

ATKINSON • FARASYN, LLP

ATTORNEYS AT LAW

660 WEST DANA STREET

P.O. BOX 279

MOUNTAIN VIEW, CALIFORNIA 94042

TELEPHONE (650) 967-6941

FACSIMILE (650) 967-1395

MEMORANDUM

TO: Brisbane City Council

FROM: Hal Toppel, City Attorney

RE: Replacement of nonconforming residential structures in the R-3 Zone

MEETING DATE: July 13, 2009

During the City Council discussion of the Housing Element Update on June 29th, the question was raised as to whether a minimum density requirement would apply to the replacement of a single family residence located in an R-3 District that is destroyed by fire or other casualty. In other words, if the minimum density standard requires that 3 residential units be constructed on a standard 5,000 square foot lot that is zoned R-3, would the owner of a pre-existing single family dwelling on such lot be required to construct a triplex if the home is destroyed? The answer is No.

Upon adoption of a minimum density standard for the R-3 Zoning District, an existing single family residence would become a legally established nonconforming structure. Section 17.38.090 of the City's Zoning Ordinance provides that a nonconforming residential structure that is damaged or destroyed can be reconstructed. The type of reconstruction depends upon the extent of the damage. If less than 75% of the floor area is damaged, the structure must be restored to its original size and configuration. If more than 75% of the floor area is damaged, then the structure can be replaced but the new dwelling does not need to conform with the original configuration of the damaged structure. Instead, it must comply with the following conditions:

1. The total floor area of the replacement structure cannot be greater than the floor are of the original structure.
2. **The total number of dwelling units in the restored structure shall not be greater than the total number of dwelling units in the original structure. [bolding added]**
3. The front, side and rear setbacks cannot be less than the original structure.
4. No reduction can be made in the number of off-street parking spaces.
5. The new structure shall comply with all applicable building codes.

Paragraph 2 above would expressly prohibit any increase in the number of dwelling units on the same lot if the owner elects to replace the home pursuant to Section 17.38.090.

It should be noted that Section 17.38.090 is permissive rather than mandatory. The property owner "may" replace the damaged structure with another single family dwelling but is not *required* to do so. Instead, the property owner may elect to replace the damaged structure with a new triplex (having a higher market value), as allowed by the minimum density regulation applicable to the lot.