Helping Development in a Down Economy

— by Dwight H. Merriam —

Photo Illustrations By Alexander H. Merriam

How about that old aphorism, "when all you've got is lemons, make lemonade"? 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.

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 these recent times of the 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.

Permits for Nonconforming Uses

A special use or conditional use permit – same thing, different name – can provide 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 the 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 a 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.

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. 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. The applicant for a variance can seldom truly meet the "practical difficulty" and "unnecessary hardship" requirements. However, most variances that are granted are never appealed and, thus, escape scrutiny.

Variances have come into play in dealing with distressed properties. In Long Beach, California, a property owner recently requested a variance to eliminate the three-foot side-yard setback, 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."[1] Ultimately, the Planning Commission unanimously granted the variance, subject to the condition that the applicant demonstrate that a structural alternative was not possible.[2]

Gardner, Massachusetts, in its list of distressed properties, makes a point of giving information on where to get a zoning variance.[3] And 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.[4] Testimony in support of the variance included claims of economic need, supported by the Executive Director of the Hermosa Beach Chamber of Commerce and Visitors' Bureau, who "said the business was important to the economic health of the City, because $500,000 had gone toward sales tax since [it] opened...".[5] In the end, the public officials all recognized that economic distress was not a basis for a variance. One planning commissioner said the Planning Commission could not make the findings for the variance either, as "the Pavilion project had other elements, such as being a distressed property that had been vacant for many years."[6]

Overlay Districts

For other than the smallest communities, I prefer overlay districts because they:

- allow for great variation in the criteria for designation;
- may vary in the size of the area;
- are, as map amendments, usually characterized as "legislative" and, as such, are most easily defended; and
- can permit site-specific determin-

continued on page 16

Dwight H. Merriam founded Robinson & Cole's Land Use Group in 1978. He represents governments, land owners, developers, and individuals in land use matters. Dwight is a Fellow and Past President of the American Institute of Certified Planners, a former Director of the American Planning Association, Vice-Chair of the American Bar Association of State and Local Government, a Fellow of the Royal Institution of Chartered Surveyors, a Fellow of the American Bar Foundation, a Fellow of the Connecticut Bar Foundation, a Counselor of Real Estate, a member of the Anglo-American Real Property Institute, and a member of the American College of Real Estate Lawyers. He teaches land use law at the Vermont Law School, and has published five books and 200 articles. Dwight received his B.A (cum laude) from the University of Massachusetts, his Masters of Regional Planning from the University of North Carolina, and his J.D. from Yale.

> tions when coupled with a somewhat discretionary approval process, such as a special use, or conditional use, permit.

For example, Springettsbury Township, Pennsylvania, has adopted a flexible development overlay district – a floating zone – to enable assembly of distressed properties so as to facilitate redevelopment. It was adopted as part of zoning regulation changes enacted in June, 2007. The purpose section of the regulations states:

> § 325-88. Purpose. 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.[7]

Apparently, the first use of that flexible overlay district was in the fall of 2007, when a pharmacy, Rite Aid, applied for approval to assemble four properties: one of them developed with a Jiffy Lube business, and the three others vacant.[8]

The Los Angeles Approach

The City of Los Angeles, California, 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 other housing. The concept 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).[9] Here is the purpose section for the downtown adaptive reuse area:

> 26. Downtown Adaptive Reuse Projects
> (a) Purpose. 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.[10]

Eligible buildings in the downtown project area include buildings constructed in accordance with building and zoning codes in effect prior to 1974; buildings constructed after 1974 are eligible if they meet the specified criteria, including the zoning administrator's finding that the building "is no longer economically viable in its current uses or uses."[11]

In addition to the findings otherwise required, the zoning administrator is required to 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"; that the project will not displace viable industrial uses; and that the project complies with the standards for dwelling units, joint living and work quarters, and guest rooms, as set forth in the Code.[12]

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, 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.[13] The Metro Planning Commission, by the way, really likes overlay zones. In my review of the Zoning Code, I came across ten other overlay districts, including a Historic Overlay District, Greenway Overlay District, Floodplain Overlay District, Airport Overlay District, Adult Entertainment Overlay District, Urban Design Overlay District, Institutional Overlay District, Impact Overlay District, and a Neighborhood Landmark District.[14]

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.[15]

The design standards are remarkably loose, being:

> 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.[16]

If further relief is needed, alternative design standards are provided for where a proposed residential development cannot comply with the standards, and allow an applicant to seek a special exception from the Zoning Board of Appeals. That board – and this is smart – is prohibited from granting some variances and, where the variance would involve a PUD, the board must consider the Planning Commission's recommendation.[17]

A slide show in PDF from a 2004 presentation to the Metro Planning Commission, explaining how the Adaptive Reuse Ordinance works, is available online.[18]

Conclusion

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.

(Author's Note: This article was originally prepared for the ALI-ABA Land Use Institute, in August 2008.)

Notes

1. Long Beach, Ca., City Planning Commission Minutes (July 19, 2007), available at http://www.longbeach.gov/civica/filebank/blobdload.asp?BlobID=16842, or Google "Long Beach Planning Commission Minutes, July 19, 2007," and scan the hits.
2. *Id.*
3. City of Gardner, Department of Community Development and Planning, *Distressed Property List* (2006), available at http://www.gardner-ma.gov/forms/DistressedProperty.pdf.
4 . Hermosa Beach, Ca., Resolution No. 05-6389, To Deny the Conditional Use Permit and Variance for Union Cattle Company (Apr. 26, 2005).
5. Hermosa Beach, Ca., Minutes of the Regular Meeting of the City Council (Apr. 26, 2005) available at http://www.hermosabch.org/departments/cityclerk/agenmin/cca20050426/minutes.html.
6. *Id.*
7.Springettsbury Township, Pa., Zoning Ordinance 07-08, art. XX F-D, § 325-88 (2007). A copy of the ordinance is available at http://springettsbury.govoffice.com/vertical/Sites/%7B4CA0C2A3-83C3-431C-8CE2-5C40D45B8BA2%7D/uploads/%7B3A51BB12-1EA3-4674-A968-F2D3F0A4967C%7D.PDF or, to avoid this impossibly-long address, just Google "Springettsbury zoning." It's probably worth taking a look at and saving for future reference.
8. *Rite Aid gets green light for Springetts site*, The York Dispatch, Nov. 27, 2007.
9. *Los Angeles City Council Expands Adaptive Reuse Incentives*, available at http://livableplaces.org/policy/adaptive.html.
10. Los Angeles, Ca., Code, ch. I, art, 2, § 12. 22-A, 26 (2001). The entire Code is available at http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:lapz_ca or just Google "Los Angeles zoning code" and click on "planning and zoning code." A 229-page *Los Angeles Zoning Code Manual and Commentary* can be found at http://www.ladbs.org/zoning/zoning_manual.pdf. A particularly useful resource is the book, *City of Los Angeles, Adaptive Reuse Program* (Feb. 2006) at http://www.scag.ca.gov/Housing/pdfs/summit/housing/Adaptive-Reuse-Book-LA.pdf. For the downtown program, go to http://lafd.org/prevention/pdfforms/adaptive_reuse_ord.pdf, or Google, "Los Angeles downtown adaptive reuse."
11. Los Angeles, Ca., Code, ch. I, art, 2, § 12. 22-A, 26(d) (2001). According to the Los Angeles Adaptive Reuse Program book mentioned in the preceding

continued on page 38

New Twist on Housing

continued from page 37

that no alternative would serve the governmental interest with a less discriminatory effect).

17. *See* Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 573 (2d Cir. 2003).

18. *Id.*

19. *See* Mountan Side Mobile Estates P'ship, 56 F.3d at 1253.

20. 466 F.3d 1276, 1286 (11th Cir. 2006).

21. *Id.* at 1286-87.

22. As previously noted, the trial court declined the opportunity to indulge this argument, which was raised in the City's motion to dismiss, motion for summary judgment, and halftime motion for a directed verdict.

23. Dews v. Town of Sunnyvale, Tex., 109 F. Supp.2d 526 (N.D. Tex. 2000).

24. *Id.*

25. *Id.*

26. Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276, 1288 (11th Cir. 2006).

27. *See* Doe v. City of Butler, 892 F.2d 315, 320 (3rd Cir. 1989) ("every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."); *see also*, Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996) ("the exercise of discretion, whether to require a minimum of 650 square feet for an apartment of four people, as opposed to a minimum of 500 square feet or 800 square feet, is a legislative, not a judicial function").

28. *See* Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) (Seventh Circuit expressly rejects the argument that, once a racially discriminatory effect is shown, a violation of the FHA has necessarily been established); *see also*, Oti Kaga, Inc. v. South Dakota Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir. 2003); *compare* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988).

29. 272 U.S. 365 (1926); *see also*, Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (Supreme Court recognized a city's police power to protect its citizens from "the premature and unnecessary conversion of open-space land to urban uses" and the "ill effects of urbanization").

30. City of Kyle, Tex., Ordinance No. 438 (2003).

31. *See* Elliott v. City of Athens, Ga., 960 F.2d 975, 982 (11th Cir. 1992).

32. The City also challenged the plaintiffs' experts with *Daubert* motions. **ML**

Helping Development

continued from page 17

endnote, "In making this finding, the Zoning Administrator shall consider the building's past and current vacancy rate, existing and previous uses, and real estate market information." *Id.* at 30.

12. Los Angeles, Ca., Adaptive Reuse Incentive Areas Specific Plan, Ordinance No. 175,038, § 6 (2003).

13. Metropolitan Government of Nashville and Davidson County, Tenn., Ordinance No. BL2004-492 (Feb. 02, 2005), available at http://www.nashville.gov/mc/ordinances/term_2003_2007/bl2004_492.htm, or go to www.nashville.gov and search "BL2004-492."

14. Metropolitan Government of Nashville and Davidson Country, Tenn., Code, ch. 17.36, Overlay Districts (2008). The Code is available using the Online Library at www.municode.com.

15. Metropolitan Government of Nashville and Davidson County, Tenn., Ordinance No. BL2004-492 (Feb. 02, 2005).

16. *Id.* at § 2.

17. *Id.* at § 11.

18. *See* ftp://ftp.nashville.gov/web/mpc/Adaptive_Reuse_Ordinance.pdf. **ML**

Federal

continued from page 18

Feb. 27, 2008) (Explanatory Note on Evidence Rule 502).

9. *Id.*

10. For emphasis, this means that the terms of the court order would be enforceable in a subsequent proceeding against non-parties.

11. 145 Cong. Rec. S1318 (daily ed. Feb. 27, 2008) (Explanatory Note on Evidence Rule 502). **ML**

Supreme Court

continued from page 23

a traditional Title VII lawsuit, while the plaintiffs were stepping into what were usually the employer's shoes and defending the validity and use of the tests. In the end, the court found that the desire to comply with Title VII was a legitimate non-discriminatory reason, and that the City had leeway to decline to certify the tests, even when the ultimate validity of the tests, had they been used, remained uncertain.

On appeal, a three-judge panel of the Second Circuit summarily affirmed, essentially endorsing the district court's decision. The plaintiffs moved for rehearing *en banc*, which the Second Circuit denied by a 7-6 vote, with several dissenting opinions. Among their concerns, the dissenters questioned whether the district court used the correct framework, which gave a large degree of deference to the City, or whether something more akin to strict scrutiny was the appropriate standard for the City's admittedly race-conscious conduct. And assuming that compliance with Title VII could provide the basis for a compelling governmental interest, the dissenters also questioned whether the City could legally abandon its test for race-conscious reasons without a more detailed analysis of the validity of the test. What, the dissenters asked, prevented municipalities from adopting stealth quota systems based upon the mere presence of adverse impact?

A Grant of *Cert.* and a Plea for Clarity

In January, the plaintiffs' petition for certiorari was granted. Final briefs are due on March 18, and the case may be argued and decided this Term. As demonstrated by *Ricci*, hiring and promotional testing, especially in police and fire departments, continues to produce results that are legally perplexing and politically challenging. Cities continue to face the threat of litigation from either white or minority applicants (and sometimes both) each time they make a decision to test and to use (or not use) test results. Whatever the final outcome, municipalities must hope that the Supreme Court gives guidance as