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**PRACTICE REVITALIZATION**



12

A large, bold, black number '12' is superimposed over a faded, sepia-toned photograph of a modern multi-story building. The building features balconies with metal railings and a curved architectural element on the left side.

# Lending a Helping Hand: What Planners Can Do to Turn Around Distressed Properties

By Dwight H. Merriam, FAICP

“When things go wrong, you’ll find they usually go on getting worse for some time; but when things once start going right they often go on getting better and better.”

These words by C.S. Lewis have meaning for planners today, who have a role to play as turnaround agents. There are opportunities with distressed properties to turn them into beneficial uses, but in most instances some type of zoning relief will be necessary. It is axiomatic that distressed properties are likely to be older properties that are physically, functionally, and economically obsolescent in some form. Along with such obsolescence typically comes the unhappy status of being a nonconforming use. And along with that comes the inability to expand or alter the use because one or more of the dimensional requirements at the site have been exceeded or the use proposed is simply not permitted.

In short, these older, distressed properties are trapped inside zoning restrictions that preclude attempts to reposition them in the marketplace and return them to profitability. Essentially, what planners must do is figure out how to respect local plans, conform redevelopment to the neighborhood as it is and is evolving, and add enough looseness to the joints of the zoning requirements to enable the owners and developers of distressed properties to meet the market. If you have ever seen extreme jugglers—like one who juggles a running chainsaw, rock, and flaming torch—you will have a sense of how challenging, and dangerous, this can be.

The alternatives for relief are several. They start with the most conventional approaches and run to the possibility of a new type of zone, created especially for the recent credit crisis and distress in the real estate economy.

## CONVENTIONAL REZONING

Usually, the best place to start is in the world of the status quo, the as-of-right, and the zoning ordinance as it exists. If you have an underdeveloped, older group of apartments that is economically distressed and the zoning allows a higher density in a preferable layout, then an as-of-right application would be the typical first choice. The instances where this is possible are few and far between.

Seattle is one good example. It has rezoned property in distressed areas to enable more intensive development. Here is how Seattle described the situation: “. . . the neighborhood plan covers an area that has been included in a City sponsored neighborhood planning program because of the presence of economically distressed areas and support for the rezones has been demon-

strated through the neighborhood planning process . . .” (Ordinance 119796, 1999).

To get the rezoning to the more intensive use, the applicant must meet several criteria, one of which is that the planning area for the rezoning must have been “included in a City sponsored neighborhood planning program because of the presence of at least one distressed area.”

In St. Paul, Minnesota, the city amended its Comprehensive Plan to propose small-area rezoning for the Brewery/Ran-View area to create a mixed use and mixed income community on reclaimed industrial land in the middle of a historic neighborhood (Brewery/Ran-View Small Area Plan, 2000). The plan addendum includes a small, 40-acre study recommending four areas for rezonings, some of them single parcels.

➡ Allowing planned development as a conditional use can provide an incentive to bring structures and uses into conformity with an updated vision for community growth or change.



Alexander H. Merriam

## ASK THE AUTHOR JOIN US ONLINE!

Go online from January 4 to 15 to participate in our “Ask the Author” forum, an interactive feature of Zoning Practice. Dwight Merriam, FAICP, will be available to answer questions about this article. Go to the APA website at [www.planning.org](http://www.planning.org) and follow the links to the Ask the Author section. From there, just submit your questions about the article using the e-mail link. The author will reply, and Zoning Practice will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of Zoning Practice at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA Zoning Practice web pages.

### About the Authors

Dwight Merriam, FAICP, founded Robinson & Cole’s Land Use Group in 1978. He is past president of the American Institute of Certified Planners and received his Masters of Regional Planning from the University of North Carolina and his Juris Doctor from Yale.

Site-by-site rezonings to reposition distressed real estate is not an issue just for large cities. Highland, a city in southwest Illinois, is 6.4 square miles and has a population of 8,500. During a single meeting of the Combined Planning and Zoning Board on March 5, 2008, three parcels were proposed for rezoning because they were distressed (CPZB minutes 030508, 2008).

### SPECIAL USE PERMIT/CONDITIONAL USE PERMIT FOR NONCONFORMING USES

A special use or conditional use permit—same thing, different name—is often a helpful avenue of escape from the constraints of the nonconforming use. These site-specific discretionary approvals can allow for limited physical expansion and even some change in use for properties that predate existing zoning. For example, a two- or three-family house that is nonconforming as to the number of units and nonconforming as to side yards and lot coverage might be allowed to expand its footprint to add a much-needed first-floor bathroom or deck to the rear of the building. Modest improvements to existing nonconforming properties can assist in keeping them from becoming obsolescent and strengthen them economically.

Salt Lake City, for example, permits planned development as a conditional use where one criterion for approval is “[e]limination of blighted structures or incompatible uses through redevelopment or rehabilitation” (City Code Section 21A.54.150.A.8). The code’s decision-making requirements direct that the planning commission should consider whether the use will “[i]mprove the character of the area by

encouraging reinvestment and upgrading of surrounding properties” (City Code Section 21A.54.080.B.4.e).

Similarly, such site-specific discretionary approvals can be applied to distressed properties to reposition them. Criteria for the application of the distressed properties special use permit might include location in a designated area and evidence that the current size, layout, or use is uneconomic. Economic hardship is never a basis for a variance, but it can be for a special use permit. In Apache County, Arizona, if there is economic hardship from restrictions in use in the Reserve Overlay Zone, there may be relief by allowing any use allowed anywhere subject to the granting of a conditional use (Zoning Ordinance Section 504.03.1). Speaking of variances . . .

### VARIANCES

Variances are the Swiss Army Knife of land-use permitting. Intended by the drafters of the Standard State Zoning Enabling Act (1921, published 1924) to save regulations from constitutional attack when an individual property was rendered valueless, they have instead become the easy way out of many ordinary zoning limitations, except when someone challenges their issuance. Seldom can the applicant for a variance truly meet the practical difficulty and unnecessary hardship requirements. Most variances granted are never appealed and escape scrutiny.

Regardless, variances *have* come into play with distressed properties. In Long Beach, California, a property owner recently requested a variance to a side yard

➔ Rezoning, variances, and special permits, when used carefully, can be effective tools to help rehabilitate nonconforming structures.



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➔ Floating flexible development overlay districts can be a helpful tool to facilitate assembly of distressed properties.



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### Springettsbury Township, Pennsylvania

Springettsbury Township has adopted a flexible development overlay district—a floating zone—to enable assembly of distressed properties to facilitate redevelopment. It was adopted as part of zoning regulation changes enacted in June 2007. Apparently the first use of that flexible overlay district was in the fall of 2007 when Rite Aid applied for approval to assemble four properties, one of them developed with a Jiffy Lube and the three others vacant (Garman, 2007).

Here is the purpose section of the regulations:

The Flexible Development District (F-D) is hereby established as a district in which regulations are intended to permit and encourage flexibility in development to encourage reinvestment and redevelopment. In promoting such development, the specific intent of this article is to allow for the use of vacant and under-utilized lands and buildings through the use of flexible development and redevelopment standards; sustainable development practices, including compatible architectural design; environmental performance standards, and by strictly prohibiting any use that would substantially interfere with the development, continuation or expansion of such uses within this district. (Township Code, Section 325-88)

### Los Angeles

Los Angeles has had an Adaptive Reuse Ordinance since 1999. The ordinance is intended to incentivize the conversion of underutilized commercial buildings into housing in the downtown area. Since its adoption, numerous older commercial buildings have been converted into thousands of apartments, condominiums, live-work units, artists' lofts, and so forth. The concept

setback from three feet down to zero feet in order to further the reconstruction of a nonconforming duplex. There was some discussion during the hearing as to whether the work could have been done without the variance. However, one commissioner commented that “. . . the benefit of doubt should be given especially when upgrading a distressed property.” Ultimately, the planning commission granted the variance 5–0 subject to the condition that the applicant demonstrate that a structural alternative was not possible (City Planning Commission Minutes, July 19, 2007).

Gardner, Massachusetts, in its list of distressed properties, makes a point of giving information on where to get a zoning variance (“Distressed Property List 2008”).

In Hermosa Beach, California, following the recommendations of the director of community development and the city manager, the city council upheld the denial of a variance for a banquet facility (City Council Agenda, April 26, 2005). Testimony in support of the variance included claims of the economic need. The executive director of the Hermosa Beach Chamber of Commerce and Visitors Bureau said, “. . . the business was important to the economic health of the city, because \$500,000 had gone toward sales tax since they opened . . .” In the end, the public officials all recognized that economic distress is not a basis for a variance. Commissioner Ron Pizer, speaking at the public hearing, said the “Planning Commission could not make the findings for the variance either . . .” even though the par-

cel in question was “. . . a distressed property that had been vacant for many years” (City Council Minutes, April 26, 2005).

### OVERLAY DISTRICTS

For all but the smallest communities, I prefer overlay districts because they

1. allow for great variation in the criteria for designation;
2. may vary in the size of the area;
3. are, as map amendments, usually characterized as “legislative” and as such are most easily defended; and
4. can permit site-specific determinations when coupled with a somewhat discretionary approval process, such as a special use or conditional use permit.

➔ Under the right circumstances, adaptive reuse provisions can be used to meet housing demand in urban areas with surplus and obsolete commercial or industrial properties.



Kris Morley

has been extended into other areas of the city, including Chinatown, Lincoln Heights, the Hollywood and Koreatown CRA project areas, and Central Avenue between the Santa Monica Freeway and Vernon Avenue (enabled by a specific plan for that area) (Livable Places, 2005).

Here is the purpose section for the downtown adaptive reuse area:

The purpose of this Subdivision is to revitalize the Greater Downtown Los Angeles Area and implement the General Plan by facilitating the conversion of older, economically distressed or historically significant buildings to apartments, live/work units or visitor-serving facilities. This will help to reduce vacant space as well as preserve Downtown's architectural and cultural past and encourage the development of a live/work and residential community Downtown, thus creating a more balanced ratio between housing and jobs in the region's primary employment center. This revitalization will also facilitate the development of a "24-hour city" and encourage mixed commercial and residential uses in order to improve air quality and reduce vehicle trips and vehicle miles traveled by locating residents, jobs, hotels and transit services near each other. (Municipal Code, Chapter I, Section 12.22.A.26.a)

The criteria for applying the adaptive reuse ordinance to downtown buildings include the following:

- The building was built before July 1, 1974, in accordance with existing building and zoning codes; or
- The building was built on or after July 1, 1974, but it's been sitting vacant for five years and the zoning administrator finds that it is no longer economically viable as a commercial or industrial property; or
- The building is designated a historic structure or contributes to a Historic Preservation Overlay Zone (Municipal Code, Chapter I, Section 12.22.A.26.d).

For adaptive reuse projects in industrial districts in the downtown area, the following conditions and findings are required:

- (i) Require that one or more signs or symbols of a size and design approved by the Fire Department are placed by the applicant at designated locations on the exterior of each Adaptive Reuse Project to indicate the presence of residential uses;
- (ii) Limit the occupations permitted in joint living and work quarters to the following: accountants; architects; artists and artisans; attorneys; computer software and multimedia related professionals; consultants; engineers; fashion, graphic, interior and other design-

ers; insurance, real estate and travel agents; photographers and similar occupations;

(iii) Find that the Adaptive Reuse Project complies with the standards for dwelling units, guest rooms, and joint living and work quarters set forth in Section 12.22 A.26.(i);

(iv) Find that the uses of property surrounding the proposed location of the Adaptive Reuse Project will not be detrimental to the safety and welfare of prospective residents; and

(v) Find that the Adaptive Reuse Project will not displace viable industrial uses. (Municipal Code, Chapter I, Section 12.24.X.1.b.4)

### Metropolitan Government of Nashville and Davidson County

The Metropolitan Government of Nashville and Davidson County is fortunate to have one of the country's leading land-use planners, Rick Bernhardt, FAICP, as the executive director of the Metro Planning Department. The regulations for adaptive reuse of commercial areas within the Urban Zoning Overlay District along arterial and collector streets are exemplary.

The Urban Zoning Overlay District ordinance starts with this preamble:

WHEREAS, there are existing, vacant non-residential buildings and underutilized properties along arterials and collector roadways within the Metropolitan Government of Nashville and Davidson County as shown on the Major Street Plan;

WHEREAS, residential uses would benefit existing, marginally viable commercial and retail areas by fostering pedestrian-oriented neighborhoods due to daily services, amenities, and shops being located within walking distance, if not within the same building as one lives thereby reducing traffic on local roads and interstates and in turn, improving the regional air quality by providing residential densities along major transit commercial corridors; and,

WHEREAS, encouraging residential development where growth can be easily accommodated due to the long-term capital investment by the Metropolitan Government of Nashville and Davidson County in services and infrastructure will help to preserve Nashville's single-family neighborhoods and increase Nashville's housing stock. (Ordinance BL2004-492)

The design standards are remarkably "loose":

#### 2. Design Standards.

a. All Residential Uses: The standards of this section shall apply only to a building or portion thereof converted to residential use, and any addition to an existing building for residential use, where a minimum of 40% of

the building's gross floor area is devoted to residential use, as explicitly shown on the approved final site plan under the authority of Section 17.40.170.A of this title, except as provided below for new construction. The standards of this section shall not apply to any building proposing to devote less than 40% of the gross floor area to residential uses.

b. Single-Family and Two-Family Residential Uses: Single-family and two-family uses shall be permitted only in an existing building or as part of a new mixed-use development within a single-structure.

Otherwise, all other requirements and standards established by other chapters of this title, as well as any other applicable metropolitan government, state or federal regulation, shall apply to the development and use of properties shown on the final site plan. In case of conflict between the standards of this section and other chapters of this zoning code, the provisions of this section shall control, except for Council approved plans such as planned unit developments, urban design overlay districts, and redevelopment districts. (Metropolitan Code, Section 17.16.030.E.2)

If further relief is needed, the applicant can get a special exception from the Zoning Board of Appeals, which at the same time—and this is smart—is prohibited from granting variances for projects developed under the adaptive residential standards; where the variance would involve a PUD, the ZBA must consider the Planning Commission's recommendation.

11. Alternative Design Standards. Where a proposed residential development cannot comply with the standards of this section, the applicant shall be required to submit for review by the Board of Zoning Appeals a special exception, in accordance with Sections 17.16.140 and 17.16.150 of this Title. The minimum filing fee shall be equal to a commercial application as per the adopted Board of Zoning Appeals fee schedule. In granting such approval of a special exception application, the Board shall determine that the applicant has demonstrated that the relief being requested will not be injurious to surrounding properties, nor violates the adopted General Plan. The Board shall not act on any application without first considering a recommendation from the planning department. (Metropolitan Code, Section 17.16.030.E.11)

The board shall not grant variances to the land use provisions of Section 17.08.030, the density or floor area ratio (FAR) standards of Tables 17.12.020B and 17.12.020C, nor the required size of residential lots approved by the planning commission under the authority of Section 17.12.070, (Lot averaging), Section 17.12.080, (Cluster lot option) or Section 17.36.070C (PUD), or residential development permitted by Section 17.16.030.E. Further,

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the board shall not act on a variance application within a planned unit development (PUD), urban design overlay or institutional overlay district without first considering a recommendation from the planning commission. (Metropolitan Code, Section 17.40.340)

The Metro Planning Commission, by the way, really likes overlay zones. In my review of the Zoning Code, I came across 10 other overlay districts.

- Planned Unit Development District
- Historic Overlay Districts
- Greenway Overlay District
- Floodplain Overlay District
- Airport Overlay District
- Adult Entertainment Overlay District
- Urban Design Overlay District
- Institutional Overlay District
- Impact Overlay District
- Neighborhood Landmark District
- Urban Zoning Overlay District



Alexander H. Merriam

➔ Distressed properties can be functionally obsolete simply due to changing tastes.

### Marietta, Georgia

Marietta uses a Residential Infill Development Overlay District to "[p]romote neighborhood preservation and enhancement through redevelopment of blighted, distressed and underutilized properties" (Zoning Ordinance, Section 712.11.A).

Interestingly, it combines a conventional overlay zone—the Infill Development District (IDZ)—with uses as-of-right, conditional uses approved by the planning and zoning director, special uses permitted by the board of zoning appeals, and special uses subject to city council approval. The IDZ is implemented through the Residential Infill Development Overlay District regulations.

B. *Applicability*. This district implements the Infill Development Zone (IDZ). The provisions of this district apply to all residential parcels designated within the IDZ and within designated redevelopment areas. The boundary of this district shall be shown on the Official Zoning Map of the City of Marietta and all parcels contained within the zone, which meet the eligibility section below, are able to utilize the provisions set forth in this ordinance. All land uses and development, including but not limited to buildings, driveways, parking areas, streets, buffers, tree protection/landscaping, and pedestrian/bicycle ways, shall be located and/or provided



## An approach for most communities that has proved workable is the overlay district, designating targeted areas in advance, and qualifying individual buildings and properties under definitive criteria.

for in accordance with the provisions of the zoning ordinance and land development regulations, except as modified by this chapter. (Zoning Ordinance, Section 712.11.B)

C. *Eligibility.* Properties may use the IDZ ordinance if they meet the following criteria:

- Parcels created by legal division, testamentary procedure, or laws of descent prior to April 11, 1984; and
- Parcels whose gross size is 2 acres or smaller; and
- Parcels that can and will be served by public water and sewer; and
- Parcels that have a residential zoning designation; and
- Parcels identified in the applicability section of this ordinance. (Zoning Ordinance, Section 712.11.C)

E. *Exclusions.* The following activities shall be excluded from use of the Infill Development Zone (IDZ) requirements and development review, although they may be reviewed under separate administrative procedures where noted in this section or in other sections of the Marietta Municipal Code.

- Nonresidential property. All nonresidentially zoned lots are excluded from this ordinance but shall comply with the provisions set forth in other sections of the Marietta

Municipal Code. Compliance with these provisions shall be verified through the building permit process.

- Marietta Historic Districts. Properties that are contained within a locally designated Historic District as identified on the Official Historic Map of Marietta or the Official Zoning Map of Marietta are exempt from this ordinance but shall comply with all other Municipal Codes that pertain to this property. (Zoning Ordinance, Section 712.11.E)

The regulations have additional provisions including development and architectural standards.

### CONCLUSIONS

Most distressed properties are physically, functionally, and economically obsolescent. They will almost certainly be nonconforming dimensionally and probably as to use. Repositioning these properties to restore their economic viability requires zoning relief. Conventional map changes and text amendments under the existing ordinance are possible in many cases and the as-of-right or existing discretionary approval approach frequently may work.

However, it may be necessary to create a somewhat discretionary and site-specific approach using the special use or conditional use permit. The availability of this type of relief for older, nonconforming properties may help prevent them from becoming obsolete and economically distressed by enabling modest changes in dimension, bulk, and use.

The traditional variance is always available, but may not be legally defensible in most cases.

An approach for most communities that has proved workable is the overlay district, designating targeted areas in advance, and qualifying individual buildings and properties under definitive criteria. The overlay district approach may include a quasi-discretionary, site-specific review process by incorporating the special use or conditional use permit.

A positive example of adaptive reuse is the merging of two older, commercial buildings by a modern element to create condos. iStockphoto.com/Chris Beddo; design concept by Lisa Barton.

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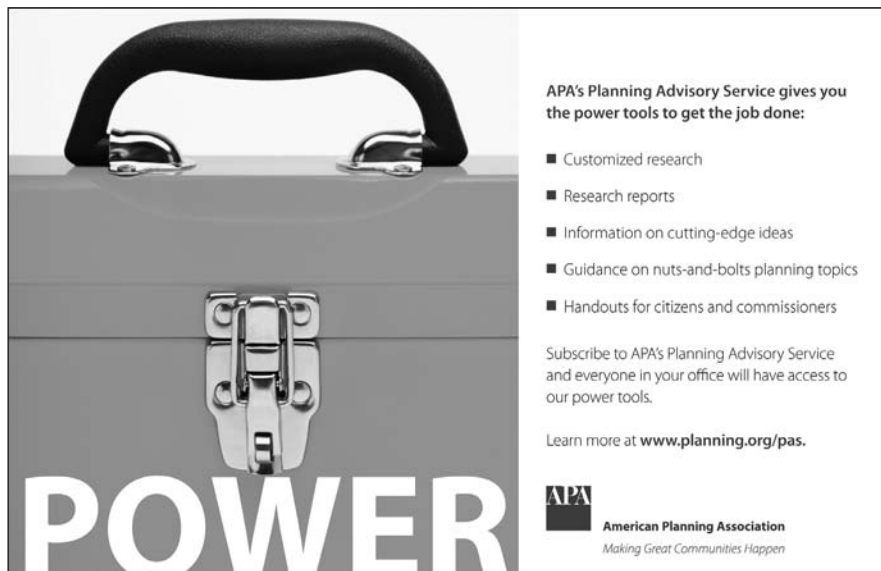
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DOES YOUR COMMUNITY  
HAVE A STRATEGY FOR  
DISTRESSED PROPERTIES?

12

