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TO: Jenah Thornborrow, Development Services Director
FROM: Charles I. Wadams, City Attorney
DATE: 04/14/2020
SUBJECT: Guidance, Proposed Flood Hazard Ordinance Concerns

BACKGROUND: Garden City has received public comment over the City's proposed flood hazard ordinance (CPAFY2018-6) and its potential effects on private property and property rights. In particular, it has 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 Planning & Zoning Commission Chairman has requested formal guidance regarding these concerns.

The abovementioned correspondence does not identify specific language in the proposed flood hazard ordinance that is concerning. However, in an effort to provide the requested guidance, specific language from the proposed ordinance is identified below.

ANALYSIS: Section 8-4H-2 of the proposed ordinance sets forth all applicable definitions. "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 versus on or after “January 12, 1979, the effective date of the initial Flood Insurance Rate Map” as provided by Section 8-4H-2 of the proposed ordinance. Development activity constitutes a “Substantial Improvement” when it involves “any reconstruction, rehabilitation, addition, or other improvement of a structure,” which is a walled and roofed building, “the cost of which equals or exceeds fifty percent [sic] (49%) of the market value of the structure before the ‘start of construction’ or the improvement,” including “structures which have incurred ‘substantial damage’, regardless of actual repair work performed,” but excluding any improvements to correct violations of applicable regulations and alterations approved by an issued variance of historic structures.

Section 8-4H-5B(5) of the proposed 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 proposed 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 proposed 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.

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. 3 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.*

For example, in *Cradduck v. Yakima County*, the Washington Court of Appeals analyzed whether a county flood hazard regulations violated substantive due process by unduly oppressing rights associated with private property that had non-conforming status. 271 P.3d 289 (Wash. Ct. App. 2012). The plaintiff owned a mobile home park, which had been recently included in the floodway identified in an updated version of the FEMA Flood Insurance Risk Map. *Id.* at 292. Subsequently, the plaintiff sought a building permit for one of the lots in the mobile home park that had been vacant since before the floodway was expanded. *Id.* at 292-93. Yakima County denied the permit on the basis that new

residential construction was prohibited in the floodway. *Id.* The plaintiff challenged the denial, arguing that it violated her substantive due process rights. *Id.* at 293.

Ultimately, the court held that the flood hazard regulations did not violate the plaintiff's substantive due process rights and therefore, the denial of the building permit was proper. *Id.* at 297-98. First, the flood hazard regulations had a legitimate public purpose because they were aimed at alleviating recurring flood damage to public and private property and protecting public health and safety. *Id.* at 295. Second, the regulations were reasonably related to the purpose because prohibiting new residential construction in the floodway solved the issue of flood damage, as there would be "less reoccurring flood damage to private property if there are fewer people living in homes in the floodway." *Id.* Finally, the regulations were not unduly oppressive on non-conforming private property rights because they "targeted a particular behavior or condition that contributed to a public problem." *Id.* at 296. Moreover, the regulations simultaneously minimized burdens on property owners in the floodway. *Id.* at 297. The plaintiff was not outright prohibited from owning and operating the mobile home park, rather, she was prohibited from constructing *new* non-conforming uses and structures. *Id.* at 298. This limited restriction was reasonable because local governments have the authority to "regulate and even, within constitutional limitations, terminate non-conforming uses." *Id.* at 296. This authority is necessary because the indefinite continuation of non-conforming uses goes against public policy considerations. *Id.*

Here, in any event, properties within the regulated area, whether they are considered non-conforming or pre-FIRM, are not necessarily entitled to special treatment or exempt from the proposed ordinance just because they pre-date some or all of the

flood hazard regulations. However, the proposed 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 proposed ordinance would be unduly burdensome.

While the proposed ordinance does treat substantial improvements differently than other development activity, it does not specifically address non-conforming uses or structures. Additionally, the proposed 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. If this is in fact addressed in the proposed ordinance, it may not be sufficiently clear in its current form.

It may be advantageous for the City to consider whether incorporating additional or clarifying language to address non-conforming uses and structures specifically related to flood hazard regulations would provide helpful guidance and clarity for all stakeholders. Further, the City may want to analyze whether providing additional parameters for maintenance and non-substantial improvements would help clarify whether and when property owners must seek authorization or a variance from the City.

CONCLUSION: The proposed flood hazard ordinance adequately balances the City's duty to protect the public from flood hazards and its interest in recognizing private property rights. However, additional or clarifying language could be included in the proposed ordinance to ensure all stakeholders understand their rights and obligations under the regulations.