

October 24, 2018

To: Mr. Chairman and Members of the Boothbay Planning Board

From: Jean Reese-Gibson, East Boothbay

During workshop public comment last evening, I mentioned some concerns for the section in our Ordinance that I called “the substantial similarity clause” that’s directing a determination of Land Use. Although your draft is establishing standards in many areas, this section stands out to me as vulnerably vague, with no standards expressed. Determination of Land Use is the crucial starting point for Ordinance regulation, so I view a comparison that leads to this determination as extremely important to be done well and done via a consistency that evidences fair treatment to all applicants.

In our Ordinance there are no guidelines for executing this crucial comparison. I couple this with my perception that our Appeals Board recently struggled with making a substantial similarity determination and could have used some specific guidance as to what should form the basis for the comparison *specifically with regard to significant aspects of land use* – for example: manner of use, potential for number of participants in the use which goes to comparison of impact, infrastructural impact comparison, noise comparisons, and so on. A checklist of some sort not only goes toward assuring a thorough assessment, but would contribute to evidencing the comparison made – in order to evidence fair treatment given to all applicants.

To illustrate my point more completely, I’ve placed a couple of examples below. (Different towns have different issues to address in Ordinance, so please don’t be sidetracked by details that pertain to a local situation – but rather view these examples for the fact that there is a guide provided for the comparison.)

The first example, from Teller County, is detailed and thorough –in its ability to direct a board’s focus onto assessing similarity *with respect to specific Ordinance concerns*. I would not suggest we would need to be quite this detailed, but I find it good for the ground it covers.

The short and sweet one from Bremen Maine, is an attempt -- but I believe it falls short and would likely produce determinations difficult to evidence and defend.

The section written by County of Santa Clara is interesting for recognizing that although a Use may be substantially similar, that doesn’t mean it has the same impact – and their version allows for a permit that would otherwise be provided by right, to be conditioned. (Of course, upon an evidenced determination of the difference in impact.)

And finally, I press my point for the need to provide guidance within the Ordinance by including a piece by David Owen, a professor of Public Law at UNC.

Thank you all, for your consideration. (P.S. the red highlighting is mine.)

--Jean

Teller County Land Use Regulations: CHAPTER 2 ZONING

(Please excuse that the indents of the outline format didn’t remain when I copied this material below)

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D. Determination of Similar Use. The Planning Director shall determine, in writing and subject to Appeal to the Board of Adjustment, whether a proposed use not listed in these Regulations shall be allowed by right, not be allowed, or be allowed subject to an Administrative Review Use Permit, Conditional Use Permit, or Special Use Permit in one or more zone districts. In making this determination, the Planning Director shall consider the following:

1. Nature of the Primary and Any Secondary Use

a. Sales. Whether the use is retail or wholesale, for general or specific goods. Whether the goods are “soft” (by way of example **only**: general household goods, clothes, computers, books, small appliances) or “hard” (by way of example **only**: lumber or stone, major appliances and furniture, heating or plumbing systems).

b. Service. Whether the use is office-oriented (by way of example **only**: legal, accounting, consulting, medical, real estate, and government offices), or not office-oriented (by way of example **only**: excavating, hauling, installation contractors, storage services, repair services, home care giving services). If a use is not office-oriented:

(1) Whether the use requires extensive on-site storage of goods or materials and special heavy equipment; or

(2) Whether the use may require on-site storage of goods or materials and special heavy equipment; or

(3) Whether the use may require on-site storage of goods or materials but not special heavy equipment; or

(4) Whether the use requires no special on-site storage of goods or materials and no special heavy equipment.

c. Manufacturing. Whether the proposed use produces small objects or large objects; whether full assembly or value-added product is proposed; whether hazardous materials are used; the number of employees required; and input/output shipment procedures.

d. Resource Consumption or Use. Whether the proposed use is, by way of example **only**, logging, mining, or farm or ranch animal in nature; and whether the use is seasonal or year-around.

e. Recreation. Whether the use is passive enclosed (by way of example **only**: movie theater, arcade); passive open (by way of example **only**: picnicing, walking, snowshoeing); active enclosed (by way of example **only**: bowling, climbing gyms, karate); or active open (by way of example **only**: outdoor soccer, golf, rodeo).

2. Scale of Use. Whether the use is:

a. Regional Scale. (By way of example **only**: super discount store; $\pm 150,000$ to $\pm 400,000$ sq.ft.; serving a population base of $\pm 150,000$; 30 minutes driving time to the use from home).

b. Community Scale. (By way of example **only**: large supermarket; $\pm 55,000$ sq.ft.; serving a population base of $<40,000$ to $\pm 150,000$; 10 to 15 minutes driving time to the use from home).

c. Neighborhood Scale. (By way of example **only**: “mom & pop”, ± 400 to $\pm 6,000$ sq.ft.; serving a population base of $\pm 3,000$ to $<40,000$; five minutes driving time to the use from home).

d. Scale Varies. Scale is dependent on amount of resource availability (by way of example **only**: timber, mining, farm or ranch product) or nature of the use (by way of example **only**: golf course as opposed to climbing gym).

3. Location. Whether the use stands alone, is adjacent to or adjoining other existing or compatible uses, or is part of a proposed residential, shopping, industrial, or manufacturing complex; and whether the use is compatible with the intent of its zone district.

4. Parking Required and Traffic Generated. Whether the parking requirement and traffic generation is little to none, small, moderate (by way of example **only**: small retail store), or extensive (by way of example **only**: supermarket).

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5. Duration of Use. Whether the use is temporary (less than six months) or long-term (longer than six months).

6. Special Requirements. Whether the use involves hazardous materials, has the potential for pollution, creates visual impacts, may not be compatible with adjoining or adjacent or potentially adjoining or adjacent uses, may require special licensing, or otherwise has requirements needing special consideration.

7. Purpose and Goals. Whether the use proposed meets the following criteria:

(1) Purpose of the Zone District. The proposed use sustains the purpose/s for which the zone district has been created.

(2) Public Goals. The proposed use does not sacrifice legitimate public goals, including the protection of adjoining or adjacent landowners, or require undue limitation on the ability of landowners to use their land in a manner consistent with the goals, objectives and policies of all applicable legislatively adopted Teller County master plan(s) or map(s).

<http://www.co.teller.co.us/CDS/Planning/LandUseRegs/CH%2002%20zoning%20ADOPTED07-22-2010.pdf>

Land Use Ordinance of the Town of Bremen, Maine

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2. USES REQUIRING A CEO PERMIT: Uses substantially similar to those requiring a CEO Permit, but that are not listed in the Schedule of Uses, may be permitted by the CEO.

3. USES REQUIRING A PLANNING BOARD PERMIT: Uses substantially similar to those requiring a Planning Board Permit, but that are not listed in the Schedule of Uses, may be permitted by the Planning Board.

4. SUBSTANTIALLY SIMILAR: In determining whether a proposed use is substantially similar, the CEO or Planning Board shall consider the requirements of this Ordinance and decide if that use does not materially affect the applicable requirements of this Ordinance or raise issues that need consideration by the Town.

4.4. USES SUBSTANTIALLY SIMILAR TO PROHIBITED USES ARE PROHIBITED Uses substantially similar to any uses listed as a Prohibited Use in the Schedule of Uses shall be prohibited.

<http://www.bremenmaine.org/wp-content/uploads/2012/06/Land-Use-Ordinance-For-The-Town-Of-Bremen-Maine.pdf>

County of Santa Clara California

1. Uses not listed. The zoning administrator may deem a use to be a permitted use that is not listed on the table of uses if such use is substantially similar in nature and intensity to at least one listed permitted use, and the use is clearly compatible with both the intent of the applicable district and the applicable land use designation of the general plan. The zoning administrator shall also determine the

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nature of the permitting process, based on the nature and intensity of the use and that use to which it is substantially most similar. Where such a use technically meets the criteria for a use that is allowed by matter of right, but the intensity or impacts of the use substantially exceed that reasonably expected to be associated with the use classification, the zoning administrator may interpret the zoning ordinance to require a permit for the use.

Draft: 11/24/09

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https://www.sccgov.org/sites/dpd/DocsForms/Documents/ZonOrd_corrections_2010.pdf

**By David W. Owens, Gladys Hall Coates Professor of Public Law and Government,
University of North Carolina**

(The entire piece is concerned with unlisted Uses and is interesting to read in its entirety. This is an excerpt from: Dealing with Land Uses Not Specifically Addressed in a Zoning Ordinance: The Saga Continues)

“...Third, the courts clearly favor a provision that unlisted uses should be treated the same as the most nearly similar use as opposed to a blanket prohibition of unlisted uses. This makes attention to the first two points all the more important. But it also means a zoning ordinance should give some definition and guidance to staff as to how to evaluate the similarity of uses to avoid placing an impermissible degree of discretion in the hands of the zoning administrator. It would be helpful for the ordinance to specify the factors to be considered, such as the type, density and intensity of development, environmental effects, and the anticipated amount traffic, noise, light, vibration, odor, and other impacts on neighbors and the community.”

<https://canons.sog.unc.edu/dealing-with-land-uses-not-specifically-addressed-in-a-zoning-ordinance-the-saga-continues/>
