



Board of County Commissioners - Staff Report

Subject: AMD2020-0002: LDR Text Amendment for Discontinued Use

Agent/Applicant: Teton County

Property Owner: n/a; County-wide

Presenter: Rian Rooney, Associate Long-Range Planner

REQUESTED ACTION

Proposal to amend the Teton County Land Development Regulations (LDRs) Section 6.1.2. Classification of Uses, pursuant to Section 8.7.1, to define the discontinuance of a use and to exempt cessation of use due to the following:

- certain government actions,
- natural disaster,
- catastrophic events such as fire or pandemic that are not the result of a willful act of the owner,
- and time spent maintaining, altering, replacing, or expanding a structure or site devoted to the use.

BACKGROUND/DESCRIPTION

PROJECT DESCRIPTION

The arrival of the COVID-19 pandemic has meant that many businesses have not been able to operate as they would typically. Planning Department Staff recognized that this unexpected and uncontrollable pause in normal business operations could have implications for use permits throughout Teton County, many of which have expiration terms tied to the discontinuance of operations for a year or more. To prevent use permits from unintended expiration due to these and other circumstances, staff is proposing the addition of a standard in Section 6.1.2. Classification of Uses to define "Discontinuance of Use." This definition will clarify when a use is classified as operationally discontinued, and therefore subject to possible permit expiration. Additionally, by clarifying this definition, interruption of a permitted use will not be considered a discontinuance if the interruption is due to the following conditions:

- Government action other than those described in 1.9.1.I. (County condemnation of a structure)
- Natural disasters
- Actions not considered a willful act of or not a result of action by the owner or occupant, such as pandemic;
- And time spent maintaining, altering, replacing, or expanding a structure or site devoted to the use.

The proposal of the enumerated exceptions is intended to support landowners by alleviating the burden of losing a use permit for cessation of business operations due to certain circumstances beyond their control. The COVID-19 pandemic and its impact on local business operations was the impetus for this amendment, but the addition of other exceptions can help to prevent unintended expiration of use permits due to future, unforeseen conditions like natural disasters. The exceptions comprising this proposed text amendment are consistent with existing "discontinuance" standards in the LDRs Section 1.9.3., Nonconforming Uses. By adding this proposed text amendment, the LDRs will set clear and consistent terms for defining discontinuance of a use for both nonconforming and permitted uses.

Additionally, to address the unforeseen postponement and cancellation of events permitted by existing Conditional Use Permits for Outdoor Reception Sites this year due to COVID-19, this amendment includes a recommendation from the Planning Director and Planning Commission for a temporary exception to allow these sites to roll over cancelled events impacted by the pandemic from 2020 to 2021. If approved, these rollover events will be allowed in 2021 in addition to the number of events permitted under each site's existing CUP.

EXISTING CONDITIONS

The current LDRs refer to “discontinuance of use” in a few locations throughout the text, but the term is not currently defined or elaborated within Article 6, Use Standards for uses that are permitted or allowed by right. Discontinuance is addressed within the LDRs Section 1.9.3., Nonconforming Uses, under subsection *D. Discontinuance*. This subsection describes the conditions of operational discontinuance that determine when a nonconforming use can and cannot be resumed or reestablished. The subsection lays out certain exempt conditions that may cause cessation of a use but for which discontinuance regulations will not apply. These exceptions include government actions, natural disasters, actions not considered a willful act of the owner, and time spent maintaining, altering, replacing, or expanding a structure or site devoted to the nonconforming use. These existing standards apply only to nonconformities, and there are currently no exceptions elsewhere in the LDRs for discontinuance of use.

The terms of Permit Expiration for use permits in the LDRs (Basic Use Permit, Sec. 8.4.1.; Conditional Use Permit, Sec. 8.4.2.; Special Use Permit, Sec. 8.4.3.) state that a use permit will expire if a use is operationally discontinued or abandoned for a period of one year or more. Under current regulations, permits issued with these terms would expire if operations were to stop for a year for any reason, including impacts of the COVID-19 pandemic and/or other events or conditions that are unanticipated, not the fault of the landowner or use operator, and prohibitive of continued use.

Staff performed an analysis of existing Conditional Use Permits (CUPs) in Teton County and found that there are more than 300 properties linked to one or more CUPs that were approved in the past. Of these CUPs, some are for business uses (e.g. dude ranches, bed & breakfasts, etc.) that may be especially at risk of interruption and involuntary cessation of use due to the COVID-19 pandemic.

Additionally, when CUPs are issued for Outdoor Reception Sites, they frequently include specified numbers of allowed events per year or per season. Those allowances are tied to the permit at the time of review and issuance.

LOCATION

N/A; applies County-wide.

STAFF ANALYSIS

A draft of the proposed text amendment is included as an attachment to this report.

KEY ISSUES

KEY ISSUE 1: Relationship of proposed amendment to existing use permits

A primary purpose of this amendment is to provide relief to landowners and use operators with existing use permits whose operations may be impacted by the pandemic. In crafting this text amendment, staff focused on producing language that would not only impact future permits but also would protect permits that have been previously issued. Staff believes that this proposed amendment is the most efficient process to protect prior use permits, however, the amendment to formally define discontinuance and relevant exceptions may not cover all previously issued permits, depending on specific permit language and issue date. By formally defining discontinuance of use, this regulation would cover use permits issued under the standards of the current LDRs, which refer to discontinuance in the terms of expiration. The expiration terms for a Conditional Use Permit in the current LDRs are excerpted below (emphasis added):

“Expiration

A conditional use permit shall expire one year after the date of approval except under one of the following circumstances:

- 1. The use is commenced and ***has not been operationally discontinued or abandoned for a period of one year or more;***

- 2. A physical development permit has been issued and is active for physical development needed to commence the use; or
- 3. An alternate expiration is set through the approval of the CUP.”

The proposed amendment to define discontinuance addresses the introduction of the discontinuance provision in the current LDRs. The 1978 and 1994 LDRs do not include a discontinuance provision within the expiration terms of use permits, and permits issued under these previous LDRs likely would not be impacted by the interruption of the COVID-19 pandemic. Still, this proposed amendment may not capture expiration terms for all previously issued use permits. Permits with other specified expiration terms included on the issued permit may not be covered by the addition of this definition. While not all permits may be protected with this solution, staff believes that the proposed amendment is the most efficient method to protect existing use permits from unintended expiration due to COVID-19 and other exceptional circumstances.

KEY ISSUE 2: What are the pros and cons of the proposed amendment?

Pros: Approval of this amendment defining Discontinuance of Use for permitted and allowed uses will benefit the administration of land use standards and the implementation of the Comprehensive Plan in the following ways:

- Protect existing use permit holders from inadvertent expiration of their permits due to operational limitations from the COVID-19 pandemic or future events and circumstances deemed exceptional. This should take significant burden off landowners and prevent additional costs and delays to get Conditional Use Permits reinstated through the public hearing process.
- Maintain desired community character by avoiding undue expiration of use permits that have already been issued upon finding the use compatible with the desired future character of an area.
- Align discontinuance standards for permits and conforming uses with existing discontinuance standards for nonconformities to enhance clarity and consistency of the LDRs.

Cons: The following impacts may result from approval of this amendment:

- The addition of exemptions to operational discontinuance could open opportunities for landowners with use permits that have expired due to cessation to contest that designation. Proposed standard 6.1.2.G.3. refers to actions “not considered a willful act of...the owner or occupant that can be documented as a reason for discontinuance.” While this places a requirement on the permit holder to produce proof, this standard may leave open some room for interpretation and judgement by staff. Existing county enforcement standards require landowners to demonstrate compliance, and this requirement would similarly task landowners with providing evidence to determine cause or fault.

KEY ISSUE 3: What alternative amendments were considered?

Staff considered other ways to protect use permit holders from undue expiration due to the COVID-19 pandemic. One alternative that was originally considered was to modify the expiration terms of use permits in Division 8.4. of the LDRs to include the proposed exceptions. While this solution would have changed the standards and regulations on use permits issued in the future under that effective amendment, staff does not believe that this change would apply to those permits which have previously been issued –those about which this amendment is concerned—because they are subject to the language on the issued permit. This alternative amendment, then, could work forward but not backward.

Staff also discussed placing a moratorium on use permit expirations. However, moratoria are typically instated prior to a legislative action that would allow the moratorium to expire, therefore, a moratorium would still necessitate an amendment like the one proposed.

Finally, staff considered the possibility of issuing a Planning Director interpretation stating that cessation of use due to COVID-19 will not be considered a basis for permit expiration. However, this option was eliminated based on advice from the County Attorney's Office.

KEY ISSUE 4: Additional allowance for events cancelled or postponed in 2020

As part of this amendment, staff has also been directed by the Board of County Commissioners to consider allowances for additional events in 2021 for Outdoor Reception Sites with approved CUPs. The pandemic has caused the cancellation or postponement of many outdoor events for the 2020 calendar year. Conditional Use Permits for Outdoor Reception Sites often limit the number of events allowed per season or calendar year. As a result, it is a challenge for events sites to reschedule 2020 postponements and cancellations on top of 2021 bookings and to make up some of 2020's lost revenue in 2021.

Staff believes that the best solution to provide additional event allowances is to amend all impacted CUPs. However, this is an unrealistic solution because each impacted permit must be reviewed and amended independently by the Board of County Commissioners.

To attempt to reach all impacted permitholders efficiently, the Planning Director and Planning Commission are recommending, as part of this LDR text amendment, a special exception for 2020-2021. This exception would allow Outdoor Reception Sites with CUPs which had 2020 events cancelled or postponed due to COVID-19 to host those cancelled events in calendar year 2021, in addition to the number of events allowed in 2021 by their CUPs. Because the pandemic is a one-time event, staff is recommending that this special exception not be codified in the LDR text but be filed in the Clerk's Office and remain in effect for the duration of 2020 and 2021.

Under this proposed solution, the total number of events that could possibly be held at each site between 2020 and 2021 would not exceed the total number which is currently allowed between both years. However, the distribution of events across the two years would likely be backloaded in 2021 due to the cancellations and postponements in 2020. After 2021, the existing allowances for permitted events will return to the rules stipulated by each CUP.

PLANNING COMMISSION ANALYSIS

The Planning Commission met on July 13, 2020 to discuss this LDR text amendment proposal. Planning Commissioners Esnard, Lurie, Muromcew and Mateosky were present, with Commissioner Rockey absent.

During the staff presentation, Chair Esnard sought clarification regarding the relationship of the additional recommendation of allowance for rescheduled events in 2021 to the proposed LDR text amendment. Deputy County Attorney Graham clarified that this new rule is part of the LDR text amendment but because it is a one-time occurrence, the recommendation is to not codify that rule in the LDRs and to just pass it, allowing it to expire after 2021.

Following the presentation Planning Commissioner Lurie asked for an example of how this proposal may provide an opportunity for individuals to contest the expiration of permits due to discontinuance. Mr. Rooney explained that the amendment aims to exempt discontinuance due to actions that are not willful acts of the owner or not the result of actions of the owner. While evidence of the cause of unwilful cessation would be expected whenever possible, Mr. Rooney noted that determination of will can be gray and may leave open the necessity for staff to make a judgement. He offered the example of a catastrophic fire caused by faulty electrical wiring.

Planning Commissioner Muromcew asked for confirmation that existing CUP holders would not need to go through an additional application or review to have this amendment apply to them. Mr. Rooney confirmed that this was correct. Planning Commissioner Esnard noted that this amendment addresses a current, temporary issue with a solution that addresses broader and future challenges. He also raised the question of how to apply the rule to businesses currently closed because of a willful decision by the owner, noting that the reasons for ceasing use

during this pandemic can be difficult to judge. Deputy County Attorney Graham responded that this could lead to a judgement call and individual evaluation and said that the language was not inherently broad or narrow as it related to reasons for ceasing operation. Mr. Graham suggested that the Planning Commission could make a recommendation to alter the language to broaden or narrow it.

Following public comment, Planning Commissioner Lurie expressed concerns about allowing additional events in 2021 and the potential impacts of those additional events on neighborhoods. Planning Commissioner Muromcew noted the extraordinary times and that this allowance could help struggling businesses as well as ranchers and landowners who depend on these events to maintain the viability of their open space. Planning Commissioner Esnard recognized that as currently proposed, the allowance would not produce any increase in the total number of events over the two-year period but would backload them in 2021 after a slower 2020.

The Planning Commission voted 4-0 to recommend the amendment for approval as proposed.

STAKEHOLDER ANALYSIS

PUBLIC COMMENT

Since the proposed amendment is not specific to a single site or localized area, there was no requirement for neighborhood meetings, posted notice nor neighborhood notices. This item was noticed in the legal section of the JH News and Guide as required by the LDRs.

Staff mailed notice of the proposed amendment to property owners holding Conditional Use Permits (CUPs) as a courtesy, although it was not required to do so. Staff did receive several phone calls in response to the letter sent to CUP holders, generally regarding clarification. None of the phone calls included comments opposed to the proposed text amendment.

All written public comment received as of the completion of this staff report on July 27th, 2020 is attached to this report.

LEGAL REVIEW

Graham

RECOMMENDATIONS

PLANNING DIRECTOR RECOMMENDATION

The Planning Director recommends **APPROVAL of AMD2020-0002**, as presented in the draft dated June 4, 2020, with no conditions based on the findings recommended below. The Planning Director further recommends that Outdoor Reception sites with approved CUPs, which due to the COVID-19 pandemic had cancellations and postponements of 2020 events, be permitted to host those cancelled events in 2021 in addition to their annual event allowances permitted under their CUP.

PLANNING COMMISSION RECOMMENDATION

At their July 13th, 2020 meeting, the Planning Commission voted 4-0 to recommend **APPROVAL of AMD2020-0002**, as presented in the draft dated June 4, 2020, to add a Discontinuance of Use definition to the standards of Section 6.1.2. with no conditions, being able to make the findings of Section 8.7.2 as recommended by the Planning Director, and to recommend that Outdoor Reception sites with approved CUPs, which due to the COVID-19 pandemic had cancellations and postponements of 2020 events, are permitted to host those cancelled events in the 2021 season, in addition to their annual event allowances permitted under their CUP.

PLANNING DIRECTOR & PLANNING COMMISSION RECOMMENDED FINDINGS

Pursuant to Section 8.7.1.C of the Land Development Regulations, the advisability of amending the text of these LDRs is a matter committed to the legislative discretion of the Board of County Commissioners and is not controlled by any one factor. In deciding to adopt or deny a proposed LDR text amendment the Board of County Commissioners shall consider factors including, but not limited to, the extent to which the proposed amendment:

1. Is consistent with the purposes and organization of the LDRs:

Division 1.3: Purpose and Intent: Based on the legislative discretion of the Board of County Commissioners, these LDRs are in accordance with the Jackson/Teton County Comprehensive Plan. Their purpose is to implement the Jackson/Teton County Comprehensive Plan and promote the health, safety, and general welfare of the present and future inhabitants of the community with the intent listed below.

1.3.1. *Implement the Community Vision: Preserve and protect the area's ecosystem in order to ensure a healthy environment, community, and economy for current and future generations.*

1.3.2. *Implement the Common Values of Community Character*

A. *Ecosystem Stewardship*

1. *Maintain healthy populations of all native species and preserve the ability of future generations to enjoy the quality natural, scenic, and agricultural resources that largely define our community character.*

2. *Consume less nonrenewable energy as a community in the future than we do today.*

B. *Growth Management*

1. *Direct future growth into a series of connected, Complete Neighborhoods in order to preserve critical habitat, scenery and open space in our Rural Areas.*

2. *The Town of Jackson will continue to be the primary location for jobs, housing, shopping, educational, and cultural activities.*

C. *Quality of Life*

1. *Ensure a variety of workforce housing opportunities exist so that at least 65% of those employed locally also live locally.*

2. *Develop a sustainable, vibrant, stable and diversified local economy.*

3. *Residents and visitors will safely, efficiently, and economically move within our community and throughout the region using alternative modes of transportation.*

4. *Timely, efficiently, and safely deliver quality services and facilities in a fiscally responsible and coordinated manner.*

1.3.3. *Implement the Illustration of Our Vision*

A. *Achieve the desired future character identified for each Character District.*

B. *Implement the policy objectives for each Character District.*

C. *Achieve the character-defining features identified for each Subarea.*

1.3.4. *Predictable Regulations, Incentives, and Allowances*

A. *Ensure standards are consistently applied to similar applications and circumstances.*

B. *Ensure landowners, the public, and decision-makers know the amount, location, and type of growth to expect.*

C. *Use data analysis and best practices to inform standards and implement the adaptive management philosophy of the Growth Management Program.*

1.3.5. *Coordination Between Jurisdictions*

A. *Implement the joint Town/County Vision through coordinated, supportive actions.*

B. *Maintain a common structure, format, and definitions in Town and County LDRs.*

Div. 1.4. Organization of the LDRs: These LDRs constitute the County's zoning and subdivision regulations. They have two organizing principles. Primarily, they are organized by zone in order to implement and emphasize the community's character-based planning approach. Secondarily, to provide ease of use, they are organized to answer three questions:

- *What can be built or physically developed?*
- *What uses are allowed?*
- *How can the land be developed or subdivided?*

Can Be Made. Defining discontinuance of use and relevant exceptions adds predictability and clarity for users of the LDRs, use permit holders and applicants. The provision of exceptions for circumstances causing cessation of use beyond a landowner's control can help to add stability to and maintain diversity in the local economy. It also can help to preserve community character by protecting existing local businesses from additional interruptions due to the pandemic and other disasters.

2. Improves the consistency of the LDRs with other provisions of the LDRs:

Can Be Made. Defining discontinuance of use in Article 6 improves consistency of terminology within the LDRs and adds clarity where previously discontinuance was only formally described in the nonconforming use standards. This amendment should improve consistent application of the LDRs.

3. Provides flexibility for landowners within standards that clearly define desired character:

Can Be Made. This amendment specifically adds flexibility for landowners regarding maintaining active use permits during exceptional circumstances. Conditional Use Permits which have previously been reviewed and approved, having been found to be compatible with desired future character for an area, will be allowed to remain active. The additional allowance of events in 2021 for disruptions due to the 2020 pandemic will also allow for greater flexibility and help to support businesses that help to keep rural open space viable.

4. Is necessary to address changing conditions or a public necessity and/or state or federal legislation:

Can Be Made. The unexpected, emergency circumstances related to the COVID-19 pandemic have heightened the necessity to address the expiration of use permits to protect existing businesses. The pandemic has revealed an opportunity to improve the LDRs that should be addressed to prevent the same challenges during future exceptional events.

5. Improves implementation of the Comprehensive Plan; and

Can Be Made. The Vision presented in the Comprehensive Plan integrates a balance of all three community values: ecosystem stewardship, growth management, and quality of life. Clarifications in the LDRs allow for simplified implementation of these standards. Aligning discontinuance of use regulations with the existing standards for nonconformities will help to preserve and enhance the desired community character in subareas throughout the County. The Conditional Use Permit process already provides a framework for evaluating whether a proposed use is compatible with the desired future character of an area. These clarifications in the text will protect those already vetted CUPs from expiring due to the pandemic and future uncontrollable and catastrophic circumstances.

6. Is consistent with the other adopted County Resolutions.

Can Be Made. No apparent conflict or relationship to other County Resolutions were identified by staff in this review.

ATTACHMENTS

- Draft Amendment dated June 4, 2020
- Public Comment

SUGGESTED MOTION

I move to **APPROVE AMD2020-0002**, as presented in the draft dated June 4, 2020, to add a Discontinuance of Use definition to the standards of Section 6.1.2. with no conditions, being able to make the findings of Section 8.7.2 as recommended by the Planning Director and Planning Commission. I further move to recommend that Outdoor Reception sites with approved CUPs, which due to the COVID-19 pandemic had cancellations and postponements of 2020 events, are permitted to host those cancelled events in 2021 in addition to their annual event allowances permitted under their CUP.