



## Memo

To: Teton County Board of Commissioners  
From: Gary Armstrong – Planning Administrator  
Date: August 26, 2019  
RE: Planning Update

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**Non-Conforming Uses** – It has been requested that we have as a discussion item, Non-Conforming Uses (usually called “Grandfathered Uses”). This is covered in Teton County Code 8-7. A copy of that section of our code is attached. This part of our code is really pretty clear in regards to non-conforming uses, repairs, maintenance, changes in occupancy, expansion of the use, replacement, and discontinuance.

Where it is not clear in my opinion, is in establishing the baseline of the use. The Code does indicate that the baseline is for how the use was present prior to March 11, 1996. Attempting to establish the status of the use 22 years after the fact is a challenging task. As I read the code, it refers to consideration of the baseline of use in 1996, when applying for a building permit. This can be established with the use of historic images where buildings are concerned. However, for uses that may not involve buildings, it is more difficult to establish. Examples of this might include expansion of gravel operations, campgrounds, composting facilities, or recreation areas to list a few uses from the County Land Use table.

In establishing that historic baseline, there are number of issues that deserve legal consideration. What kind of evidence is there that would accurately identify that use? Does the County have authority to request records from private land owners that may indicate use? Is neighbor observation and anecdotal memory enough to establish historic use prior to the 1996 date mentioned in the Code? These are all questions worthy of consideration and identify some of the challenges in establishing that baseline use, in order to determine if the use has changed or expanded beyond what is defined in Title 8-7 of our Code.

In looking into this, I further reached out to the County’s attorney, and she suggested a variety of different options to the discussion:

*Under our present code, the nature and extent of a non-conforming use must be adjudicated by the court on a case-by-case basis. The question would most likely come up as a defense to an enforcement action. To establish a non-conforming use, the proponent and opponent would present evidence of historic use like witness testimony, photographs, permits and licenses, and other information tending to indicate what occurred on the property during the relevant time.*

*Because the County does not have a record of property uses prior to March 11, 1996, there is no baseline for code enforcement officers to determine if a use is non-conforming. This is a challenge to zoning enforcement because each case includes the potential hurdle of determining not only what is occurring on the property now, but also what was occurring on the property two decades ago.*

*The Board of County Commissioners could take responsibility for adjudicating non-conforming uses. Each property owner would be entitled to due process. To ensure due process, the county could give*

*notice to all property owners (perhaps making exceptions for lots in active PUDs or subdivisions). Each owner claiming a non-conforming use would submit a written statement with a summary of evidence to the county. The Board could review the written submissions and set contested cases for hearing (similar to the public road hearings). The Board would hear evidence from the owner and any opponents, and then make a determination on the nature and extent of the non-conforming use. The owner or opponent would have a limited time to appeal to the District Court. Such a process would be an investment of time by the Board, but would firmly establish a baseline and aid in enforcement.*

*The Board could also address this issue by amortizing the most troubling non-conforming uses. This would put an expiration date on non-conforming uses, requiring owners to obtain the necessary permits or cease use by a particular date. The Board should consult with the prosecuting attorney regarding potential takings liability resulting from this approach.*

*At minimum, the Board could consider limitations on expansion, enlargement and reconstruction. The code currently allows a non-conforming use to increase on a particular parcel, which makes the baseline a moving target.*

## CHAPTER 7

### NONCONFORMING USES

#### SECTION:

#### 8-7-1: Nonconforming Uses

8-7-1: **NONCONFORMING USES:** Any uses lawfully occupying a building or land at the effective date hereof, or of subsequent amendments hereto, which do not conform to regulations for the zoning district in which it is located shall be a nonconforming use and may be continued. Nonconforming uses are, therefore, grand fathered under provisions of this title. The following provisions apply to nonconforming uses:

- A. **REPAIRS; MAINTENANCE:** There shall be no limit on repairs of maintenance for nonconforming buildings or uses. Repairs and maintenance shall not increase the degree of nonconformity; other than to meet the provisions of law to accommodate handicap access as required by American Disabilities Act and other federal and state law.
- B. **CHANGES IN OCCUPANCY:** Changes in occupancy may be permitted in a nonconforming use, provided the new occupancy has no greater impact on the land use, traffic, noise generation, parking requirements, and similar factors that existed with the nonconforming land use prior to the change in occupancy.
- C. **EXPANSION OF NONCONFORMING USE:** Nonconforming uses may expand, but only on the lot occupied by the land use on the effective date of the zoning ordinance in effect on March 11, 1996. A building permit must be obtained prior to any expansion. Proof of lot size and existing buildings for the nonconforming use occupied on the adoption date of the zoning ordinance in effect March 11, 1996, must be submitted with the building permit by the applicant.
- D. **REPLACEMENT:** Any nonconforming building may be replaced, but only where the effect of the replacement remains similar to or lessens the adverse impact of the nonconforming land use. Replacement of nonconforming structures requires a building permit.
- E. **ABANDONMENT; DISCONTINUANCE:** Whenever a nonconforming use of land or building has been abandoned or discontinued for a period of 18 months, the use shall be deemed terminated. Use of the premises thereafter shall be in conformity with the regulations of the zoning district in which it is located.
- F. **RIGHT:** The right to a nonconforming use runs with the land, not with the owner.

**Code Enforcement** – One particular area that has been a bit troublesome is enforcement of the zoning regulations (Teton County Code Chapter 8)<sup>1</sup>. Typically, how things happen is someone will observe a land use on a property, and feel that the use is in violation of the law (zoning code). That person will contact the planning office (or other county official) and report the activity. At this point, when the Planning Office is contacted in such situations, we refer the person to the Sheriff’s Office, to report the activity. Then the person contacts the Sheriff’s office and files a report. The Sheriff’s Office then dispatches a deputy to investigate and determine if there is a violation for whatever has been reported. The investigating deputy may call the Planning Office for further clarification of the code, so they can better determine if there is a violation. Upon investigation by the Sheriff’s Deputy, they determine if they will issue a misdemeanor citation. At that point, everything is handled through the Sheriff’s Office and the judicial processes.

The Planning Office does have a “complaint form” that people may fill out. If we receive a complaint form, we pass it along to the Sheriff’s Office for investigation.

Generally, when we hear complaints, most of the people making the complaint turn down the opportunity to file a formal complaint, as many are reluctant to put their name on a complaint form. In most cases, people will say something to the effect of “I don’t want to get anyone in trouble, I just want (XYZ activity) to stop.”

At present, while the Planning Office may listen to complaints from the public, planning staff do not enforce the zoning code. Enforcement of the zoning code is treated like any other violation of state or local law, and is enforced by the Office charged and trained for law enforcement, the Sheriff’s Office.

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<sup>1</sup> Typically, we group Title 8 – Zoning, and Title 9 – Subdivision Regulations, together. When it comes to code enforcement however, we really are focused on Title 8 – Zoning Regulations. Title 9 – Subdivision Regulations are procedures that are followed in the process of dividing parcels of land into lots, either through land splits or subdivisions. Enforcement of Subdivision Regulations happens in that process, and seldom, if ever, will be relevant outside of that process.

**Current County Code Regarding Code Enforcement** – Current legal direction for enforcement of Title 8 – Zoning Regulations - in Teton County is outlined in Title 8-10. It reads:

**TITLE 8 CHAPTER 10  
ADMINISTRATION**

**SECTION:**

*8-10-1: Enforcement*

*8-10-2: Violation;*

**Penalty 8-10-1: ENFORCEMENT:** *The enforcement officer shall be appointed by the board of county commissioners and such officer shall be responsible for the enforcement of the provisions of this title.*

**8-10-2: VIOLATION; PENALTY:**

- A. **PENALTY:** *Any person, firm or corporation violating any part of the provisions of this title shall be guilty of a misdemeanor, and shall also be subject to administrative fines as provided in Section 1-4-1 of the Teton County Code. Every day or portion thereof during which any violation is committed, continued or permitted may be treated as a separate offense and punishable as such.*

In a most direct form, the Board of County Commissioners appoints a Code Enforcement Officer to enforce the Zoning Code (Title 8).

Title 8-10 references Title 1-4-1 of Teton County Code. That section reads:

**TITLE 1 CHAPTER 4  
GENERAL PENALTY**

**SECTION:**

*1-4-1: General Penalty*

*1-4-2: Application of Provisions*

*1-4-3: Liability of Officers*

**1-4-1: GENERAL PENALTY**

- A. **Infraction:** *Every offense declared to be an infraction is punishable only by a penalty not exceeding one hundred dollars (\$100.00) and no imprisonment.*
- B. **Misdemeanor:** *Except in cases where a different punishment is prescribed by the ordinances of the county, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not to exceed six (6) months or by a fine not exceeding three hundred dollars (\$300.00), or by both such fine and imprisonment, and, in addition thereto, any person so convicted shall pay such costs as the court may assess. (2001 Code)*

**1-4-2: APPLICATION OF PROVISIONS**

- A. **Application Of Penalty:** *The penalty provided in this chapter shall be applicable to every section of this code and ordinance of the county the same as though it were a part of each and every separate section or ordinance. Any person convicted of a violation of this county code or any ordinance of Teton County where any duty is prescribed or obligation imposed, or where any action which is of a continuing nature is forbidden or is declared to be unlawful, shall, unless otherwise provided, be deemed guilty of a misdemeanor. A separate offense shall be deemed committed for each day such duty or obligation*

*remains unperformed or such act continues, unless otherwise specifically provided within this county code.*

- B. Imposition Of Penalty: In all cases where the same offense is made punishable or is created by different clauses or sections of this county code, the prosecuting officer may elect under which to proceed; but not more than one recovery shall be had against the same person for the same offense; provided, that the revocation of a license or permit shall not be considered a recovery or penalty so as to bar any other penalty being enforced.*
- C. Breach Of Provisions: Whenever the doing of any act or the omission to do any act constitutes a breach of any section or provision of this county code and there shall be no fine or penalty specifically declared for such breach, the provisions of this chapter shall apply. (2001 Code)*

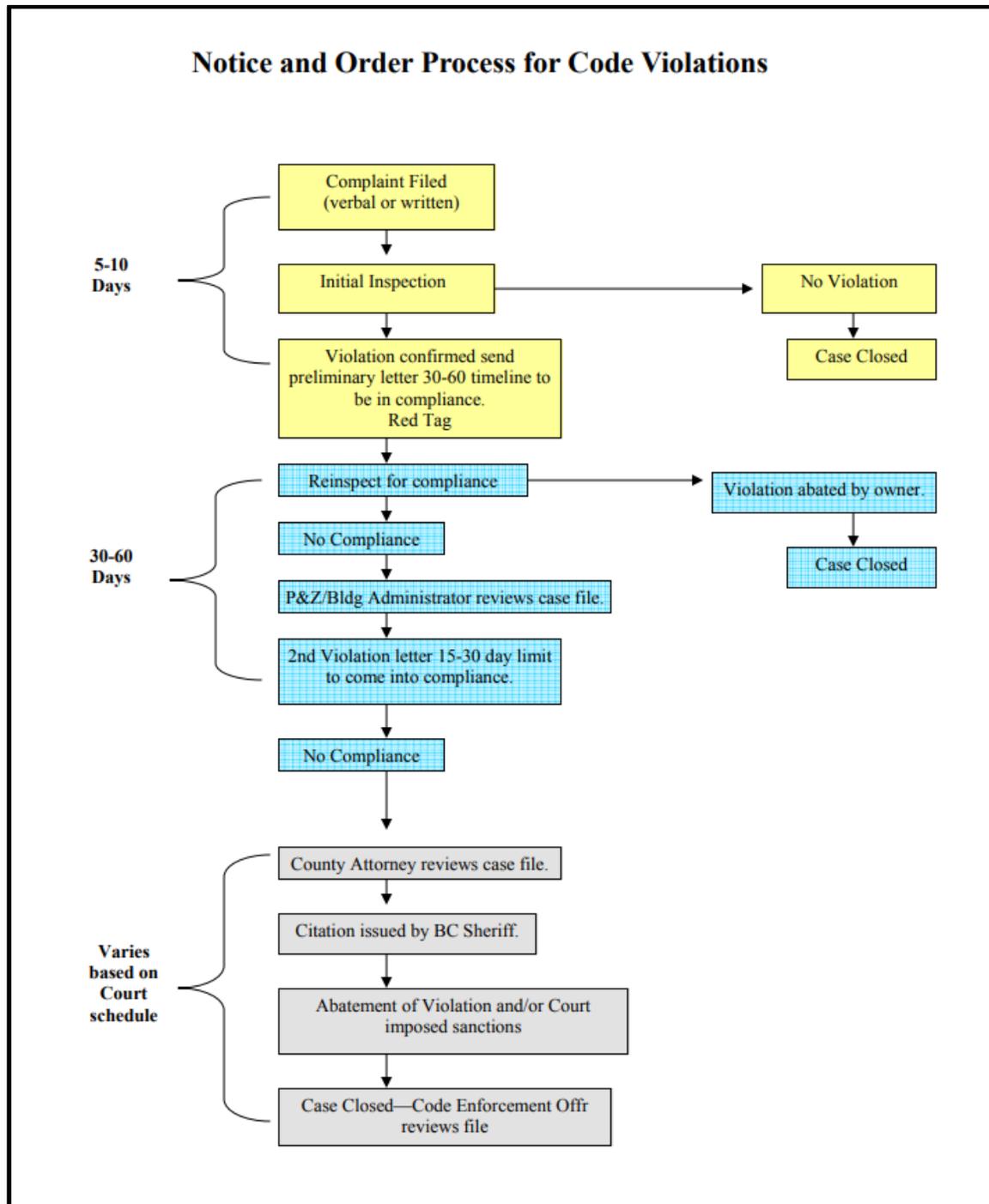
*1-4-3: LIABILITY OF OFFICERS: No provision of this county code designating the duties of any officer or employee shall be so construed as to make such officer or employee liable for any fine or penalty provided for a failure to perform such duty, unless the intention of the board of county commissioners to impose such fine or penalty on such officer or employee is specifically and clearly expressed in the section creating the duty. (2001 Code)*

In discussions with other counties from around the state, each does things a bit differently. In presentations given at a statewide planning conference last fall, it was noted that those counties that felt that they had a good handle on code enforcement had four key elements:

1. **Clear and enforceable code** – Counties most successful felt that they first had to have a very clear and objectively written zoning code that was consistent, and free of inconsistencies. They indicated that a code that is very clear and objective made it easier for the enforcement officer to determine if there was a violation. The more objective the code, the easier it was to enforce.
2. **Commitment from the Sheriff's Office** – Among the many challenges many rural counties face, the reality is that budgets are very tight, which means that law enforcement resources are stretched very thin. As such, county law enforcement can be maxed out on what might be considered greater threats to public safety. In these cases, limited law enforcement resources tend to focus attention on preventing and investigating violent crimes, responding to domestic disputes, dealing with drunk drivers, or responding to reports of violence. In other words, typical zoning complaints like barking dogs and the neighbor's outdoor lights being too bright usually take secondary priority when a deputy is called to respond to someone that is suicidal, or there is a domestic dispute, or a fatal accident occurred on the highway. Counties most successful with zoning code enforcement made a financial commitment for the Sheriff's Office to have resources sufficient to dedicate a deputy solely to zoning code enforcement.
3. **Commitment from the County Prosecutor** – Similar to the many demands placed on the Sheriff's Office, similar demands are placed on the County Prosecutor's Office. With limited resources, priority is typically placed on prosecuting issues of greater public safety. Counties most successful in zoning code enforcement were those that made the financial commitment to staffing support in the Prosecutor's office (either through employees or contracted) for zoning code enforcement.
4. **Dedicated Enforcement Officer** – Counties that were most successful had a dedicated code enforcement, trained law enforcement officer.

Each County I've talked to has seemed to find their own kind of solutions. But those that think they are most successful have these common elements.

Commissioner Riegel suggested we look at Blaine County's approach to code enforcement, and provided the following information graphic from the Blaine County Website:



With the Blaine County Approach, the Planning Office takes the lead role in the first two steps of the process. The Planning Office will receive the complaint from the reporting public, and then will conduct an initial investigation and determine if there is a violation. If they determine there is, they will send a preliminary letter to the violator, requesting that the activity end. After 30-60 days, they will re-inspect, and if the violation is still present, a second letter is issued. If there is still no compliance after that, then the file is turned over to the County Prosecutor for further enforcement.

Our County Attorney reviewed the Blaine County approach and offered the following:

*I spoke to Blaine County's prosecutor office and planning office two years ago. They have adopted a modified approach where the first offense violation is treated as civil with enforcement through the planning office. Later offenses are treated as criminal and directed to the sheriff's office. The planning office still cannot conduct the investigation that gets prosecuted. When I spoke with employees in Blaine County, they had always resolved complaints through the planning office and had not ever referred any complaints to the Sheriff's Office. So, in essence, Blaine County has adopted the civil model.*