



OREGON PROPERTY OWNERS ASSOCIATION

House Committee on Wildfire Recovery OPOA Testimony in Support of Senate Bill 405

April 19, 2021

Chair Clem and Committee Members:

The Oregon Property Owners Association (OPOA) submits this testimony in support of Senate Bill 405, a bill designed to provide relief to property owners who were making a legal non-conforming use on private property that was interrupted as a result of a state or local COVID-19 order or the Labor Day wildfires.

SB 405 adds a new provision to ORS Chapter 227, making it applicable to cities, and amends the non-conforming use provisions of ORS 215.130, which apply to counties. A non-conforming use is a use that was legal at the time it was enacted but would no longer be allowed under the current law. For example, a rural school that was built in the 1940's or 50's that is now in an exclusive farm use zone may be considered a non-conforming use due to changes in zoning laws that were enacted in the 1990's.

Oregon law has long protected owners of non-conforming uses. Both the legislature, most (and maybe all) cities, and the Oregon appellate courts have all worked to ensure that a person who created a lawful use should be allowed to continue that use, even if the law changes in a way that would not allow that use to be approved if it had not already been established. The principle is one of equity – to force a property owner to abandon a use because the laws change is unfair.

That does not mean, however, that non-conforming uses are favored by the law. In fact, non-conforming uses are not favored, because there has been a change in state or local policy to make the use no longer appropriate for the property. Non-conforming use law represents a balancing of two factors – the government's need to achieve compliance with the new laws versus the inequity of telling a property owner that a use that was lawfully established and in many cases has continued for decades now has to be abandoned because the law has changed. It is the balancing of those factors, in light of the COVID-19 pandemic and the recent Labor Day wildfires that SB 405 addresses.

Currently, a non-conforming use must be discontinued if the use is interrupted or abandoned. The legislature has not defined when a use has been discontinued or abandoned, but many jurisdictions use a one-year consecutive period as a rule. Using our rural school example from above, if a school district closed a rural school for at least a year, and the school was a non-conforming use, the use of the building as a school would be considered abandoned, and the school would not be allowed to reopen unless it complied with the existing law.

Some non-conforming uses do not operate continuously, however. For example, an annual festival or other gathering may only occur once each year, but if the use has occurred continuously since it was first lawfully established, it can continue to operate.

For a use that must be restored or replaced due to a fire or other natural disaster like a wildfire, flood, or earthquake, as opposed to a use that has been abandoned or discontinued for any other reason, the legislature has made it clear that the use must be re-established within one year of the date of the event.

Unfortunately, two events in 2020 have made it difficult, and in many cases impossible, to comply with the ability of property owners to re-establish uses that have been interrupted or abandoned. First, the COVID-19 pandemic and the corresponding state and local executive orders have made it illegal for some non-conforming uses, like festivals, to occur. If the festival occurred annually, and it was either prohibited from occurring due to a provision of state or local law relating to COVID-19, or the owners chose to postpone the event to avoid spreading the virus, the use could technically be considered to have been interrupted or abandoned. If the event was a regularly scheduled annual event which was cancelled for 2020, there would be an approximate two-year period between events. In most (and maybe all) cities and counties, a two-year gap between events would be considered an interruption or abandonment of the non-conforming use, meaning the use would no longer be allowed.

It is unfair to punish a property owner who postponed or canceled a lawful non-conforming use because a state or local COVID-19 order or the property owner's choice to voluntarily postpone or cancel an event to prevent the spread of the virus prohibited the non-conforming use from occurring, and the period of time between the most recent event and the next scheduled event exceeded the time set for "interruption or abandonment" of the use.

SB 405 provides that when determining whether a non-conforming use has been interrupted or abandoned, a city or county cannot count the period of time that a federal, state, or local emergency order limits or prohibits the use from occurring, or prohibits the replacement or repair of the existing use. This is fair and results in no harm to anyone.

SB 405 also provides that a property owner who lost a non-conforming home or other structure in the Labor Day wildfires may re-establish that use, notwithstanding the one-year time period for replacement or repair of the dwelling, as long as the replacement or repair is commenced on or before September 30, 2025. Given the devastation of the Labor Day wildfires to both the property owners and the local government's ability to provide needed services to those property owners, it is unrealistic to expect that all uses that were destroyed in the recent wildfires will be able to commence repairs or reconstruction within a year. SB 405 will give those property owners and local governments a break, so that cleanup can occur, insurance claims can be resolved, and needed local services restored before the repair and/or reestablishment of the use occurs. This is a just resolution for all involved, and like the other parts of SB 405, results in no harm to anyone.

Thank you for hearing this bill. We hope that you will move forward with SB 405.

Very Truly Yours,



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