



OFFICE OF THE CITY ATTORNEY

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TO: Mayor and Council
FROM: Charles I. Wadams, City Attorney
DATE: 06/03/2020
SUBJECT: Proposed Flood Hazard Ordinance Concerns (Proposed Ordinance No. 1016-20)

ACTION REQUIRED: Passage of the Proposed Ordinance.

RECOMMENDATION: Adoption of the Proposed Ordinance.

FISCAL IMPACT/BUDGET IMPLICATIONS: If the Proposed Ordinance is not passed, the Federal Emergency Management Agency will reportedly suspend Garden City from the National Flood Insurance Program on June 20, 2020.

BACKGROUND: Garden City has received public comment over the City's proposed flood hazard ordinance (CPAFY2018-6) (Ordinance) and its potential effects on criminal records, private property, and property rights. In particular, it has been requested that the possible misdemeanor penalty for a violation be removed because residents may not understand the ordinance or be able to comply. It has also been contended that the City "has inadequately considered the extent to which its ordinances comply with the constitutional protections afforded property owners of existing non-conforming uses and structures."

The Ordinance has been reviewed by the Design Review Committee (DRC) and the Planning and Zoning Commission (PZC). During my legal review, I noted that while the Idaho statutes referenced as authorizing local governments to adopt floodplain management ordinances was Idaho Code §§ 46-1020 through 46-1024, some of the definitions in the Ordinance did not match the definitions in Idaho Code § 46-1201. In response, Maureen O'Shea, AICP, CFM, State NFIP Coordinator, Idaho Department of Water Resources (IDWR), indicated on May 8, 2020 that some of the definitions in I.C. § 46-1021 are not compliant with the National Flood Insurance Program (NFIP). (May 8, 2020 9:45 am O'Shea email.) Ms. O'Shea indicated that her office was working on getting the definitions corrected.

Also during my legal review, I noted that the penalties in the Ordinance did not match the sanctions in I.C. § 46-1203. Therefore, the Ordinance was modified to mirror the penalties in I.C. § 46-1203. The Ordinance was also modified to provide for some exemptions based on concerns from both the City and the public. Staff received comments regarding the Ordinance from Ms. O'Shea and Suzanne Sarpong, PE, CFM, Floodplain Management Specialist, Federal Emergency Management Agency (FEMA) on May 8,

2018. (May 8, 2020 12:00 pm O'Shea email.) In response to modifications made by staff to the Ordinance, Ms. O'Shea indicated I.C. § 46-1023 was not compliant with NFIP, and that NFIP prohibits any exemptions. (May 13, 2020 3:42 pm O'Shea email.) Ms. O'Shea relies on Title 44 of the Code of Federal Regulations 60.3(b) for the proposition that exemptions are prohibited.

Based on recommendations by the DRC and PZC, comments from the public, and legal review, the Ordinance had received some modifications before review by the City Council. On May 11, 2020, the modified Ordinance was considered by the City Council. The Council deliberated and discussed the need for clarification from the City Attorney's Office on certain items. A motion to have the first reading by title only was passed, and the City Clerk read the Ordinance by title only. The second reading of the Ordinance is on the City Council Meeting Agenda for May 26, 2020.

Thereafter, I began emailing Ms. O'Shea some questions. On May 19, 2020, Ms. O'Shea indicated that there must be a penalty for non-compliance and typically, the penalty is a fine and not a criminal offense. (May 19, 2020 1:27 pm O'Shea email.) Ms. O'Shea also indicated that Garden City Development Services Director, Jenah Thornborrow, was provided two model ordinances (the Idaho State version & FEMA's version), and that either language is acceptable. Ms. O'Shea has also indicated that the NFIP communities adopting the new Flood Insurance Rate Maps (FIRMs) in Ada County (Ada County, Boise, Eagle, Garden City, Meridian, and Star) are required to have violation and penalty language in their ordinances. For this proposition, Ms. O'Shea relied on Title 44 of the Code of Federal Regulations Section 60.2(e).

On May 20, 2020, Ms. O'Shea indicated that pursuant to NFIP, Development is any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations, or storage of equipment or materials. While Ms. O'Shea acknowledged that FEMA has a list of exempt activities in a publication titled Floodplain Management Regulations: A Study Guide & Desk Reference for Local Officials *FEMA-480*, she contends that FEMA has concluded the publication is obsolete. Therefore, Ms. O'Shea states that there are literally no exemptions from requiring a Floodplain Development Permit for Development Activity. (May 20, 2020 1:15 pm O'Shea email.)

When I asked if there had been any litigation regarding FEMA in relation to NFIP, Ms. O'Shea indicated that FEMA had concluded that I.C. §§ 46-1021 and 46-1022 are noncompliant codes. Apparently in 2017, FEMA threatened to suspend the entire state of Idaho from the NFIP, and provided a Memorandum of Agreement that Idaho has with FEMA. (May 20, 2020 1:15 pm O'Shea email.)

Regarding my question concerning nonconforming rights under the NFIP, Ms. O'Shea responded:

Legal non-conforming structures in the SFHA are allowed to remain until such time as they are Substantially Damaged or Substantially Improved.

Substantial Damage: damage of any origin sustained by a structure whereby the cost of restoring the structure to its before-damaged condition would equal or exceed 50 percent (50%) of its market value before the damage occurred. See definition of “substantial improvement”.

Substantial Improvement: any reconstruction, rehabilitation, addition, or other improvement of a structure, the cost of which equals or exceeds 50 percent (50%) of the market value of the structure before the “start of construction” of the improvement. This term includes structures which have incurred “substantial damage”, regardless of the actual repair work performed. The term does not, however, include either:

1. Any project for improvement of a structure to correct existing violations of state or local health, sanitary, or safety code specifications which have been identified by the local code enforcement official and which are the minimum necessary to assure safe living conditions; or
2. Any alteration of a “historic structure”, provided that the alteration will not preclude the structure’s continued designation as a “historic structure” and the alteration is approved by variance issued pursuant to this ordinance.

(May 20, 2020 1:15 pm O’Shea email.)

Regarding the wording of the current Ordinance regarding the concept of Seclusion, an agreeable definition has been determined. The City Council has requested formal guidance regarding these concerns.

ANALYSIS: Sections 8-4H-2 and 8-7A-2 of the Ordinance sets forth applicable definitions and where there are conflicts with definitions, the definitions in Sections 8-4H-2 shall be applied to this Article only. “Development” and “Development Activity” are defined as “any man-made change to improved or unimproved real estate, including but not limited to, buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations, or storage of equipment or materials” and an activity related thereto “which will necessitate a Floodplain Development Permit.” Whether a development is considered “Pre-FIRM” or “Post-FIRM” is determined by whether the “start of construction” occurred before May 15, 1980, the effective date of the initial Flood Insurance Rate Map, as provided by Sections 8-4H-2 and 8-7A-2 of the Ordinance.

Flood hazard regulations “typically contain some protection for non-conforming uses” and these regulations generally “allow routine maintenance, including modest improvements, to a structure but will require that any new construction or ‘substantial improvement’ conform with” the regulations. Patrick J. Rohan, *Zoning and Land Use Controls* § 18.04 (perm. ed., rev. vol. 2015). However, while vested rights may be protected and non-conforming uses and structures may lawfully remain in existence “in a newly discovered or newly designated floodplain, there are limits.” *Id.*

Here, as stated by IDWR, legal non-conforming structures in the SFHA are allowed to remain until such time as they are Substantially Damaged or Substantially Improved.

Section 8-4H-5B(5) of the Ordinance states that additions and improvements to a pre-FIRM structure that are not considered a substantial improvement must simply “be designed to minimize flood damages and must not be any more non-conforming” than the pre-FIRM structure. Only when the additions and improvements to the pre-FIRM structure constitute a substantial improvement does the pre-FIRM structure also have to comply with the standards for new construction. For additions and improvements to a post-FIRM structure that are not considered a substantial improvement, only the additions and improvements must comply with the standards for new construction. When the additions and improvements constitute a substantial improvement, the post-FIRM structure also must comply with the standards for new construction.

Section 8-4H-4C(4) of the Ordinance sets forth standards for the City to follow when taking action on permit applications related to existing structures. Additionally, Section 8-4H-4E of the Ordinance provides property owners with a procedure for seeking and obtaining a variance from the City in order to lawfully enjoy relief from specific flood hazard regulations. Moreover, Subsections (3) and (8) contain specific factors and conditions that the City must consider before making a final decision on an application for a variance. Read together, the definitions and the other standards described above ensure that the City adequately balances the need (and mandate) to enforce flood hazard regulations with the obligation to respect individuals’ private property rights.

Properties within the regulated area, whether they are considered non-conforming or pre-FIRM, are not necessarily entitled to special treatment from the Ordinance just because they pre-date some or all of the flood hazard regulations. However, the Ordinance recognizes that these properties are protected from complete and total regulation when additions and improvements are undertaken but not substantial in nature. Moreover, property owners are empowered to seek a variance from the City when they believe strict compliance with the Ordinance would be unduly burdensome.

While the Ordinance does treat substantial improvements differently than other development activity, it did not specifically address non-conforming uses or structures. Additionally, the Ordinance does not appear to explicitly allow for or even address when a property owner may engage in maintenance without first seeking authorization or a variance from the City. Therefore, wording has been added to make this clear.

While the Idaho statutes referenced as authorizing local governments to adopt floodplain management ordinances was Idaho Code §§ 46-1020 through 46-1024, some of the definitions in the Ordinance did not match the definitions in Idaho Code § 46-1201. However, the IDWR indicates that some of the definitions in I.C. § 46-1021 are not compliant with NFIP, and it was working on getting the Idaho definitions corrected. Based on this representation, I am no longer concerned with this variance.

Additionally, the Ordinance did not match the sanctions in I.C. § 46-1203. However, IDWR represents that the City is required to have penalty language, the penalty is typically a fine and not a criminal offense, and relies on Title 44 of the Code of Federal Regulations

Section 60.2 (e). After review, I have modified the Ordinance to include multiple possible infractions and only two misdemeanors.

Furthermore, IDWR submits that NFIP prohibits any exemptions relying on Title 44 of the Code of Federal Regulations 60.3(b). After further review, which included the Memorandum of Agreement that Idaho has with FEMA, I have removed the exemptions section from the Ordinance. Regarding the concept of Seclusion, an agreeable definition has been added for the third reading of the Ordinance.

CONCLUSION: The Ordinance seems to adequately balance the City's duty to protect the public from flood hazards and its interest in recognizing private property rights. After additional information provided, I am not particularly concerned with the variances between the Ordinance and the Idaho Code. I have modified the Ordinance to include multiple possible infractions and only two misdemeanors, and removed exemptions from the Ordinance. Clarifying language is included in the Ordinance to ensure all stakeholders understand their rights and obligations under the regulations. Other minor changes have been made to the Ordinance for the third reading.