer.

Like replacement, different jurisdictions have various approaches to expansion of nonconforming structures.

- City of Bainbridge Island: Expansion within shoreline buffer shall not exceed 25 percent of existing building footprint; no limit outside shoreline buffer
- City of Kirkland: Varies by lot size; any enlargement of the building footprint within the shoreline setback shall not exceed 10 percent of the gross floor area of the existing primary structure prior to the expansion. Other enlargements, such as upper floor additions, may be permitted
- City of Bremerton: Up to 250 square feet within shoreline buffer; up to 500 square feet outside shoreline buffer
- City of Olympia: Alteration of structures located within a required Vegetation Conservation Area (VCA) that include expansion of the building footprint is prohibited. Only interior and exterior remodels and the addition of upper stories are permitted.

In all jurisdictions where expansion is allowed, the expansion cannot result in a new or increased nonconformity. San Juan County's shoreline master program says it succinctly: Nonconforming structures cannot "create a new nonconformance or increase the degree of inconsistency with provisions of SMP." Several jurisdictions do not have a specific allowance for expansion, including Snohomish and Island Counties, Port Townsend, and Edmonds. If there is no specific provision for expansion, it is not allowed if it would result in a new or increased nonconformity.

Summary

Moving forward, the major policy questions for the City Council remain the same:

- Can intentionally demolished nonconforming structures be rebuilt? If so, which ones?
- Can nonconforming structures be expanded? If so, what is the limit to expansion?

To help answer the City Council answer these questions, this memo provided information to clarify whether or not the City's SMP and/or the Planning Commission's rationale is consistent with a) the City's critical areas ordinance and b) other jurisdictions' shoreline master programs, a summary of which is provided on the following page.

In general, the Planning Commission's recommendation is consistent with the City's CAO and other jurisdictions' SMPs relative to expansion of nonconforming structures but differs from the City's CAO

(and zoning code) and most other jurisdictions' SMPs in allowing reconstruction/rebuilding after intentional demolition of 100 percent of the structure.

Policy Questions		
	Can intentionally demolished nonconforming structures be rebuilt? If so, which ones?	Can nonconforming structures be expanded? If so, what is the limit to expansion?
City's existing SMP	<p>Essential single family residential accessory structures may be reconstructed in same footprint.</p> <p>All other structures may be reconstructed/rebuilt only in conformance with all standards of the program.</p>	<p>Yes, when all of the following provisions are met:</p> <ul style="list-style-type: none"> • Located landward of the existing or original building footprint • Only one such expansion may occur within the lifetime of the development • Expansion shall not exceed: <ul style="list-style-type: none"> • The allowed building area for Point Monroe District, Section 5.9.6(2) • The allowed building area for encumbered lots, Section 4.2.1.7 • For structures not meeting above, 25% of the existing building footprint • Height may be added to allowed limit
Planning Commission recommendation	<p>Yes, all structures may be rebuilt within the existing footprint and height may be added to allowed limit</p>	<p>Yes, single family primary structures may be expanded when all of the following provisions are met:</p> <ul style="list-style-type: none"> • Located landward of the existing or original building footprint • Shall not exceed 500 square feet (footprint) throughout the life of the structure • Height may be added to allowed limit
City's CAO	<p>No, a structure that is entirely (100%) intentionally demolished cannot be rebuilt in the same footprint.</p> <p>If a building is harmed or destroyed by more than 50 percent of its square footage, the building must be reconstructed in compliance with current provisions. When less than 50 percent of a building is</p>	<p>Yes</p> <p>All buildings may be expanded when all of the following provisions are met:</p> <ul style="list-style-type: none"> • Any expansion of the footprint is located only within a critical area buffer. No expansion of the footprint is allowed within a wetland or fish and wildlife habitat conservation area • Cantilevers over critical areas are not allowed

Policy Questions		
	Can intentionally demolished nonconforming structures be rebuilt? If so, which ones?	Can nonconforming structures be expanded? If so, what is the limit to expansion?
City's CAO	demolished, any new construction must meet current provisions.	<ul style="list-style-type: none"> • The expansion of the footprint at ground level does not exceed 500 square feet • Any expansion of the footprint is used only as indoor living space or to accommodate accessibility • Any expansion of the footprint is no closer to the critical area than the existing footprint** <p><i>**This is essentially the same as saying "landward" of the existing footprint.</i></p>
City's zoning code	Same as CAO.	<p>Yes</p> <p>Adding to the footprint of a nonconforming structure is permitted as long as the addition meets the requirements of the zoning code.**</p> <p><i>**This is essentially the same as saying the expansion cannot increase or create a nonconformity.</i></p>
Other jurisdictions' SMPs	Most jurisdictions have a limit on the amount of destruction/demolition (50 to 75%, by square footage or value), after which reconstruction must meet current provisions.	<p>Varies</p> <p>Some jurisdictions do not allow expansion if it increases or creates a nonconformity.</p> <p>Some jurisdictions allow expansion, varying from 250 to 1,000 square feet.</p>