

## ADMINISTRATIVE DETERMINATION

Date: August, 2010

Made By: Community Development Department and endorsed by McCall City Council on August 12, 2010

Subject: Non-Conforming Structures

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This Administrative Determination is in response to the fact that, in years past, the McCall City Code addressing non-conforming structures has been applied differently, in some cases incorrectly. The different applications have resulted from the change in personnel and a lack of published interpretation from which to operate. The intent of this determination is to provide a singular interpretation so that all future applications of the City Code for non-conforming structures will be consistent and based in an appropriate, accurate, and published interpretation. Because of the variable nature in which previous non-conforming structure situations have been handled, this determination may or may not be a departure from either the interpretation or application of the non-conforming code in the past.

The following Administrative Determination addresses non-conforming structures that violate setback requirements. Other determinations will address the other situations in which structures can be non-conforming.

### **Part I – General**

The intent of the non-conforming chapter in the McCall City Code is stated at 3.11.01(A) as follows:

*“It is the intent of this chapter to permit [non-conforming structures or portions thereof] to continue until they are removed, but not to encourage their perpetuation. It is further the intent of this chapter that nonconformities shall not be enlarged upon, expanded or extended...”*

This intent articulates the guiding principles behind the specifics of the non-conforming code sections. In all cases of indeterminacy, dispute or other non-agreement the intent of the code shall be relied upon in determining a resolution.

### **Part II – Non-conforming Repairs and Maintenance**

In accord with the above stated intent of the non-conforming portion of the City Code, non-conforming structures may be repaired in a limited fashion. Prior to understanding the details of what repairs and maintenance are allowable, it is crucial to understand some concepts. After the explanation of these

concepts, the explanation of what repairs and maintenance are allowable is noted in the “Thresholds” section.

### **Non-Conforming Structure vs. Portion of a Non-Conforming Structure**

Both MCC 3.11.03.B and 3.11.07 make reference to the non-conforming portion of a structure. That is, allowing for the portion of a structure that is violating City Code – the portion located in a setback – to be considered as a separate piece from the entire structure. This is important in considering the valuation of non-conforming structures in determining what improvements can or cannot be made.

### **Damages vs. Repairs and Maintenance**

MCC 3.11.03.B makes reference to a percentage threshold for the reconstruction of an existing non-conforming structure that has been damaged, whereas MCC 3.11.07 makes reference to a percentage threshold for the repair and maintenance of a non-conforming structure. It is critical to understand the terms “damage” and “repairs and maintenance” in understanding this code section.

The term “damage” includes natural or accidental events, such as fire, flood, lightning, or fallen snow or tree, but does not include incidental harm by the owner to a structure.

The term “repairs and maintenance” includes ordinary repairs, and repairs and replacement of nonbearing walls, fixtures (i.e. doors, windows, etc.), wiring, or plumbing.

### **Valuation of Current Replacement Costs**

MCC 3.11.03.B and MCC 3.11.07 reference the current cost of replacement for determining those improvements which are allowed or not allowed by the City Code. The current replacement cost of an entire non-conforming structure, or the replacement cost for the non-conforming portion of a structure, can be determined, as a baseline for the percentage thresholds, by two methods:

#### *Valuation Method #1*

The applicant may elect to have a qualified third party provide a written estimate detailing the costs of replacement of either the entire structure or non-conforming portion thereof; or

#### *Valuation Method #2*

The applicant may elect to have the City apply the Building Department’s cost-per-square-foot calculation from the Building Permit application process to the square footage of the non-conforming structure, or portion thereof, and utilize the resulting figure.

The current replacement cost needs to be based upon reconstruction to the current basic building codes and requirements.

## Thresholds

MCC 3.11.03.B and MCC 3.11.07 make reference to percentage thresholds which dictate certain allowable action and articulate certain prohibited action. The threshold in MCC 3.11.03.B, relating to the repair of a “damaged” non-conforming structure works in the following manner:

**If a non-conforming structure, or portion thereof, is damaged to an extent where repair would cost more than 50% of the current cost of replacement, then the structure, or portion thereof, if rebuild in conformance with the current requirements of the McCall City Code, except that the same structure may be built on the same footprint and may be modified to decrease the structure’s nonconformity.**

The requirements and stipulations noted above for the reconstruction of a damaged structure also apply in situations in which the cost of the damage is less than 50%.

The threshold in MCC 3.11.07, relating to “repairs and maintenance” works in the following manner:

**If an individual wishes to complete ordinary repairs, repairs or replace nonbearing walls, fixtures, wiring, or plumbing he/she are allowed to do so, as long as these repairs or maintenance do not exceed 10% of the current cost of replacement of the non-conforming structure, or portion thereof. This repair or replacement of the listed features may occur once every 12 months.**

“Repairs and maintenance”, as defined above, neither includes nor limits interior remodeling relating to such items as cabinets, flooring, household fixtures (i.e. faucets, lights, etc.), painting and so forth. The exception to the “damage greater than 50% of replacement cost” scenario only allows for the same structure to be built on the same footprint, and does not allow for designs that are “substantially” similar. The term “same” shall mean “identical” in all regards, including, but not limited to, location, size, material (unless potentially hazardous, i.e. asbestos, lead, etc.), and so forth, for all elements and aspects of the to-be-rebuilt structure, or portion thereof, including walls, roofs, windows, decks, doors, and so forth. This exception does not allow for the alteration of the replacement structure, or portion thereof, except for the deletion of non-conforming portions of the structure and those minimal changes necessary to accommodate the deletion(s).

## **Safety Exception**

Nothing in this Determination or the City Code shall prevent an individual from strengthening, or restoring to a safe condition, any non-conforming structure, or portion thereof. The term "unsafe" shall have a high standard for interpretation. "Strengthening" and "restoring" are terms to be narrowly construed. To understand the limitations of these terms it is important to look at their definitions. The definition of "restoring" includes:

*"to bring back to a former, original, or normal condition..."*

The definition of "strengthen" includes:

*"to make stronger; give strength to"*

These definitions imply the following, regarding the extent of construction in fixing an "unsafe" situation:

- Limiting the restoration and strengthening to only that portion of the structure that is "unsafe"
- Returning of the "unsafe" condition to its original form, material(s), or design, but not an upgrade of the "unsafe" condition to a new form, material(s), or design (except for those minimal changes necessary to meet current building code)

A report from a structural engineer or certified architect may be required to determine whether or not a structure, or portion thereof, is "unsafe". Once determined "unsafe", plans regarding the repairs to the structure will need to be submitted as a part of a building permit application. No repairs to unsafe conditions may occur without the issuance of a building permit.

The Community Development Department Administrator will determine whether the "unsafe" clause is being used to circumvent the letter or intent of the McCall City Code relating to the reconstruction of non-conforming structures and is leading to the undue perpetuation of the nonconformity in question.

## **Part III – Expansions and Enlargements of Non-Conforming Structures**

The phrase "shall not be enlarged upon, expanded upon or extended in any way", means that in no way may the dimensions of any part of the structure be increased either by length, width, or height, including any increase through the expansion of inside or outside volume dimensions of the structure. That is to say, alterations that increase any of the measurements or volume of the current non-conforming portion of the structure are prohibited.

## **Part IV – Appendix**

The three major sections relating to non-conforming structures are MCC 3.11.01, 03, and 07. They are copied, in their entirety from the McCall City Code, below:

### **3.11.01: NONCONFORMITIES; PURPOSE:**

- (A) *Within the zones established under this title or amendments that may later be adopted, there may exist lots, structures, uses of land and structures, and characteristics of use which were lawful before the effective date of the applicable regulations, but which would be prohibited, regulated, or restricted under the terms of this title or future amendment. It is the intent of this chapter to permit these nonconformities to continue until they are removed, but not to encourage their perpetuation. It is further the intent of this chapter that nonconformities shall not be enlarged upon, expanded or extended, nor be used as grounds for adding other structures or uses prohibited elsewhere in the same zone.*
- (B) *Nonconforming uses are declared by this chapter to be incompatible with permitted uses in the zones involved. A nonconforming use of land or structure, or a nonconforming use of land and structure in combination, shall not be extended or enlarged after passage of this chapter by the addition of other uses of a nature which would be prohibited in the zone.*
- (C) *To avoid undue hardship, nothing in this chapter shall be taken to prohibit completion of construction of a structure for which a building permit has been issued prior to the adoption of this title.*
- (D) *Design review (see [chapter 16](#) of this title) is required for all new construction or major exterior remodeling (in the judgment of the administrator) of a principal dwelling unit on nonconforming lots of record.*

### **3.11.03: NONCONFORMING STRUCTURES:**

*Where a lawful structure existed on the effective date of the applicable regulations, that could not be lawfully built under the terms of current regulations, by reason of restrictions on area, lot coverage, height, yards, location on the lot, or other requirements concerning the structure, such structure may be continued so long as it remains otherwise lawful, subject to the following provisions:*

- (A) *No such nonconforming structure may be enlarged or altered in a way which increases the nonconformity, but any structure or portion thereof may be altered to decrease its nonconformity.*
- (B) *Should such nonconforming structure or nonconforming portion of structure be damaged by any means to an extent of more than fifty percent (50%) of its replacement cost at time of destruction, it shall not be reconstructed except in conformity with the provisions of this title; provided, that the owner of such structure may repair or reconstruct the same structure, on the same footprint, and in the process may alter it to decrease its nonconformity, so long as:*

1. *Within eighteen (18) months after the date of such damage or destruction, the owner commences such repair or reconstruction, and diligently prosecutes the work to completion in accord with then applicable building codes; and*
  2. *No other nonconforming structure was constructed on that site during the eighteen (18) month period.*
- (C) When a nonconforming structure is moved for any reason over any distance, it shall conform to the regulations for the zone to which it is moved.*

*A nonconforming residential structure in a residential zone may be enlarged, so long as the addition to the structure conforms to all the requirements of the zone.*

**3.11.07: REPAIRS AND MAINTENANCE:**

*For any nonconforming structure containing a nonconforming or permitted use, ordinary repairs, repair or replacement of nonbearing walls, fixtures, wiring, or plumbing to an extent not exceeding ten percent (10%) of the current replacement cost of the nonconforming structure or portion of structure may be made. Nothing in this chapter shall be deemed to prevent the strengthening or restoring to a safe condition of any nonconforming structure or part thereof declared to be unsafe by the building inspector.*