

# NONCONFORMING STRUCTURES, USES AND LOTS



September  
2011

Community Development Department

**A Discussion of the Intent, Application, and Practice of  
California Land Use and Planning Law Governing  
Nonconforming Structures, Uses and Lots.**





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*A DISCUSSION OF THE INTENT AND PRACTICE OF CALIFORNIA  
LAND USE AND PLANNING LAW GOVERNING NONCONFORMING  
STRUCTURES, USES AND LOTS*

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City of Tustin Community Development Department





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# Nonconforming Structures, Uses and Lots

## *A DISCUSSION OF THE INTENT AND PRACTICE OF CALIFORNIA LAND USE AND PLANNING LAW GOVERNING NONCONFORMING STRUCTURES, USES AND LOTS*

### PURPOSE |

On March 1, 2011, the Tustin City Council directed Community Development Department staff to draft a code amendment to provide clarity, provide consistency with prior practice, and reduce ambiguity of the term “nonconforming” throughout the Tustin City Code (TCC).

This document is intended to discuss the intent and practice of California Land Use and Planning Law governing nonconforming structures, uses and lots. Issues discussed in this report include:

- An analysis of the concept of nonconforming structures, uses, and lots.
- What is considered nonconforming?
- What is *not* considered nonconforming?
- How are non-conforming regulations applied?
- Enlargement, repair, and destruction of nonconformities.
- How illegal structures, uses, and lots are identified and addressed.
- Actual case example.
- Conclusion.

### INTRODUCTION |

One interest of community zoning/planning is to establish and control land use. The legal basis for all land use regulation is the police power of a city to protect the public health, safety, and welfare of its citizens. The City of Tustin has adopted codes and land use regulations to confine buildings and land uses to certain locations to protect the health, safety, and welfare of its citizens, and to shape the physical layout and appearance of the community including site planning and urban design. The Building Code, Zoning Code and Subdivision Ordinance are the primary regulatory tools used to accomplish these goals. Staff takes great care when preparing new ordinances for Planning Commission and City Council consideration to minimize the creation of nonconformities. However, as the community’s vision for its built environment continues to evolve and change, revision of the City’s regulations (use requirements, setbacks, height limitations, etc.) will inevitably result in the creation of nonconforming structures, uses or lots.



To ensure that a community’s adopted vision and goals are fully accomplished over time, regulatory provisions are put in place to require nonconforming structures, uses, or lots to be made conforming or ensure their replacement over time. Any change in a structure, use, or lot that gives permanency to, or expands the nonconformity would not be consistent with this purpose and are typically prohibited. In most cases, nonconformities are allowed to continue unaltered (structures may be repaired within certain limits) until the end of their economic life when they would eventually be replaced with a conforming structure, use or lot.

## WHAT IS NONCONFORMING? |

**Nonconforming structures, uses and lots** are relatively commonplace, but the concept may not be completely understood. One might picture a dusty, old brick-making business, surrounded by single family homes, that long predates its current residential zoning; or, an old church that appears to be too close to a street property line because the City widened the right-of-way some time in the past and eliminated a portion of the property’s front yard.

The Zoning Code identifies development limitations associated with various Districts identified on the City’s Zoning Maps that establish uniform building setbacks, height limitations, parking requirements, minimum lot sizes, identify allowed uses, etc. Zoning rules change or are updated over time to guide, control and regulate future development.

A legal nonconforming structure, use or lot is *caused by a governmental action* that changes the Zoning Code, the Zoning Map, or the Subdivision Ordinance. *All legal nonconforming structures, uses or lots were lawfully established under the codes at the time, but due to the adoption of a new ordinance, regulation, or map revision, the property no longer conforms to the policies and standards of the code in which the property resides.*<sup>1</sup> Legal nonconforming is sometimes referred to with the term “grandfathered.”<sup>2</sup>

***Nonconforming Structure, use, or lot*** – A nonconforming structure, use, or lot has been lawfully established in the past but no longer meets the current code requirements (i.e. setback, height, parking, use, lot size, etc.)

As a general rule, nonconforming regulations presume that a nonconformity is detrimental to the public interest (health, safety, morals or welfare), and that the nonconformity needs to be brought into

<sup>1</sup> *Curtin’s California Land Use and Planning Law*, Cecily Talbert Barclay, Solano Press Books, 2011, *Guide to California Planning*, William Fulton and Paul Shigley, Solano Press Books, 2005, *Eastman’s California Land Use and Municipal Law*, John Eastman, 2006, *A Planner’s Dictionary*, Edited by Michael Davidson and Fay Dolnick, American Planning Association, 2005.

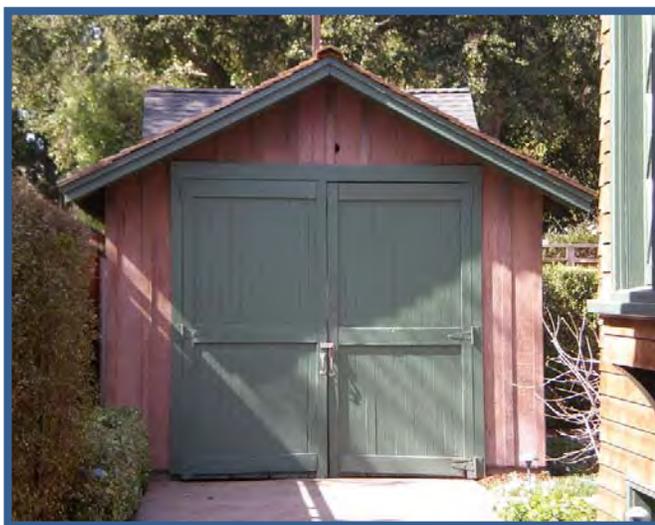
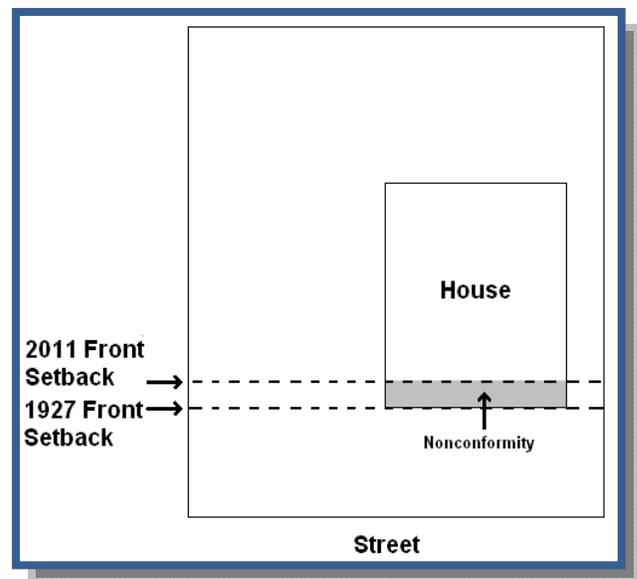
<sup>2</sup> Note: Under the Building Code, a lawfully constructed building is not affected by subsequent Building Code updates that may occur in future years. However, when an addition/alteration is proposed to a lawfully constructed older building, the addition/alteration would be required to meet current Building Code requirements and some existing building components (e.g. fire sprinklers, electrical panels, energy features, etc.) would be required to be upgraded at the time of permit issuance to current standards.

conformance with the current code at some point in time. For example, a community that finds that an existing code allows structures to be built too tall may adopt a code amendment to lower the height limit of new construction. The code looks to the future and assumes that existing, lawfully established nonconforming buildings that exceed the new height limit may continue to exist but will be brought into conformance or eliminated over time.

**Nonconforming Structures** – In regards to the built environment of a community, the Zoning Code implements the City’s General Plan and translates the goals and principles of that Plan to parcel-specific regulations intended to guide or restrict development to the overall aesthetic vision of the community. To accomplish this vision, the Zoning Code identifies building limitations and design requirements that restrict the height, setback, design, parking, etc. to ensure that all buildings proposed within a particular Zoning District are similar in bulk, scale and purpose.

A nonconforming structure is a lawful structure existing on the effective date of a new zoning restriction that has continued since that time without conformance to the ordinance. Again, a new zoning ordinance anticipates that a nonconforming structure will be eliminated over time and replaced with a conforming structure.

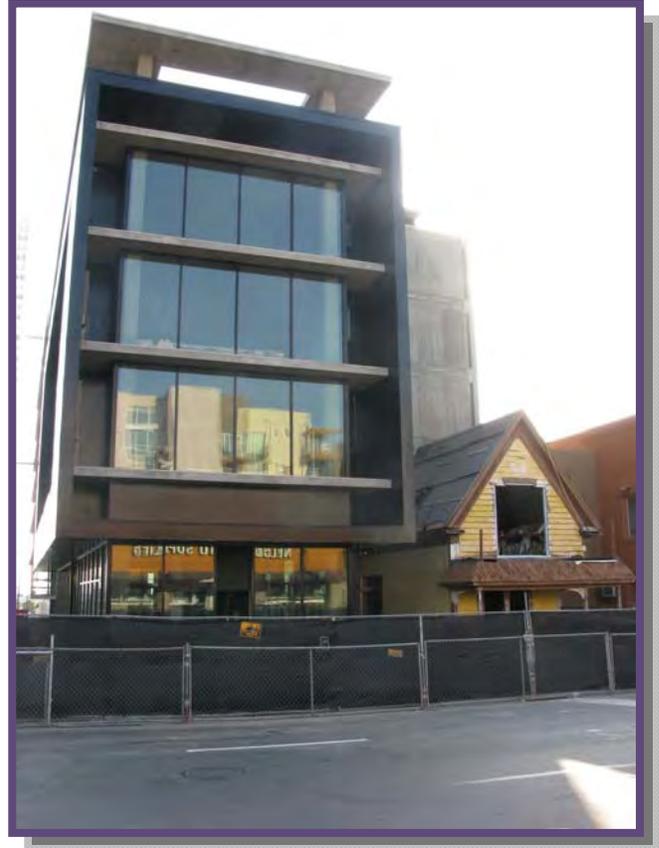
***Nonconforming Structure*** – In the example at right, the street setback was changed to require more open space adjacent to a street after the house was lawfully constructed.



***Nonconforming Structure*** – In the example at left, this garage was built to accommodate one car before the adoption of the current zoning requirement for a two car garage.

**Nonconforming Uses** - The Zoning Code identifies the types of land uses that a community desires to be permitted, conditionally permitted, or prohibited within certain Districts identified on the City's Zoning Map. A nonconforming use describes a lawful use existing on the effective date of a new zoning restriction that has continued since that time without conformance to the ordinance. Again, a new zoning ordinance anticipates that nonconforming uses will be eliminated over time and replaced with conforming uses.

***Nonconforming Use*** - In the example at right, a single family residential use is a use that is nonconforming to current downtown retail/office zoning.



**Nonconforming Lots** - The Zoning Code and Subdivision Ordinance establishes minimum lot sizes for construction of a building. Some properties have developed prior to the establishment of these code restrictions. A nonconforming lot describes a lawful lot existing on the effective date of a new zoning or subdivision requirement that has continued since that time without conformance to the ordinance. Again, a new ordinance anticipates that nonconforming lots will be eliminated over time (possibly combined with an adjacent lot) and eventually made conforming.

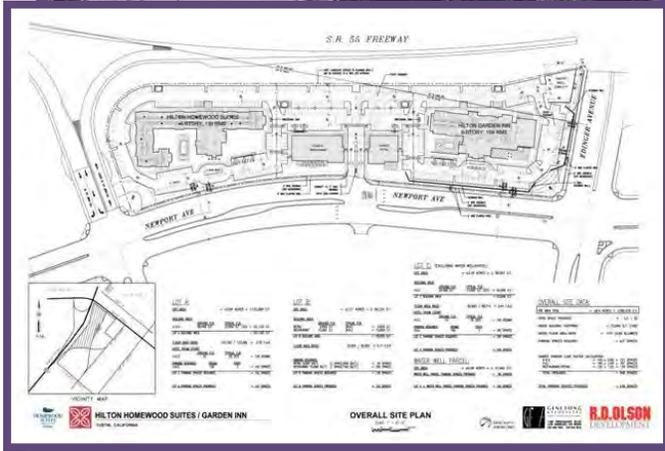
***Nonconforming Lot*** - In the example at left, a nonconforming lot has been developed into a single family use.



**Nonconforming use** – Tustin Block (left) on Newport Ave. was a nonconforming use that was replaced by the Arbor Walk residential project (below).

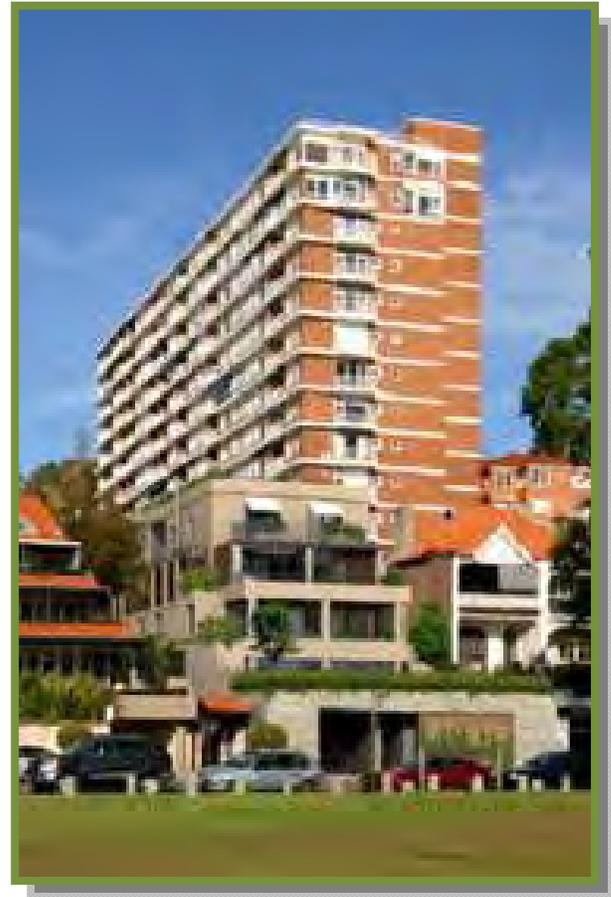


**Nonconforming use** – Existing manufacturing uses (above) were made nonconforming through adoption of the Pacific Center East Specific Plan which supports development of hotels, retail, office and related uses such as the Hilton Garden Inn (R.D. Olson Agreement approved by City Council in July 2011). Example pictured at upper right was built in Florida).



Nonconforming structures, uses, and lots are not always old. Sometimes nonconforming structures are new. There are recent examples of community actions aimed at correcting modern zoning situations. Specifically, when a community determines that the current code does not adequately protect the health, safety, morals and welfare of the community, the community may determine that the current code should be modified. Community's can occasionally change their minds about how a community should be developed.

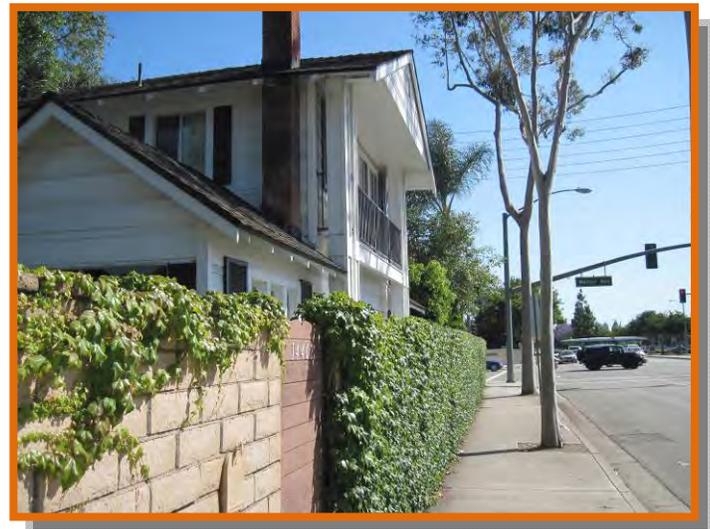
In the example at right, community concern after a tall residential building was approved could convince community leaders to enact a zoning code amendment limiting all future construction to 4-stories, the historic height limit of the existing neighborhood's built environment. Should this occur, the new, lawfully established high-rise building would be made nonconforming.



## WHAT IS *NOT* NONCONFORMING? |

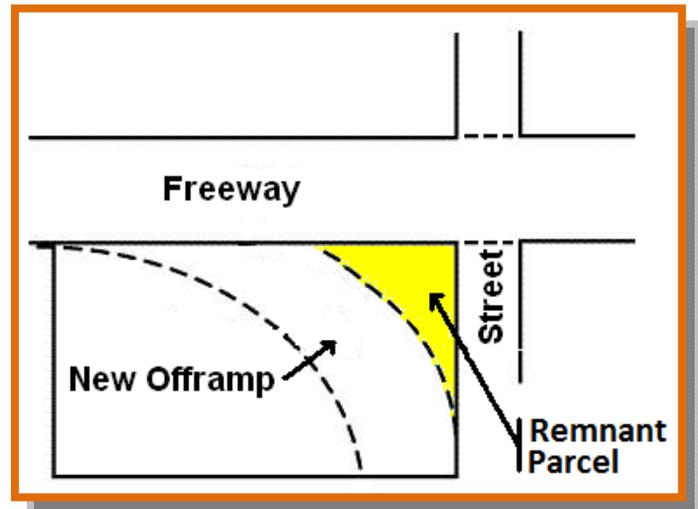
There are certain instances when an existing structure, use or lot is out of conformance with the adopted code but is *not* considered to be nonconforming. Public right-of-way takings, adaptive reuse of historic structures, illegal structures/alterations, illegal uses, and illegal lots are examples of these circumstances that are examined in more detail below.

**Right-of-Way Takings** – Periodically, a community may take actions that widen or improve public right-of-ways. [Pictured at right, the “Nisson House” front yard was eliminated by the widening of Red Hill Avenue]. Staff attempts to ensure that such “takings” will have little impact upon a lawfully established structure, use, or lot. Although right-of-way takings occur through an action by a governmental agency similar to the adoption of a more restrictive zoning code regulation, the code mandates that structures or lots made nonconforming (e.g.



setback, lot size, parking, etc.) as a result of the *acquisition of public right-of-way* be considered *conforming* unless determined to be a nuisance or threat to health.

Although legal in status, lots left as remnant parcels by a right-of-way taking are often unbuildable pursuant to the Zoning Code due to their small size, location or other constraints. Residential, commercial or industrial buildings affected by a right-of-way taking that are considered conforming may be altered or added to without restriction. Remnant (undersized or inaccessible) parcels are sometimes problematic when acquired by misled or uninformed owners who erroneously believe a small remnant parcel to be developable.



**Adaptive Reuse of Historic Structures** – The City of Tustin’s codes allow some expansion/alteration of a nonconforming, qualified historic structure (discussed later in this article). The City also supports adaptive reuse of historic structures. Sometimes, a community’s vision for the use of an area or the built environment can change. For example, a zone change from residential to commercial use may leave behind older buildings that may not appear to be consistent with the planned use of the area. Market pressures can result in many old buildings being torn down, altered, or replaced with buildings that are more supportive of the planned commercial use. Remember, the elimination of nonconforming buildings is a goal of the community’s new vision for the neighborhood and a requirement of new zoning regulations.



Adaptive reuse preserves the important physical attributes of a historic resource for future generations to appreciate by adapting it to purposes other than what the building was originally designed for (e.g., conversion of a historic sardine cannery into a museum, or a historic single family home into a teahouse use – such as the McCharles House shown at left). Generally, adaptive reuse converts a use (single family house) that is nonconforming because of its location (commercial zone) into a conforming use (restaurant). A lawfully established adaptive reuse may require an owner to make potential Building Code upgrades, and is considered *conforming* under the code. The McCharles Tea House (left) is an example of

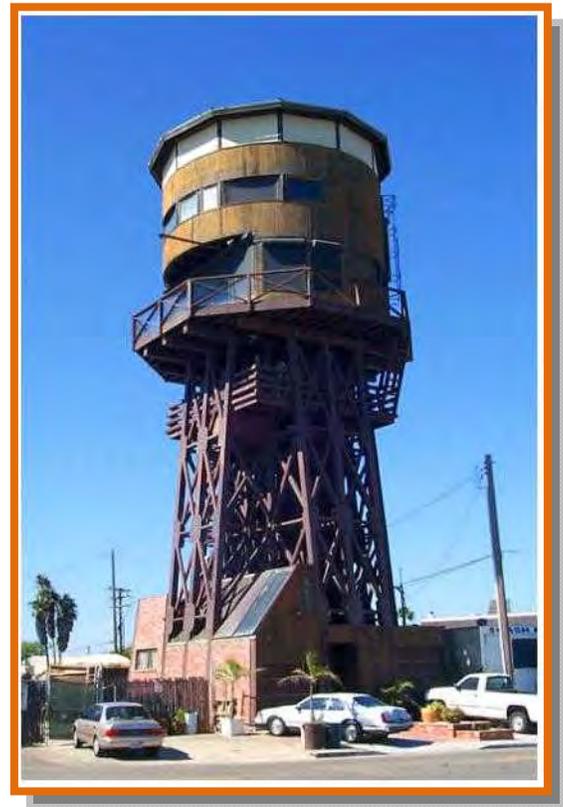
an adaptive reuse success story in Tustin. It was originally built as a single family house in 1899, and was converted to a commercial teahouse use in 1985. The owner and City staff were able to utilize the

California Historic Building Code to grant certain allowances (the Teahouse does not fully comply with zoning and building code standards) to ensure that the architectural design of this important historic resource was preserved for future generations while at the same time extending its economic life as a commercial building.

**Structures Where Exceptions Have Been Granted** – Variances and conditional use permits are methods by which a property owner may seek and obtain relief from the strict stipulations of a zoning code requirement. The allowances granted by a variance or use permit runs with the land, which means that subsequent owners may enjoy the benefits granted by the variance or conditional use permit as long as the stipulations or conditions of approval are met. Although variances may not be granted to authorize a use that is not otherwise allowed by the adopted zoning regulations, deviations from zoning regulations governing lot size, setback, height, parking, etc. may be granted, typically because the property experiences some hardship that prevents it from enjoying the same rights as other similar properties. Similarly, conditional use permits are utilized to authorize special development regulations that apply to the property.

Once granted, the variations in setback, parking, height, etc. are not considered to be nonconforming, but are recognized as conforming. Remember, a nonconforming structure, use, or lot lawfully existed *prior to* a change in a code. A structure developed utilizing a variance or conditional use permit differs from a nonconforming structure in that the variation occurred lawfully *after* the adoption of the code.

**Code Exceptions** – In the example at right, a railroad water tower was lawfully converted to a residence through discretionary approvals such as a variance and/or conditional use permit, exempting the structure from various zoning regulations (height, setback, etc.). (Adaptive reuse of historic buildings is discussed later in this report). Note: the structure is not considered nonconforming since the exceptions were lawfully established *after* the adoption of the code, not prior to.



**Structures Approved But Never Built** - Approval of a project proposal prior to a code amendment does not guarantee legal nonconforming status. Sometimes a code amendment is proposed while projects are “on the drawing board.” Projects may be in plan check or be issued permits during the time an amendment is proposed, adopted and made effective. In most cases, when a code amendment is adopted, projects in plan check or that have been issued a valid permit may continue to be implemented consistent with the previous code (some exceptions exist pertaining to urgency ordinances and urgent life-safety building code amendments).<sup>3</sup> However, the right to execute a project using a prior code typically expires when projects are not built in a timely manner, and when permits or plan checks are allowed to expire. An adopted moratorium can prevent the issuance of additional building permits to ensure that future development is consistent with a new code.



Again, a structure, use, or lot must be *lawfully established* (in place and given final City approval), and be later found to be inconsistent with a newer, adopted zoning regulation to be considered nonconforming.

**Illegal Structures, Uses, or Lots** - A structure, use or lot that is out of conformance with the adopted code is *not* considered to be nonconforming when it has been illegally established. An illegal structure, use, or lot is *caused by the actions of a past or current owner, tenant or property manager*, and not a governmental action.<sup>4</sup> Because the structure, use or lot was not *lawfully established*, it is ineligible to utilize the responsibilities or privileges afforded to a lawfully established nonconforming structure, use, or lot. Specifically, illegal structures, uses or lots may not remain in their current state indefinitely, but are *required to be brought into immediate compliance with current code standards*. Illegal nonconformities can pose life-safety concerns to the property owner, neighbors and to others, including safety personnel such as fire and police



<sup>3</sup> *Stubblefield Construction v. City of San Bernardino* – 32 Cal. App. 4<sup>th</sup> 687, 38 Cal. Rptr. 2d 413 (1995) – The California Court of Appeals determined that the City followed proper procedures in adopting a moratorium and revising the zoning requirements prior to an apartment developer obtaining the required permit approvals.

<sup>4</sup> *United States v. Monsanto Company* – 858 F. 2d 160, 28 ERC 1177, 57 USLW 2170, 19 Env'tl. (1988) – The case involved determining responsibility for environmental contamination left by a lessee of a property owned by the Monsanto Company. The United States Court of Appeal (4<sup>th</sup> Circuit) ruled that an owner is responsible for the actions of a tenant and stated it did “not sanction such willful or negligent blindness on the part of absentee owners.”

respondents. The following discussion further describes illegal structures, uses, and lots.

- **Illegal Structure** – An illegal structure, sometimes referred to as a “bootlegged structure,” is a building constructed without permission of the City and without required plan check or building inspector oversight. Depending upon the expertise of the builder, an illegal structure may or may not meet the adopted code requirements (e.g. the Zoning Code, Building Code, etc.). Examples of illegal structures include room additions, converted garage apartments, signs erected without authorization, structural modification of the interior of an existing building without authorization, etc.

### PANEL REJECTS BID TO LEGALIZE SOME GARAGE DWELLINGS

May 28, 1997 | HUGO MARTIN | L.A. TIMES STAFF WRITER

A Los Angeles City Council panel rejected a proposal Tuesday to legalize some of the city's 50,000 to 100,000 bootleg garage dwellings, opting instead to crack down on landlords who rent out the illegally converted living spaces.

In response to eight deaths in three months from fires in converted garages, a joint council committee proposed making it a misdemeanor to rent out such accommodations. The penalty would be a \$1,000 fine.

### BOOTLEG DWELLINGS BECOMING A FIXTURE IN THE SOUTHLAND

May 11, 1990 | SHAWN HUBLER | L.A. TIMES STAFF WRITER

Dennis Cassity's beach house is a modest place, really. OK, so it's a garage. But such a cozy garage! Tiled bathroom, kitchenette - and all for about \$100 a month less than the cheapest apartment in town.

"Of course, I knew it was illegal," the 40-year-old computer repairman chuckled, recalling the day he found his Hermosa Beach apartment. "I was born and raised on the beach. I know a bootleg (apartment) when I see one." No matter. Cassity took the place anyway.

When an illegal structure is constructed in noncompliance with the City's zoning requirements (i.e. setback, height, use, etc), the building is not considered nonconforming. When an illegal structure is discovered, an owner would be required by staff to submit plans showing that the building meets current Zoning and Building Code requirements, obtain a permit, and pass building inspections to legalize the illegal structure.

Even a structure erected with a City-issued permit could later be determined illegal if for instance a City official were to have mistakenly allowed the structure to be constructed in violation of the code.<sup>5</sup> When discovered, false statements, errors and/or omissions made by the applicant, owner, architect, etc., can result in a structure, use, or lot being reclassified as illegal. *Hypothetical example; an architect's plans approved by the City indicates that a proposed structure is legally set back from a property line. After a permit is issued and construction begun, a building inspector notes on the job site*

<sup>5</sup> *Horwitz v. City of Los Angeles*, No. B172053, 04 C.D.O.S. 11002 (2005) — an appellate court ordered the City of Los Angeles to revoke all building permits and the certificate of occupancy issued in error for building additions to a single family home. “Just as the city has no discretion to deny a building permit when an applicant has complied with all applicable ordinances, the city has no discretion to issue a permit in the absence of compliance.”

### **CRACKDOWN GOES BEYOND GARAGE CONVERSIONS**

**May 21, 2009** | LEILONI DE GRUY | LOS ANGELES WAVE STAFF WRITER

COMPTON — Citing what officials call a zero-tolerance policy on safety code violations, code enforcement officers here are cracking down on illegal garage conversions. These conversions, in which areas for automobile storage are modified into living spaces, are “a major problem,” said City Manager Charles Evans. “Our problem is that many of our garages are converted illegally and they don’t meet the health and safety requirements. And they pose a danger and a safety hazard to the people who occupy them.”

“From the outside, a lot of these conversions look like they are garages but on the inside there is a wall,” said Deputy Fire Chief Marcel Melanson. He said the lack of a proper exit endangers both residents and the fire fighters who might be called on to rescue them. “It definitely poses a danger to our fire fighters when they are working in that type of environment.”

### **SISTERS KILLED BY FIRE MEMORIALIZED IN LONG BEACH ORDINANCE**

**December 15, 2010** | PAUL EAKINS | LONG BEACH PRESS TELEGRAM STAFF WRITER

Tuesday's City Council meeting had an emotional moment, when three sisters who were killed in a fire in an illegally converted garage were remembered.

Family and friends of the sisters, Jasmine, Jocelyn and Stephanie Aviles, were at the meeting, where the council unanimously voted to name a section of Long Beach's municipal code that addresses illegal garage conversions after the girls. The ordinance will be known as "Aviles Law."

Following the Dec. 14, 2007, fire, the city cracked down on illegal conversions. Fire officials said Tuesday that since 2007 Long Beach has cited more than 550 illegal conversions with fines totaling almost \$200,000.



that the building is not set back as indicated on the approved plans. In fact, the structure is observed to project over the side property line into a neighbor's yard. Regardless of who is responsible for the error (e.g. the owner's architect, a City plan checker, etc.), and regardless of the fact that a building permit was issued, the building is illegally projecting over a property line and must be corrected immediately.



In addition, illegal additions to a lawfully established nonconforming structure or use often results in the loss of a structure's nonconforming status. As noted previously, a nonconforming structure, use or lot may continue indefinitely but *may not be enlarged, modified, etc.* When a nonconforming structure or use is expanded illegally, it loses its right to continue indefinitely and must be brought into full

conformance with the code.<sup>6</sup> In some cases, a legal nonconforming status can be reestablished if the illegal modification is removed.

Self-imposed hardships are not a finding to support Planning Commission issuance of a Variance to allow an illegal structure to violate a Zoning Code requirement, so it is typical for an owner of an illegally established structure to either modify it to meet the Zoning and Building Codes or have it removed. An agency can actually abuse its discretion by granting a building permit in an attempt to legitimize an illegal nonconformity<sup>7</sup> [see also Footnote 8, *City and County of San Francisco v. Board of Permit Appeals*, 207 Cal. App. 4<sup>th</sup> 687, 38 Cal. Rptr. 2d 413 (1995)].



### HOUSE FIRE DISPLACES 8 PEOPLE

July 25, 2011 | CARY ASHBY | NORWALK  
REFLECTOR STAFF WRITER

A Main Street house fire has displaced eight people from their three apartments.

The cause of the blaze, which started in the northwest corner of the basement, is an overloaded circuit. Beck said the tenants had an air conditioning unit, TV and other things plugged into the same circuit.

Displaced from Sunday's fire were one couple, three friends who lived together and a mother and her two young sons.

The house, built in the early 1900s...

Again, the purpose of nonconforming regulations is to eventually eliminate nonconformities. *Selective enforcement can jeopardize the City's fair application of the code in the eyes of a court.*

*What about illegal older Buildings?* - One might think that because a particular structure or use has been around for a long period of time that it is obviously nonconforming or "grandfathered," or that because a structure is old that an owner should be allowed to continue to preserve it and use it "as is." This idea is not consistent with the concept of adaptive reuse, which presumes that the owner of the property has legally obtained the proper permits and that the building was adapted (upgraded to meet applicable Building Codes). It is also not consistent with the goal that nonconforming structures, uses and lots be eventually made to conform. Illegal additions (even old ones) may detract from the social, cultural or historical significance of an important historic

<sup>6</sup> *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4<sup>th</sup> 1519, 8 Cal. Rptr. 2d 385 (1992) – The California Court of Appeals found that the City of Costa Mesa could not require the abandonment of a tavern after the expiration of a conditional use permit authorizing a game room in the tavern. The court ruled that the City could have required elimination of the game room but not the termination of a business that had operated legally for 35 years.

<sup>7</sup> *Stolman v. City of Los Angeles*, No. B164169, 04 C.D.O.S. 30, 2004 DJDAR 22 (2004), an appellate court overturned the City of Los Angeles's approval of a variance that allowed the expansion of a nonconforming use. The court determined that a proposal to expand a gas station located in a residential zone did not meet the city's criteria for a variance; there was no evidence that imposing existing zoning requirements would create a hardship for the landowner or business owner — a requirement for a variance.

resource. Most importantly, old structures or uses must be lawfully established to ensure that they do not pose a hazard to occupants or the community.

*What about older buildings where no permits can be found?* - Many structures within the City of Tustin are old and permits may not be on file with the Community Development Department. An absence of proper legal documentation does not automatically result in a City determination that a structure, use or lot is legal or illegal. Tustin staff routinely works with affected property owners and various public agencies (Water Department, County Assessor, etc.) to review official and unofficial documentation to establish whether a structure, use or lot is legal or illegal prior to requesting a property owner to pursue any corrective action (see *How Illegal Structures, Uses and Lots Are Identified and Addressed* below). If an older structure is determined to be lawfully established, information would be added to City records documenting the fact in order to create a record for reference by future staff and property

owners, and the matter would be closed. Based upon the whole record, if City staff concludes that a structure appears to be illegal, the property owner is requested to immediately correct the concern.

In fact, many permits are issued where no permits exist for older structures when it is clear that the construction was conventional and sound construction practices were employed consistent with the Building Code adopted at the time.

Illegal additions can be very damaging to *historic structures* since the original (and historically important) character and integrity of house can be lost or significantly harmed. Illegal improvements are often out of historical context, and are inappropriate for the style and period of the historic structure. Oftentimes, the historic integrity, character and context of the historic structure can only be restored through the removal of the illegal additions.

- **Illegal use** - The regulation and enforcement of land use regulations is important in preventing potential life-safety conflicts between land uses and ensures the health, safety and welfare of the

## ILLEGAL UNITS 'ALL OVER' COSTA MESA

February 28, 2011 | FRANK MICKADEIT | ORANGE COUNTY REGISTER COLUMNIST

How many so-called "granny flats" and "spare bedrooms" are actually converted garages like the one in Costa Mesa where 17-year-old Luke Upton died Thursday morning?

"This is all over Costa Mesa," says Councilman Jim Righeimer, who went out to the scene with city fire and building officials on Saturday. "Staff is very good (about enforcing building codes) when they know about it, but you have so many people in the community turning a blind eye."



community. Illegal uses occur when an owner, tenant, etc. illegally introduces a land use to a site that is not presently zoned for such a use.<sup>8</sup> Examples of illegal uses include:

- Residential garage converted to an apartment without permits.
- Attic or basements converted to an apartment without permits.
- Introduction of an auto repair business in a single family zone.
- Creating a rooming house out of a single family home.
- A sexually oriented business without permit
- An industrial building used as a residence.
- Occupancy of a structure that intensifies the use of the property without upgrades required by the Building Code to accommodate such intensification.

### 3 ARRESTED IN CULTIVATING HASHISH AFTER GARAGE FIRE

MARCH 29, 2011|BY SEAN EMERY | ORANGE COUNTY REGISTER

SANTA ANA – Two men and a woman suspected of cultivating hashish were arrested after officers responded to a suspicious fire at a home in Santa Ana Monday night, police said.

Firefighters responding to a blaze in the garage of a residence ...suspected that the garage was being used as a methamphetamine lab but later realized that the men were using the equipment to extract hashish from marijuana...

### TWO PEOPLE SHOT, KILLED AT BOOTLEG LIQUOR JOINT

Sunday, 14 Nov 2010 - By Ken McCall and Marc Katz Staff Writers

DAYTON -- Two people were killed during a robbery at a Germantown Road residence early Sunday morning, according to police.

“The residence was set up as a boot joint, which is an after-hours illegal liquor establishment...”



A lawfully established structure is constructed to support a specific intended use. Illegal uses pose serious safety risks to occupants and safety personnel by ignoring the requirement to install Building and Fire Code upgrades prior to such use. Illegal uses also can negatively impact community services (i.e. overcrowding and excessive street parking, classroom size, park use, water and sewer service, etc.), negatively impacting the overall quality of life of an affected neighborhood. The introduction of illegal uses can have a deleterious secondary effect upon sensitive uses and persons.

<sup>8</sup> *City and County of San Francisco v. Board of Permit Appeals*, 207 Cal. App. 3d 1099, 255 Cal. Rptr. 307 (1989), The Board of Permit Appeals overruled a zoning administrator’s denial of a permit to allow an owner to retain an existing, illegal unit on a property zoned for single-dwelling use. The unit appeared to have been added over a period of years spanning 1926 and 1938, with a resulting financial benefit accrued to several subsequent property owners. The Board of Appeals partially based its decision on verbal testimony offered by neighbors but no reliable physical evidence was presented. The Court of Appeals of California reversed the Board of Permit Appeals decision and upheld the City/County determination that the unit was illegal.



Once identified, property owners are required to eliminate the violation. While owners have the option of applying for a zone change, the Planning Commission and City Council would be required to consider the effect of introducing the new land use into the property's zoning designation *throughout the City*, since spot zoning (applying a zoning regulation to only one site) is specifically prohibited by State law.

- **Illegal lot** – Illegal lots occur when a property owner illegally deeds or otherwise conveys a portion of a legal lot to another party without complying with the State Subdivision Map Act and the City's Subdivision Code. Illegal lots occur infrequently, but modern examples do occur. There are recent cases where real estate agents, escrow agents and others conspired to sell apartment units to unsuspecting buyers as condominiums. Such unscrupulous behavior typically results in prison sentences for guilty sellers.

Very old lots established prior to the enactment of modern subdivision laws are also sometimes considered illegal.<sup>9</sup> Very few options exist for property owners of an illegal lot, but City staff and the City Attorney would work with citizen-victims to resolve the matter if possible.

### ILLEGAL LOT SALE SPURS LAWSUIT

JANUARY 2003: BY JOAN BJARKO  
NORTH FORTY NEWS

A Colorado native with dreams of living simply on a piece of rural land is instead living in a nightmare of financial complications because Larimer County says he purchased an illegal lot.

## HOW ARE NONCONFORMING PROVISIONS APPLIED? |

Since most structures, uses and lots in a city conform to the code, the application of nonconforming regulations occur infrequently. For most cases, nonconformities are allowed to continue until the end of their economic life when they are *voluntarily replaced* with a conforming structure, use or lot.<sup>10</sup> Although the adoption of new regulations does not typically include a requirement for an immediate discontinuance

<sup>9</sup> *Gardner v. County of Sonoma*, No. S102249, 03 C.D.O.S. 2003 DJDAR 1429 (2003) - The California Supreme Court clarified that maps recorded prior to 1893 do not create legal, developable lots for today's purposes. And the court at least hinted that maps recorded between 1893 and 1929 might not be valid unless a city or county somehow exercised discretion in approving the map.

<sup>10</sup> *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 453 (1954) – an appeals court ruled that it “is generally held that a zoning ordinance may not operate to immediately suppress or remove from a particular district an otherwise lawful business or use already established therein.” The court also ruled that a City may establish shorter timeframes for the nonconformity to be removed.

of an otherwise lawfully established structure, use or lot,<sup>11</sup> a new zoning ordinance may compel the elimination of a nonconformity over a reasonable period of time through the establishment of an amortization period or “sunset clause” allowing the owner the opportunity to recoup some portion of his or her investment in the structure, use, or lot prior to the structure, use or lot being terminated.<sup>12</sup> For some communities, the quick elimination of a certain type of legal nonconformity is a high priority, and a shorter amortization period is established to facilitate quicker compliance (e.g. elimination of improperly zoned adult businesses, or removal of billboard signage, etc.).<sup>13</sup>

- **Enlargement, Repair, and Destruction of Nonconformities** - Any change in a nonconforming structure, use or lot that could extend the economic life, give permanency to, or expand the nonconformity would not be consistent with the community’s overall purpose and goal of eventually eliminating all nonconformities.<sup>14</sup>



- **Nonconforming structures may not be enlarged or altered unless the alteration brings the property into conformance.**<sup>15</sup> Again, the point of the nonconforming provisions is to protect a property right of an existing structure while preventing an extension of the economic life of the nonconforming *structure*, so that it is eventually replaced with a conforming structure.

Because the Zoning Code has changed over time, some older structures are nonconforming. If strictly applied, the City’s nonconforming regulations would discourage the expansion or alteration of historic resources, indirectly influencing some owners to possibly seek their demolition and replacement. The City of Tustin has an ongoing interest in supporting the preservation of important historic resources. Consequently, the Tustin City Code provides an exception for recognized nonconforming historic structures (structures listed on the City’s Cultural Resources Survey) to support the community’s goal to extend the economic life of these important historic resources. Allowing some modernization of historic structures encourages the preservation of the property to

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<sup>11</sup> *City of Los Angeles v. Wolfe*, 6 Cal. 3d 326, 337 (1971) – the State Supreme Court ruled that “enforced relinquishment is inequitable...”

<sup>12</sup> *National Advertising Company v. County of Monterrey*, - the State Supreme Court ruled that City-established amortization periods were an acceptable means of eliminating nonconformities within a “reasonable time.”

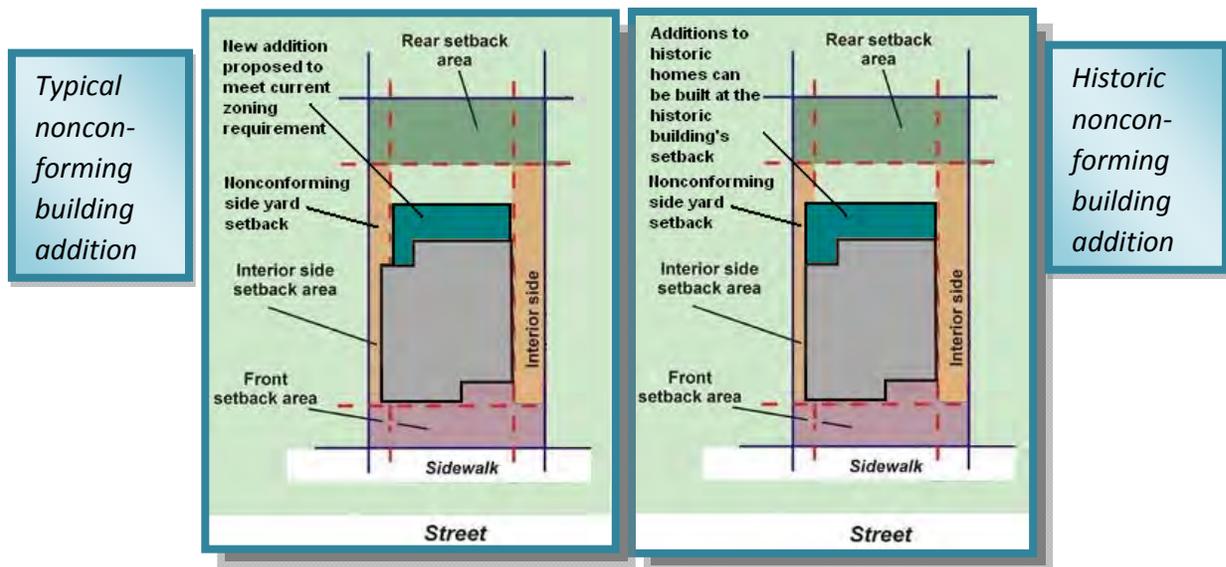
<sup>13</sup> *Baby Tam v. City of Las Vegas*, 247 F.3d 1003 (9<sup>th</sup> Cir. 2001) – The United States Court of Appeals determined that an adult bookstore was required to comply with the City of Las Vegas’ zoning and licensing requirements even though the bookstore was established prior to the adoption of the City’s requirements for the business.

<sup>14</sup> *Dienelt v. County of Monterrey*, 113 Cal. App. 2d 128, 131 (1952) – an appeals court ruled that a City may restrict the extent of additions to a nonconforming structure.

<sup>15</sup> *County of San Diego v. McClurken*, 37 Cal. 2d 128, 131 (1952) – an appeals court ruled that a City ordinance that did not permit the enlargement of nonconforming use was lawful and consistent with the intent to gradually eliminate nonconformities.

be much more attractive, especially given the market trend for larger homes, businesses, etc. The current Code provisions/exceptions are as follows:

- ❖ TCC Section 9264b of the Tustin City Code allows recognized historic residential properties to propose additions or alterations without being required to be brought fully into compliance with the requirement for a two-car garage when it can be shown that insufficient space is available on the site.
- ❖ TCC Section 9271p allows building additions to recognized historic residential structures to continue the same setback as the historic structure.



- **Nonconforming structures may be repaired, but extensive repairs are typically not allowed** - For example, a nonconforming structure would be required to be made conforming if it is ever accidentally destroyed by fire, earthquake, etc.<sup>16</sup> Most nonconforming codes include a threshold that triggers the need for a nonconformity to become more conforming at the time of a proposed repair or destruction.<sup>17</sup> For Tustin, a nonconforming structure may be repaired, or replaced as long as the improvements do not exceed 50% of the building's assessed valuation, as shown on the

<sup>16</sup> *Ricciardi v. County of Los Angeles*, 115 Cal. App. 2d 569, 576-577 (1953) – an appeals court ruled that a City ordinance may restrict the extent of repairs to a nonconforming structure.

<sup>17</sup> *Hansen Brothers Enterprises v. Nevada County*, 12 Cal. 4<sup>th</sup> 533, 48 Cal. Rptr. 2d 778 (1996) – The California Court of Appeals determined that a mining company had a vested right to continue to engage in surface mining activity as a nonconforming use under a zoning ordinance.



County Assessor tax roll.<sup>18</sup> When it can be shown that the cost of repairing a nonconforming structure destroyed is more than 50% of its assessed value, the structure must be made conforming. However, California Government Code Section 65852.25(a) exempts multifamily residential dwellings destroyed by fire and Government Code Section 43007 partially compensates an owner for the destruction and subsequent removal of a nonconforming structure by allowing property tax relief to owners of a destroyed property that cannot be rebuilt

because of zoning prohibitions. Again, the point of the requirement is to prevent an extension of the economic life of a nonconforming *structure*, until such time that it would eventually be replaced with a conforming structure.

- **A legal nonconforming use may be replaced by the same or similar nonconforming use.** When structural alterations are proposed to a building containing a nonconforming use, the nonconforming use must be replaced with a conforming use. If a nonconforming use is ever replaced with a conforming use, *the nonconforming use may never be reestablished at the site*, accomplishing the goal of gradual elimination of nonconformities. Again, the point of the requirement is to prevent an extension of the economic life of a nonconforming *use*, so that it is eventually replaced with a conforming use.

Legal non-conforming uses may be considered abandoned. Absent any specific amortization period, the courts have ruled a use that has been discontinued for seven years is evidence by itself of the owner's intent to abandon the use.<sup>19</sup> However, the City's nonconforming regulations state that a



<sup>18</sup> *Manhattan Sepulveda v. City of Manhattan Beach*, 22 Cal. App. 4<sup>th</sup> 865 (1994) – The California Court of Appeals determined that the 50% rule should be defined as the fair market value of the structure at the time of the fire, not 50% of the cost for replacement of the structure.

<sup>19</sup> *Stokes v. Board of Permit Appeals*, 52 Cal. App. 4<sup>th</sup> 1348, 61 Cal. Rptr. 2d 181 (1997) – The California Court of Appeals determined that the owner of a business had voluntarily abandoned the use of a property and subsequently lost any vested right to the nonconformity.

*nonconforming use* that ceases to operate for a period of one (1) year or more, or is changed to be a conforming use, is considered abandoned and may not be reestablished at the location. Vacant structures or lots are not restricted in this manner.

## HOW ILLEGAL STRUCTURES, USES AND LOTS ARE IDENTIFIED AND ADDRESSED |

Illegal structures, uses and lots come to the attention of City staff in a number of ways. The most common method is when a property owner approaches staff to propose an alteration of or addition to an existing structure (this includes when an owner desires to rebuild a structure damaged in a disaster). Another is when a real estate professional, mortgage lender, or prospective buyer contacts the City and requests documentation that room additions, etc. have been added legally. Another is when a property owner is seeking Mills Act property tax relief for a historic property and invites staff to the site.

Illegal structures, uses and lots also come to the attention of the City's Code enforcement staff through complaints. Except for proactive neighborhood improvement efforts conducted in cooperation with the Tustin Police Department, City code enforcement is nearly always performed on a complaint basis only. Potentially unauthorized structures, uses or lots are brought to the attention of code enforcement staff through complaints and referrals from the following sources:

- Neighbor complaints
- Orange County Fire Authority or other County agency staff
- Tustin Police Department referral
- City plan check or building inspectors
- OC Health Department
- City Business License staff
- County fictitious business name clerk
- Real estate professionals including requests by lending institutions
- The property's owners
- Tenants
- Utility providers
- Code Enforcement
- Staff inspection following fires and other disasters
- Others



When a potentially unauthorized structure, use or lot is identified, staff will confirm that the concern exists by visiting the site or by viewing plans, aerial photographs, etc. If a violation appears to exist at the site, staff will perform much more exhaustive research into the history of the potentially unauthorized structure, use or lot, to attempt to determine when it was added to the site, and whether it was lawfully established.

Staff often considers the following when attempting to develop a “whole record” by which to determine whether a potentially unauthorized structure, use or lot is legal or illegal:

- Building permits, Occupancy Permit, Variances, or other official records.
- County Tax Assessor records
- Property Title Reports and/or Record of Deed
- Historic photographs, aerials
- Historic phone books
- Water billing records
- Sewer connection records
- Other utility records (electrical, gas, etc.)
- Business license records
- Historic newspaper records
- Historic surveys or registers
- Historic Sanborn fire insurance maps
- Subdivision maps
- Written histories/letters from prior owners, residents, etc.
- Other evidence presented by the owner and/or occupants
- Other documents as may be available
- Physical inspection of the construction methodology, materials, etc. to determine whether the structure complied with building codes at the time of construction (see discussion below).
- As needed, request an independent licensed/qualified architect experienced to perform a site assessment.



City staff will always assist an owner in reviewing City records when available. In some cases, an owner may have additional official or unofficial records that may assist City staff in determining whether a particular structure, use or lot is or is legal. If, at the conclusion of staff review, the potentially unauthorized structure is determined to be lawfully established, pertinent information would be added to the City’s records documenting that fact, and the matter would be closed. However, if staff review concludes that a structure, use or lot appears to be illegal, cannot be



permitted, has not been constructed using conventional construction methods, etc., the property owner will be officially requested to correct the concern.

When informed by staff that an addition/alteration appears to be illegal, an owner will often pursue the matter further. Sometimes an owner will request another inspection of a potentially unauthorized structure by a City building inspector to ascertain whether the potentially unauthorized building improvements were done consistent with the Building Code adopted at the time of construction. A building inspector would typically visit the site to observe major life/safety related discrepancies in the workmanship and materials used to determine whether the work would have been in compliance with the Building Code requirements adopted at the time that the improvements were made (e.g. the addition did not have a foundation; electrical, water, sewer and gas installation was hazardous; required fire separation between units or floors was not installed, etc.). *Note: a structure built consistent with the Building Code adopted at the time is evidence, considered with the whole record that a structure may have been lawfully established at the time. Again, compliance with the Building Code means that the person constructing the structure was knowledgeable of the Building Code, not that the structure was built legally. However, it is more likely that the opposite would occur, e.g. City inspection of a potentially unauthorized structure could result in the identification of tell-tale Building Code inconsistencies/violations that prove beyond a doubt that the structure was illegally constructed.* Based upon a staff survey of the 34 Orange County cities, it is standard practice to use such inspection/investigative routines.

Current owners of the property may not have personally caused the illegal structure to be built. In fact, the owner may have purchased the property with an understanding that the property was legal. However, the current property owner bears full responsibility for establishing that their structure, use or lot is lawfully established. In response to the City's request to correct an illegal structure, some owners work with staff to legalize it "after the fact." Others may work with staff to remove the illegal structure. Under California law, affected owners may have legal recourse against a prior owner, real estate agent, or property title company for a failure to disclose the potentially illegal nature of a structure or addition.

## ACTUAL CASE EXAMPLE |

The following facts have been taken from current or past code enforcement cases to illustrate the research and records review methodology currently utilized by Community Development Department staff in order to determine the legality of potentially unauthorized structures, uses or lots. The information discussed below is true, but does not pertain to any one particular property in order to preserve the Planning Commission's objectivity in considering any future code enforcement case appeal.



- Staff receives a complaint that an Illegal apartment is alleged to have been added to the rear of a single family home.
- Permit records are researched by staff. Recent re-roof permit issued for single family house, inspected and given final approval. City inspector did not raise a concern at this time.
- Sewer permit records researched. Connection authorized in 1962 for a single family residence.
- Water billing records researched. Water billing is based upon the number of units requested identified on the site by the owner/applicant. Water bill indicates five units served on the site.
- Planning records researched. Property owner applied for zone change in 1968 from R-1 to R-3 to allow five units on the property. Planning Commission denied the request; property owner appealed to City Council; City Council denied the appeal stating that the property should continue to be used as a single family residence.
- Deed and property title researched. Property identified as single family residence.
- Building identified on the City's 2003 Cultural Resources Survey as a significant Craftsman style residence built in 1922. Survey indicates single family home in front and garage at rear of property converted to living quarters. *Note: the Cultural Resources Survey was prepared by a City consultant that performed the survey from the public sidewalk only. No physical on-site inspections were conducted at that time.*
- Business license records researched. Property owner does not hold a City Business License required for multifamily properties totaling four units or more.
- Current property tax information reviewed. Property owner is paying property tax on improvements described as "multifamily" with three units.
- Code enforcement performs a cursory inspection of the property with the permission of the property owner. Eight units exist at the site. Original single family house exists at the front of the property that is divided into four units. A detached garage is at the rear of the property that has been converted into two residential units. Two additional unit appears to be an illegally converted patio enclosure (the exterior walls



are thin and light is visible from the interior rooms between the bottom of the walls and the concrete floor – the rooms appear to have no foundation). One of the units has a dirt floor. An additional shed-unit (unit #9) is currently being constructed (the source of the current complaint) at the rear of the converted patio enclosure unit that extends to the rear wall, illegally within the side and rear setback. Electricity is provided to the new unit via an orange electrical cord draped across the roof of the unit. Children are observed playing in the area. Two of the existing units have no toilet, shower facilities, or kitchen. No covered parking is provided anywhere on site – residents park on a dirt portion of the lot, or the public street. Laundry room has been illegally added to garage structure.

- A building inspector inspects the structures to determine whether the buildings were built in compliance with the code adopted at the time of construction. Some units have bedrooms without windows, presenting Building Code light and ventilation concerns and fire safety violations since these rooms have no second means of exit during a fire emergency. The foundation and exterior walls appear to be failing. interior support beams may be clear inconsistencies in workmanship,



methods, materials, etc. are noted as clearly in violation of the State Building Code. City inspector determines that all additions to the original single family home were illegally added and that they are potentially unsafe to the occupants and surrounding properties.

- Original complainant is questioned by staff. Complainant indicates that five units have existed on the property since 1959, but that the owner was “a good neighbor” so complainant didn’t want to cause problems. Original owner sold property last year and retired out of state. Complainant heard new owner adding the additional unit #9 at the rear of the property so complaint was filed.

*Again*, once the structure is determined to have been illegally established, and the construction methodology, materials or workmanship are not consistent with the requirements of the Building Code in effect at the time of construction, the owner would be required to correct the violation. Upgrades may be determined necessary to support the safe use of an illegally established nonconforming structure. The owner would be required to submit plans and documentation to make the nonconforming structure safe for habitation or occupancy for the intended use. This documentation is typically in the form of reports or plans prepared and certified by a licensed building design professional (e.g. architect, structural engineer, etc.). Compliance with zoning requirements may also be required.

The California Building Code mandates that health and safety issues associated with the illegal use of the structure be corrected. Left uncorrected, the violations could pose legal liabilities upon the City or more importantly would leave the building's occupants and surrounding residents or businesses at significant risk. Thus, the property owner must provide sufficient documentation as determined by the Director of Community Development and Building Official to determine that an illegal structure is safe for habitation or occupancy for the intended or modified use (as may be approved by the City) as previously described above.

A similar approach is utilized in researching potentially unauthorized uses or lots. Along with the property owner, staff would perform significant research that can include business license and/or property tax information, business transaction receipts, utility statements, dated historic and aerial photographs, even historic telephone books can be used to establish a history of a use or lot.

## CONCLUSION |

All legal nonconforming structures, uses or lots were lawfully established under the codes at the time, but due to the adoption of a new ordinance or map revision, the property no longer conforms to the policies and standards of the code in which the property resides. A structure, use or lot that is out of conformance with the adopted code is *not* considered to be nonconforming when it has been illegally established.

The spirit of the City's nonconforming provisions is to allow nonconformities to continue to exist, but not increase. With the exception of qualified historic resources, intensification or expansion of an existing nonconforming use is not permitted, and is even discouraged. The legal basis for all land use regulation is the police power of a city to protect the public health, safety, and welfare of its citizens. And, the legality of City enforcement of these provisions has been tested and proven in court. Zoning laws look to the future to ensure that all nonconformities are eventually brought into conformance or replaced. Any change in the premises which tends to give permanency to or expands the nonconformance would not be consistent with this purpose.

