

MEMORANDUM 12-028

TO: MAYOR AND COUNCIL MEMBERS

FROM: THOMAS F. KLINKNER

CC: WALT WREDE, CITY MANAGER

RE: ORDINANCE 12-10

FILE NO.: 506,742.500

DATE: FEBRUARY 17, 2012

1. Introduction.

I have been asked to respond to an email message dated February 15, 2012 from Frank Griswold that expresses concerns regarding Ordinance 12-10, which establishes the East End Mixed Use ("EEMU") zoning district. Those concerns focus on proposed HCC 21.27.020(ii), which permits in the EEMU district:

- ii. The repair, replacement, reconstruction or expansion of a single family or duplex dwelling, including a mobile home, that existed lawfully before its inclusion in the GC1, GC2 or EEMU zoning districts, notwithstanding any provision of HCC Chapter 21.61 to the contrary, provided that a mobile home may not be used to replace or expand such a dwelling.

Under AS 29.40.030(b) a municipality must adopt a comprehensive plan, and under AS 29.40.040(a) a municipality must adopt zoning regulations in accordance with a comprehensive plan.¹ These requirements are mandatory.² HCC 21.27.020(ii) is proposed in accordance with the purpose of the EEMU district under the City's 2008 Comprehensive Plan, adopted in 2010 ("Comprehensive Plan"), so my response begins with a discussion of that purpose.

¹ In adopting a comprehensive plan and zoning regulations, the City is exercising powers delegated to it by the Kenai Peninsula Borough.

² *Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals*, 904 P.2d 373, 377-79 (Alaska 1995).

2. *The EEMU District under the Comprehensive Plan.*

The Comprehensive Plan includes a Land Use Recommendations Map that designates the area proposed for rezoning to the EEMU district as "East End Mixed Use."³ The EEMU district is described among the Commercial and Mixed Use Districts as allowing "A wide variety of commercial and industrial uses with access to the marina and airport."⁴ Appendix B to the Comprehensive Plan provides more specifics regarding the EEMU district:

- **Intent** The intent of the E-MU district is to allow a wide variety of commercial, industrial, and heavy industrial uses in a district with access to the boatyard, marine services, and the airport; and **to ensure such uses, which are important to Homer's economy, continue to have a viable location.**
- **Primary Use** Mixed-use development with fewer constraints on uses than existing GC-1 and GC-2. Designed to accommodate the wide range of uses found in the area today, as well as other future uses; examples include industrial, marine-oriented, construction services (including batch plants), storage, and artist workshops. Residential and retail are allowable, but **residential/retail and commercial conflicts with be resolved in favor of commercial/industrial uses.**⁵

Consistent with the purpose of the EEMU district to ensure that commercial and industrial uses, particularly those requiring access to the boatyard, marine services and the airport, continue to have a viable location,⁶ dwellings are not permitted principal uses in the EEMU district. Excluding dwellings as permitted principal uses ensures that they will not encroach on land that should be reserved to support the community's economic growth.

3. *Nonconforming Dwellings in the EEMU District.*

This exclusion of dwellings as permitted principal uses would create a significant number of nonconforming dwelling structures in the area that is proposed for rezoning to EEMU. The Planning Department found that 52 of the total of 216 structures in the proposed EEMU district, or approximately 25%, were dwellings.⁷ According to testimony before the Council by members of the public, the prohibition of principal dwelling uses, combined with the more stringent restrictions on expanding or rebuilding

³ Comprehensive Plan, p. 4-7.

⁴ Comprehensive Plan, p. 4-5.

⁵ Comprehensive Plan, Appendix B, p. B6 (emphasis added).

⁶ Comprehensive Plan, Appendix B, p. B6.

⁷ Staff Report PL 11-35, p. 1.

nonconforming structures that the City adopted in 2008, have made it difficult for prospective purchasers of nonconforming dwellings in this area to secure financing.⁸

All nonconforming uses are not similarly situated. Most uses that are targeted to become nonconforming have nuisance attributes. This justifies zoning regulations that encourage their discontinuance. In contrast, the purpose of restricting dwellings in the EEMU district is not to eliminate them as a nuisance-type use (in fact, dwellings that are accessory to commercial or industrial uses are permitted in the district),⁹ but instead to reserve undeveloped land in the district for future commercial or industrial development. The EEMU district regulations' permission for the expansion or reconstruction of existing nonconforming dwellings is well-tailored to this purpose.

If there are other nonconforming uses that warrant treatment similar to that proposed for dwellings in the EEMU district, the Planning Commission and Council certainly could decide to treat them in the same manner. However, the existence—hypothetical or actual—of such uses does not affect the validity of the treatment of nonconforming dwellings in the EEMU district:

...a statute is not invalid merely because it might have gone further than it did. A legislature need not eliminate all evils at the same time; it may attack a problem step-by-step, starting with the worst abuses.¹⁰

The Planning Commission and Council may proceed to adopt an appropriate treatment of nonconforming dwelling uses in the EEMU district, without at the same time addressing all situations in the City where it might be appropriate to permit the expansion or reconstruction of a nonconforming use.

TFK/CMM

⁸ Principal dwelling uses also are not permitted under the present GC1 and GC2 zoning in this area.

⁹ Proposed HCC 21.27.020(hh).

¹⁰ *Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1039-1040 (Alaska 1989).