

Here is the commission's staff analysis suggesting denial of the church's appeal:

BACKGROUND INFORMATION

St. Timothy's Episcopal Church ("the Church"), located at 401 Fir Street, Brookings, Oregon, operates in the R-1-6 Single-Family Residential District under a "de facto" conditional use permit. The Church existed and was operating prior to 1989, when the Brookings Land Development Ordinance was adopted, and therefore was considered to be a legal non-conforming use at that time. (Attachments A & B - Vicinity Map/Property Photo).

In 1999, the Church applied for and was granted by the Planning Commission a "minor change" to its building (adding 392 square feet to the church building and adding 8 new parking spaces). (Attachment C – Minor Change to CUP documents)

In late 2022, the City became aware, through a variety of sources (review of the lawsuit complaint filed by the Church, the Church website) that the Church was operating a variety of services which are not typically associated with churches in residential zones. These services include a "day program", "legal clinic", and an "advocacy team/case worker assistance."

The City has also become aware of information suggesting that the number of people served by the Church's social services activities exceeds the number of church parishioners.

Confirmation that the Church was providing these "social services" was provided by Father Bernie Lindley's deposition, which was taken on April 12, 2023 as part of discovery in the lawsuit filed by the Church against the City. During the deposition, Fr. Lindley admitted the Church operates a "day program" on Mondays, Wednesdays, and Fridays from 9:00 AM until 12:00 PM.

This "day program" provides access to showers and internet services, as well as weekly HIV/HEP-C screening. Fr. Lindley also said that the Church operates a "legal" clinic for 19-20 hours per week. The Church also conducts an "advocacy team/case worker assistance" program during the same hours as the "day program" or other hours as needed. The Church has at least 6-7 paid employees for these activities, as well as several volunteers. Finally, the Church also hosts a primary health care provider one day a month. (Attachment D –

Fr. Lindley deposition excerpts)

On April 14, 2023, the Church was issued a Notice to Abate (Attachment E) for operating a variety of social services, including an outreach clinic, a day program, and an advocacy program, in violation of 17.01.040 (Compliance with code provisions in the Brookings Municipal Code (BMC)). The church was notified that, in order to avoid enforcement and potential civil penalties, it must cease the operation of these activities, which are not allowed in an R-1-6 zone.

On April 24, 2023 letter, the Church's attorney sent a letter appealing the Notice to Abate.

(NOTE: The abatement of operation of a Benevolent Meal Service without a conditional use permit is being suspended temporarily due to ongoing litigation between the church and the city. This temporary suspension of abatement of the operation of a Benevolent Meal Service without a conditional use permit may be lifted in the future. If the temporary suspension is lifted, the church will be issued a new Notice of Abatement of operation of a Benevolent Meal Service without a conditional use permit.)

AUTHORITY FOR PLANNING COMMISSION REVIEW

The BMC allows churches in the Single-Family Residential District with a conditional use permit per BMC 7.20.040.B. The BMC does not allow the operation of a “day program”, and an “advocacy program”, and a “legal clinic” in an R-1-6 Single-Family Residential District either outright or with a conditional use permit.

BMC 17.160.020 designates any violations of the Land Development Code as public nuisances that may be abated and removed under BMC 8.15.090. Failure to correct the violation could result in civil penalties of up to \$720.00 per day that the violation exists, per BMC 1.05.010.

The BMC does not provide for an objection or appeal to the City Manager on the substance of the abatement notice – it must either be appealed to municipal court, or, (as in this case) if it is a land use matter, to the Planning Commission.

BMC 8.15.090.C states that for BMC Title 17 cases (Land Development Code), “where the potential violation is a matter of ambiguity, the code enforcement officer determination of violation may be appealed to the planning commission pursuant to Chapter 17.156 BMC.”

BMC 17.156.010 provides:

“In the event of an ambiguity in this title affecting enforcement, the planning commission shall have the power to hear and decide appeals from administrative interpretations and to declare the meaning and intent, and interpret the provisions of this code. In thus resolving ambiguities, being considered in this appeal, the planning commission shall so interpret this code as to carry out BMC 17.01.020 and the expressed purpose of the zoning district involved.”

ANALYSIS, FINDINGS, AND CONCLUSIONS

The Church requests that the Planning Commission determine that the Church’s “social services” activities at its property do not violate the BMC for one or both of the following reasons:

- these activities are “typical” functions conducted by churches and are considered part of a church use, and/or
- these activities are part of the Church’s non-conforming use of the property and are allowed to continue. The analysis for each of these requests is discussed below.

Are the Day Program, Advocacy Program, and Legal Clinic typical functions conducted by churches?

In the April 24, 2023 appeal letter, the Church asserts that the Day Program, Advocacy Program, and Legal Clinic are “typical functions” conducted by churches and therefore are allowed without having to seek any permission from the City.

In support of this assertion, the letter cites news articles and web sites that discuss different types of social services offered by various churches from around the nation. It is not apparent whether any of these churches are located in residential zones or have any other similarities to the matter currently before the Planning Commission.

In addition, the attorney’s letter cites various verses of scripture to support the assertion that the types of social services offered by the Church are typically considered church functions where they occur as part of a church use.

The letter also states that typical elements of a church include providing “advice”, “referrals”, and “fellowship” to those in need, as well as providing a sanctuary for prayer and providing advice to the community.

No support is found in the attorney’s letter to show that all of the uses provided by the Church’s programs, such as showers, legal clinics, and health care are “typical” elements of a church.

The BMC does not define “church” or provide any details about what activities are typical and/or allowed for this use.

One dictionary definition of “church” is “a building for public and especially Christian worship.” See, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/church> (last visited June 14, 2023).

Another definition is similar: “a building used for public Christian worship.” See, Oxford English Dictionary, accessed via Google search on June 14, 2023.

Both of these definitions only refer to “worship,” not any other religious activities.

The City is not aware of any information suggesting that when people are seeking and obtaining social services at St. Timothy’s there is any worship/religious service being performed. The only worship or religious service at St. Timothy’s occurs on Wednesdays from 12:00 to 12:45 PM and Sundays from 10:00 to 11:30 AM (see Attachment D).

The Church has not provided adequate evidence to show that these activities are “typical” functions conducted by churches and are considered part of a church use. Are the Day Program, Advocacy Program, and Legal Clinic part of the Church’s non-conforming use?

As mentioned above, the Church existed and was operating prior to 1989, when the Brookings Land Development Ordinance was adopted. Therefore, the Church was considered to be a legal non-conforming use at that time.

BMC 17.120.010 (Continuation of a nonconforming use) provides that a lawfully preexisting use of a structure or site, which does not conform to the regulations for the district in which it is located, shall be deemed to be a lawful, nonconforming use and may be continued, subject to regulations regarding maintaining, moving, altering, or enlarging the nonconforming structure. The BMC does not contain any provisions regarding altering or increasing the activities occurring on or within the property or the nonconforming structure.

An argument can be made that the Church considered itself to have a conditional use permit in 1999, since it applied for (and was granted) a “minor change” to its building pursuant to the BMC provisions applying to conditional uses.

Whether the Church is considered to be a legal nonconforming use or a permitted conditional use is not dispositive, since the legal analysis is very similar for both.

As mentioned above, the BMC is silent regarding altering or increasing the activities occurring on or within the property or the nonconforming structure. Other cities’ codes vary, but the majority appear to allow, or at least not expressly prohibit, expansion of nonconforming uses, most commonly through a conditional-use procedure. A few do not allow any alteration that includes an expansion of the nonconforming use.

The general rule is that a reasonable increase in the intensity of a use, without physical change, is permitted. See 4 Arden H. Rathkopf & Daren A. Rathkopf, *The Law of Zoning and Planning* §51A.04[2], at 15 51A-49 (1991); 6 Patrick J. Rohan, *Zoning and Land Use Controls* §41.03[3][b], at 41-87 to 41-91 (1991).

Another way that some jurisdictions analyze requests for intensification of a nonconforming use or a conditional use is whether such intensification would have “no greater adverse impact” to the neighborhood than the existing use. See ORS 215.130 (regarding nonconforming uses on property within county jurisdiction).

In determining whether a nonconforming use has been established, and the extent of the nonconforming use, a factual determination is needed regarding what uses were in place at the Church in 1989 (when the Land Development Ordinance was adopted).

The Church has the burden of proving both that the use existed in 1989, and what the level of use was at that time. See *Lane County v. Bessett*, 46 Or App 319, (1980); *Tylka*

1. *Clackamas County*, 28 Or LUBA 417 (1994); *Fraley v. Deschutes County*, 32 Or LUBA 27, af’d, 145 Or App 484 (1996); *Smith v. Lane County*, 21 Or LUBA 228 (1991).

In the April 24, 2023, appeal letter, the Church asserts that it has continuously conducted “social services” since its establishment (prior to adoption of the Brookings Land Development Ordinance in 1989), but provides no evidence to support that assertion.

In his April 12, 2023 deposition, Fr. Lindley stated that the “advocacy program” began in “approximately” 2018. That provides evidence that at least the “advocacy program” began fairly

recently, many years after the church was established. This shows that the nonconforming use and/or unpermitted conditional use was altered and/or expanded, and the Church should have requested a conditional use permit for adding these uses. It does not appear that the Church has met its burden of proving both that its provision of “social services” existed in 1989 and/or what the level or intensity of those services was at that time. Therefore, the Church is required to abate these “social service” activities and apply for a conditional use permit to conduct such activities at the Church location.

RECOMMENDATION

Staff recommends DENIAL of APP-1-23, based on the staff report and the evidence contained in the attachments to the staff report.

Staff will prepare a FINAL ORDER to be considered at the next meeting.