



CITY OF POMONA

COUNCIL REPORT

June 17, 2019

To: Honorable Mayor and Members of the City Council

From: Linda Lowry, City Manager

Submitted By: Anita D. Gutierrez, AICP, Development Services Director
Christi Hogin, Interim City Attorney

**SUBJECT: REPORT BACK ON POSSIBLE LAND USE OPTIONS PERTAINING TO
LEGAL NONCONFORMING RECYCLING FACILITIES.**

RECOMMENDATION:

1. It is recommended that the City Council review this report; and, direct staff to prepare a code amendment to the nonconforming Section of the Pomona Zoning Code to shorten the time frame in which a use can be discontinued from two years to 180 days.

EXECUTIVE SUMMARY:

This staff report is presented in response to the Council's request at the June 3, 2019 City Council meeting for staff to look into regulating options pertaining to legal nonconforming "recycling" uses. The first question, whether the time frame can be shortened after which a use can be discontinued, is answered in the affirmative with a staff recommendation that Council direct staff to proceed with a Code Amendment. The second question, when and how certain nonconforming uses can be terminated via amortization and/or nuisance abatement, is briefed as a tool for further discussion without a staff recommendation.

FISCAL IMPACT: *None*

PREVIOUS RELATED ACTION: At the June 3, 2019 City Council meeting, a report back on waste and recycling facilities brought discussion about legal nonconforming uses. Prior to adoption of the Waste and Recycling Ordinance, recycling centers were permitted in the C-IND, M-Special Industrial, M-1 and M-2 Zones. Some facilities would have required a Conditional Use Permit, if they were explicitly defined as a recycling center or were on a property of one acre in size or greater or had a building footprint of more than 20,000 square feet. However, other facilities may not have been explicitly defined as a recycling center prior to 2017, even though it may have been reasonable to infer that they were involved in the recycling goods supply chain. For instance the M-Zones allowed for the manufacturing of plastics and synthetics as a by-right use, which we would today consider part of the recycling goods supply chain. The 2017 Waste

and Recycling Ordinance addressed this issue by adding more inclusive definitions to capture the full breadth of waste and recycling uses. Facilities that were legally established prior to the implementation of the Waste and Recycling Ordinance would be considered legal non-conforming and would therefore be allowed to continue operations unless the use discontinued operation for a period of two or more years.

DISCUSSION:

A legal nonconforming use is a use that was valid when brought into existence but no longer conforms to the zoning laws after adoption of a subsequent ordinance. In short, it is a use that was legally established and rendered nonconforming by a later enacted zoning law.

The City is entitled to change its land use policy, which may include eliminating a use that was previously permitted. When such a change occurs, it creates an issue of fairness when applied to existing businesses that were made illegal by the change. The constitution protects individual property rights against uncompensated taking by the government. Land use law balances the rights of individual property owners with the interests of the public.

The public interest is to realize the community's zoning plans by having every property comply with their requirements. Nonconforming uses interfere with the benefits derived from comprehensive zoning plans. California courts have held that zoning laws may provide for the eventual termination of nonconforming uses. However, the City may not set an arbitrary deadline without regard to the deadline's financial impact on the business whose use is being eliminated.

There are three methods of terminating a nonconforming use: abandonment, amortization, abatement of a nuisance.

Abandonment. One method of phasing out non-conforming uses (**Option 1**) is through voluntary abandonment of a use or natural attrition. Similarly, if a use is destroyed by fire or other disaster such that it cannot be conducted on site, the City may require the property to be brought into compliance. Under the City Code, when a business ceases operation for a period of two years or more, any future use of the land shall be in conformity with current standards. This rule requires both the cessation of use and some proof of the property owner's intent to abandon the nonconforming use.

At the last City Council meeting, the Council expressed interest in shorting the time frame from two years to 180 days. If implemented by a conscientious effort to inform property owners, the City Council may amend the zoning code to shorten the amortization period. This would have the public benefit of more quickly bringing properties into compliance with current zoning laws.

Amortization. The other method of phasing-out nonconforming uses (**Option 2**) is through amortization. Remember that the constitution protects private property (which includes ongoing businesses) from being taken by the government in order to promote a public policy (such as a zoning law). The constitution allows the City to eliminate a use entirely by paying just compensation for the business. There is also a legal alternative to buying a business for market

value in order to eliminate its use. The City may establish an amortization period that allows the owner to realize the value of its investment before ceasing operations.

Amortization is constitutionally equivalent to paying just compensation. That means that an amortization period must be based on the investments involved in the uses that will lose their legal status. Courts that have reviewed amortization periods have evaluated whether they were reasonable by considering the amount of the investment, the present actual value, amortization for tax purposes, remaining useful life, length of lease under which use is operated, and harm to the public if the use is maintained past the amortization period.

Due process of law precludes the City from imposing a short termination period. The deadline for the eventual termination must be based on consideration of the particular facts of each use. Consequently, while the City may endeavor to establish a specific amortization period for a category of uses, the City must also afford individual businesses an opportunity to prove that a greater amount of time is necessary for that business to fully amortize its investment.

An important factor in determining the reasonableness of an amortization period is whether there are available alternative locations for the business. In cases involving the amortization of adult uses, for example, courts have upheld the deadlines where there were other available locations in the city for the adult businesses to operate. A leading case involving amortization periods upheld a five-year amortization period for a plumbing business located in a residential zone. The court considered the cost of moving, the length of notice, and the extent of the nonconformity (business use is very different than the surrounding residential uses). In contrast, a court found that five-year amortization for a planing mill¹ was unreasonably short where the investment had another 21 years of economic life, the land was suitable for industrial use, and the mill was surrounded by commercial and industrial uses.

Amortization ordinances must be carefully prepared with a fact-based analysis of the affected industry and include a meaningful appeal process to consider individual applications.

Abatement of a Nuisance. No property owner may maintain a public nuisance. A public nuisance exists where there is a tangible threat or impact to the public health and safety. **(Option 3)** Ultimately, a court decides whether a nuisance exists. This option would require a detailed inquiry into the impacts of the businesses and a legal analysis of those facts in light of existing law. Because abating a public nuisance necessarily interferes with individual investments in property, the City must proceed based on facts and afford the individual property owners an opportunity to challenge any nuisance findings. Abatement of public nuisances can be an effective way to address polluters and other businesses that have specific environmental impacts.

Prepared by:

Anita D. Gutierrez

¹A planing mill is a facility that takes cut and seasoned boards from a sawmill and turns them into finished dimensional lumber.

Development Services Director