American Planning Association
Michigan Chapter

Making Great Communities Happen

December 2, 2015

Honorable Representative Chatfield
124 North Capitol Avenue
P.O. Box 30014
Lansing, MI 48909-7514

Dear Honorable Representative Chatfield
And Esteemed Members of the House Committee on Local Government

I am writing in opposition to House Bill No. 5041, which proposes to amend the Michigan Zoning Enabling Act, Section 208 (5), Nonconforming Uses. As the Executive Director of the Michigan Association of Planning (MAP) Chapter, I represent nearly 4,000 professional planners and local elected and appointed officials. We are the only organization in Michigan devoted exclusively to planning and zoning, and among our members are some of the top zoning experts in the state. I have conferred with many of them in recent weeks in response to the introduction of this bill, and wish to share some history on nonconforming uses, and why the Zoning Enabling Act is not the appropriate vehicle to solve the problem this bill appears to seek to address.

History, Background and Legal Foundations of Nonconforming Uses and Structures
Nonconforming use provisions date back to the first zoning ordinance in America which was adopted in New York City in 1916. Even 100 years ago, Legislators realized that courts would never uphold zoning without protecting nonconforming uses (buildings, structures or vacant land). This was done to protect a property owners' investment by not mandating immediate removal or compliance with a new ordinance provision that created a nonconforming use. Instead, a use, building or structure was and still is permitted to continue until its useful life has expired, or it is voluntarily brought into compliance with current ordinance requirements.

Dozens of Michigan appellate court decisions have consistently said that a nonconforming use may continue *"in the same manner and to the same extent"* as existed when it was created. This is consistent with court opinions across the country.

There are very few provisions in zoning enabling acts that are more similar across the 50 states than those related to nonconforming uses. After thousands of court cases, the basic provisions remain the same because the intent of the original provisions are clear and simple, and because changing them will grant ***a special right to a single class of landowners that does not exist for any other landowner.*** In this case the special class is *rental property owners.* Legislators across the country have been very careful NOT to make such a change because

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doing so would undermine the integrity and protection of nonconforming use provisions for all other landowners AND because legislators may see a stream of other classes of landowners / land uses coming to request special treatment for them at a later time.

What HB 5041 proposes to do is to radically change existing nonconforming use law in a way that is unlike that across the country. If enacted, it would grant a special right to one class of landowners that doesn't exist for all other classes. If enacted, why wouldn't other classes of landowners come to the legislature and ask for similar special protection?

MAP opposes this bill for the following reasons:

1. It proposes special treatment for a single class of landowners that would undermine the integrity of statutory nonconforming use protections. *Effectively it gives special rights to commercial land owners of rental properties over those of adjacent non-rental property owners.*
2. It proposes to change the basic principal of nonconforming use rights that have stood the test of court cases around the nation and in Michigan for 100 years.
3. It undermines local control to make decisions based on codified local values and community norms adopted through the municipal legislative process where all citizens can participate.
4. It can have unintended consequences on individual communities and adjacent properties without adequate research on the impacts of the proposed changes.
5. Property owners have an expectation that property will develop in the manner the property is zoned. This proposed change to the law is unfair to conforming properties.
6. Zoning consistency stabilizes property values and is a major reason landowners support zoning.
7. If a community or rental property owners have specific problems with nonconforming rental properties, they can probably be adequately dealt with through amendments to the local housing codes or rental ordinances, and in extreme cases with adjustments to special use provisions related to rental units in the local zoning ordinance. Changing the Michigan Zoning Enabling Act to address this issue is like killing a mosquito with a sledge hammer, only we don't know what the final impact will be if the sledge hammer bounces back.

IMPORTANT Distinctions Between Nonconforming Uses and Nonconforming Structures

A *nonconforming use* is a broad term that encompasses buildings or structures, AND the use of those buildings or structures, or of vacant land. A nonconforming use (building, structure or vacant land) pre-exists the zoning ordinance or an amendment to the ordinance. By statute (Michigan Zoning Enabling Act), it is allowed to continue into the future if the ordinance is changed after it is established. A building could be nonconforming because it is too high, too wide, too long, or because it does not meet yard setback requirements, or because the uses the building is put to are not permitted in the district in which it is located. A lot could be nonconforming because it does not meet the minimum lot area, width or depth requirements.

Nonconforming use provisions are generally NOT found in regulations adopted to protect the public health, safety and general welfare (aka police power regulations). Normally if a code provision changes, the regulated use or activity must be brought into compliance in a short period of time. *This is the case for example with health code requirements applicable to restaurants.*

But in zoning we protect this right to continue a nonconforming use because of the large investment that exists in a property that is created by a change in regulation that made the use (building or structure) nonconforming. That use can continue into the future under zoning and does not have to be brought into conformance with new ordinance requirements applicable to that use, UNLESS the building, structure or use is proposed by the owner to be changed, then it must conform with the new regulations. This is relevant because in local codes like blight ordinances, or housing codes, or rental codes, there is NO statutory requirement to protect pre-existing or nonconforming uses, like there is in zoning.

There are Other Solutions

Also, while the intent of the language in HB 5041 is unclear to MAP, a variance is probably the wrong tool to use as most communities will either require that a proposed change to a nonconforming building meet with all the applicable district requirements, OR they will require a special land use permit with additional standards that may or may not provide flexibility in adaptive reuse of the nonconforming use. While a variance from those standards is possible, it should not be a variance related to the use of the building, rather it should be related to dimensional standards (a nonuse variance). A use variance is completely different and should not be confused with a nonconforming use, or used to circumvent nonconforming use provisions.

If MAP accurately reads the intent of most of the provisions of HB 5041, they are proposed to make changes to the WRONG statute. They could instead be targeted to statutes governing local housing codes, or rental codes, but not to the Michigan Zoning Enabling Act, although solutions through other statutes too would require substantial review to ascertain impact.

MAP urges that this bill not be approved. We are available to meet with the Chair or Committee members to discuss further the likely damage passage could cause, and to potentially identify a better solution.

Sincerely,

Andrea Brown

Andrea Brown, AICP
Executive Director