



BOA 20-04

TITLE: Conduct a Public Hearing to Consider/Discuss/Act on Determining an Amortization Period and Establishing a Compliance Date for the Nonconforming Concrete Batch Plant Use (TXI Operations, LP/Martin Marietta Redi-Mix) on the Property Located at 2005 South McDonald Street, McKinney, Texas

BOARD OF ADJUSTMENT CASE NUMBER: BOA 20-04

MEETING DATE: July 29, 2020

DEPARTMENT: Development Services

CONTACT: Michael Quint, Executive Director of Development Services
Rick Herzberger, Chief Building Official
Kerry Simpson, Interim Director of Code Services
Jennifer Arnold, AICP, Director of Planning

RECOMMENDED BOARD ACTION:

Staff recommends that the Board of Adjustment approve a compliance date of April 29, 2021 for the nonconforming use.

ITEM SUMMARY:

- Staff recommends that the Board of Adjustment approve and adopt a date which the nonconforming concrete batch plant use located at 2005 S. McDonald Street

must come into compliance with the requirements of the Zoning Ordinance.

- In accordance with Section 146-40(g) Amortization of Nonconforming Uses) of the Zoning Ordinance, the Board of Adjustment shall consider the following factors in determining a reasonable amortization period:
 1. The owner's capital investment in structures, fixed equipment, and other assets (excluding inventory and other assets that may be feasibly transferred to another site) on the property before the time the use became nonconforming;
 2. Any costs that are directly attributable to the establishment of a compliance date, including demolition expenses, relocation expenses, termination of leases, and discharge of mortgages;
 3. Any return on investment since inception of the use, including net income and depreciation;
 4. The anticipated annual recovery of investment, including net income and depreciation; and/or
 5. A reasonable wind-up period for the nonconforming use.
- To assist in this determination, the City entered into a professional services contract with Valuescope, Inc. to perform an Amortization Study for the concrete batch plant use located at 2005 South McDonald Street (TXI Operations, LP/Martin Marietta Redi-Mix). The Amortization Study is attached for the Board's review (Exhibit A).
- Based on the findings of this Study, it is Staff's professional opinion that a 9 month amortization period is a reasonable period of time for the owner to recoup their actual investment in the use based on the provisions and factors defined in the Zoning Ordinance. As such, Staff recommends that a compliance date of April 29, 2021 be approved and adopted by the Board of Adjustment.
- It is worth noting that, to the best of Staff's knowledge, the nonconforming batch plant use located at 2005 S. McDonald Street has not been in continuous operation since approximately July 19, 2019.

BACKGROUND INFORMATION

- In accordance with the requirements outlined in Section 146-40(g) (Amortization of Nonconforming Uses) of the Zoning Ordinance, on December 3, 2019, the City Council adopted Resolution No. 2019-12-145(R) formally requesting that the Board of Adjustment consider establishing a compliance date for a nonconforming use on the property located at 2005 South McDonald Street (TXI Operations, LP / Martin Marietta Redi-Mix).

- At the regular meeting on February 26, 2020, the Board of Adjustment unanimously voted:
 1. The continued operation of the nonconforming concrete batch plant use located at 2005 S. McDonald Street will have an adverse impact on nearby properties or the community welfare;
 2. A second public hearing should be scheduled to determine an amortization period and establish a compliance date for the nonconforming use; and
 3. A subpoena to Martin Marietta for the production of all relevant operational, financial, and procedural documents which will be used to determine an amortization period should be issued.
- The subpoena issued by the Board on February 26, 2020, was delivered to the property owner and to date, the property owner has not provided any documents as mandated by the Board's subpoena. The Subpoena Affidavit of Service, dated March 6, 2020, is attached (Exhibit B).

PUBLIC SUPPORT/OPPOSITION:

- To date, no letters of support or letters of opposition to this item have been submitted.

BOARD AUTHORITY:

Amortization of nonconforming land uses. The board shall have the authority to establish a compliance date for nonconforming uses at the request of the city council in accordance with section 146-40 (Nonconforming uses and nonconforming structures).

Sec. 146-40. - Nonconforming uses and nonconforming structures.

(g) *Amortization of nonconforming uses.*

- (1) *Request to establish compliance date.* The city council, by a simple majority vote, may request that the board of adjustment consider establishing a compliance date for a nonconforming use. Upon receiving such a request, the board shall hold a public hearing to determine whether continued operation of the nonconforming use will have an adverse effect on nearby properties or the community welfare. Notice of the public hearing shall be in the manner established in section 146-165 (4) b. If, based on the evidence presented at the public hearing, the board determines that continued operation of the nonconforming use will have an adverse impact on nearby properties, it shall call for a second public hearing to establish a compliance date for the nonconforming use.

- (2) *Factors to be considered.* The board of adjustment shall consider the following factors when determining whether continued operation of the nonconforming use will have an adverse effect on nearby properties or the community welfare:
- a. The Comprehensive Plan;
 - b. The character of the surrounding or nearby properties;
 - c. The degree of incompatibility of the use with the zoning district in which it is located;
 - d. The manner in which the nonconforming use is being conducted;
 - e. The hours of operation of the use;
 - f. The extent to which continued operation of the use may threaten public health or safety;
 - g. The environmental impacts of the use's operation, including, but not limited to, the impacts of noise, glare, dust, and odor;
 - h. The extent to which public disturbances and nuisances may be created or perpetuated by continued operation of the use;
 - i. The extent to which traffic or parking problems may be created or perpetuated by continued operation of the use; and
 - j. Any other factors relevant to the issue of whether continued operation of the use will adversely effect nearby properties.
- (3) *Determination of amortization period.*
- a. If the board of adjustment determines that continued operation of the nonconforming use has an adverse effect on nearby properties or the community welfare, it shall hold a second public hearing, in accordance with the law, to set a compliance date for the nonconforming use under a plan whereby the owner's actual investment in the use before the time that the use became nonconforming can be amortized within a definite time period. Notice of the second public hearing shall be in the manner established in section 146-165 (4)b.
 - b. The board of adjustment shall request and shall have the authority to require, through the issuance of a subpoena, the owner to produce the financial documentation and records within its possession, custody or control (collectively "documents") relating to the factors listed in subsection (3)e, below. The owner shall provide to the board such documents at least 30 days before the second public hearing.
 - c. The board of adjustment shall also have the authority to request that the owner allow the city and its representatives or experts reasonable access to, upon and about the property on which the nonconforming use in question is situated together with a reasonable amount of time to examine, photograph, videotape and inspect all aspects of the nonconforming use including, but not limited to, the property, structure,

fixtures, assets, records, architectural drawings, and all appurtenances thereto relating to the factors listed in subsection (3)e, below (collectively the "physical inspection"). The owner shall cooperate with the city to schedule a date and time period that is acceptable to both the owner and the city to provide the city such reasonable access together with a reasonable amount of time to allow for the physical inspection at least 30 days before the second public hearing.

- d. If the owner does not provide the board any requested documents or fails to cooperate with the board in allowing the city the ability to perform the physical inspection, the board of adjustment is authorized to make its determination of a compliance date based upon any reasonably available public records, comparisons to physical inspection of one or more other similar uses, as well as public or expert testimony at the hearing. Failure or refusal by owner to provide any requested documents or to provide reasonable accommodation to perform a physical inspection shall not prevent the board of adjustment from setting a compliance date. In addition, owner's failure or refusal to provide any requested documents or to provide reasonable accommodation to perform a physical inspection shall constitute the owner's waiver of any and all rights to challenge the qualifications of any witness providing testimony, opinions or evidence of any kind or nature to the board submitted to the board for its consideration in establishing a compliance date. Owner's failure or refusal to provide any requested documents or to provide reasonable accommodation to perform a physical inspection shall also result in the owner's waiver of any and all rights to challenge any evidence, information, testimony, theories, conclusions, analysis, opinions and results submitted to the board for its consideration in establishing a compliance date.
- e. The board of adjustment shall provide a compliance date for the nonconforming use under a plan whereby the owner's actual investment in the use before the time that the use became nonconforming can be amortized within a definite time period. The following factors shall be considered by the board in determining a reasonable amortization period:
 - i. The owner's capital investment in structures, fixed equipment, and other assets (excluding inventory and other assets that may be feasibly transferred to another site) on the property before the time the use became nonconforming;
 - ii. Any costs that are directly attributable to the establishment of a compliance date, including demolition expenses, relocation expenses, termination of leases, and discharge of mortgages;
 - iii. Any return on investment since inception of the use, including net income and depreciation;

- iv. The anticipated annual recovery of investment, including net income and depreciation; and/or
- v. A reasonable wind-up period for the nonconforming use.
- (4) *Compliance requirement.* If the board establishes a compliance date for a nonconforming use, the use must cease operations on that date and it may not operate thereafter unless such operations constitute a conforming use.
- (5) For the purposes of this section, "owner" means the owner of the nonconforming use at the time of the board of adjustment's determination of a compliance date for the nonconforming use.
- (h) *Decisions that cannot be immediately appealed.*
 - (1) A decision by the board of adjustment to establish a compliance date is not a final decision and cannot be immediately appealed.
 - (2) A decision by the board of adjustment that the continuing operation of a nonconforming use will have an adverse effect on neighboring property or the community welfare and a board of adjustment's decision to schedule a second public hearing to establish a compliance date are not final decisions and cannot be immediately appealed.
- (i) *Decision to deny a request for a compliance date.* A decision by the board to deny a request to establish a compliance date is final unless appealed to state court within ten calendar days in accordance with Chapter 211 of the Texas Local Government Code.
- (j) *Decision setting a compliance date.* A decision by the board of adjustment setting a compliance date is final unless appealed to state court within ten calendar days in accordance with Chapter 211 of the Texas Local Government Code.
- (k) *Setting compliance date by agreement.* Nothing in this section shall prohibit the city and the owner(s) of such nonconforming use from mutually agreeing upon a compliance date. Any such agreement shall be in writing, approved by the city council and said owner(s), fully executed and attested by all parties, and filed in the real property records of Collin County, Texas.
- (l) *Completion of structures.* Nothing contained herein shall require any change in the plans, construction, or designated use of a structure for which a building permit has been issued or a site plan approved prior to the effective date of this section, nor shall any changes be required in the plans, construction, or designated use of a structure for which a substantially complete application for a building permit was accepted by the chief building official on or before the effective date of this section, provided that the building permit shall comply with all applicable regulations on the date that the application was filed and the building permit is issued within 30 days of the effective date of these regulations.

BUILDING OFFICIAL STATEMENT:

The request has been validated, and I agree that the Board has the authority to consider establishing a compliance date, as described in the adopted Ordinance.

SUPPORTING MATERIALS:

- Exhibit A Amortization Study
- Exhibit B Subpoena Affidavit of Service

SUPPORTING MATERIALS:

[Exhibit A Amortization Study](#)

[Exhibit B Subpoena Affidavit of Service](#)