

# Policy Strategy B – Non-Conforming Polluting-Use Transition Incentives

**Policy Recommendation:** Amend existing zoning ordinances or administrative policies to provide incentives and progressive regulatory actions preventing/discontinuing ongoing pollution from nonconforming polluting use after a reasonable time-period through the transition, relocation, or termination of such non-conforming use.

This recommendation has sometimes been referred to as an “amortization” policy for legal non-conforming uses.<sup>1</sup> Amortization refers to a process of gradually writing off the initial cost of an asset. In this application it references a policy approach of requiring legal non-conforming land uses in designated sensitive receptor/health vulnerability zones (see policies 1 and 2) to relocate (or wind-down operations) with reasonably sufficient time that allows the owner the ability to recover the investment in the business. Amortization periods are determined by a specific property valuation methodology. This policy is a novel but precedented (and sometimes controversial) attempt to spur the transition of nonconforming or noxious/polluting

uses proximate to residential uses.

## Key Policy issues

- Important factors of consideration include the significance of the non-conformance viz. the existent threat to public health and safety and the willingness of the owner to negotiate mitigations/changes.
- While this policy can be controversial, the use of amortization in terms of nonconforming land-uses has been upheld by courts in California, see *Sabek v. County of Sonoma*, 1987; *Metromedia v. City of San Diego*, 1980; *People v. Gates*, 1974; *City of Los Angeles v. Gage*, 1954.
- This policy can also be aided with the use of incentives and subsidies to relocate businesses away from designated zones to more compatible zones.

## Method of Application – Graduated Intervention and Enforcement

The first step after adopting the policy is to create a step-by-step/graduated incentives program to encourage the phase-out or transition of non-conforming air polluting uses.

A graduated intervention approach recognizes that zoning ordinances have historically changed, and certain established businesses may still be a desired and asset to the community. For example, if an established legal nonconforming business is a good neighbor with little or no significant impact or air pollution nuisance, they might be allowed to carry on business but if the public safety concerns are too

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<sup>1</sup> A legal non-conforming use is a “grandfathered” use that was lawfully established under previous zoning regulations, but which is no longer permitted under the current zoning.

significant and/or the owner shows no to little willingness to address these concerns sufficiently than there is a means and justification for potential termination or relocation of the use.

## **CASE STUDY - National City/San Diego County – Amortization of Non-Conforming Polluting Land Use Policy**

The City of National City's *Health and Environmental Justice Element* (adopted in 2011) was California's first EJ element. Creation of this new element arose out of local concerns over the city's long history of difficult EJ planning issues. National City has many blocks where auto body and car repair shops and other polluting industrial uses are located adjacent to residences and schools. Specifically, the neighborhood district along the I-5 has 35 autobody/painting service in its 70-block area (5 x 14 block area within 1,000 ft immediately east of I-5).

In 2006 National City adopted an amortization ordinance granting it the authority to discontinue incompatible land uses in areas with sensitive populations. The idea was also to help develop the industrial area to become a green industrial park. The focus of the policy (established in Municipal Code Sec 18.11.100.D) was on the blocks of auto body/car repair and industrial uses adjacent to residences, the freeway, the Port of San Diego, and a large industrial base releasing approximately 32,000 pounds of toxic air contaminants each year.

The policy was enacted in consideration of the health impacts of the community where 14% of the children have asthma. In the National City *Westside Plan*, 96 properties in total were identified as nonconforming and ranked (using a methodology developed by the USEPA including neighborhood impact). Out of this initial list, the city took a proactive stance to encourage and work on instituting "best practices" with the majority and identified the top-five offenders to initiate and negotiate transition "amortization" strategies.

### National City Key Policy Aspects:

- Allows the city to require a non-conforming/incompatible polluting business to leave that location
- Allows for a reasonable amount of time before the business must leave that location
- Nonconforming uses that are an imminent threat to public health or safety may be terminated immediately
- Factors considered in recommending a reasonable amount of time for a business to leave the location:
  1. The total cost of land and improvements
  2. The length of time the use has existed
  3. Adaptability of the land and improvements to a currently permitted use
  4. The cost of moving and reestablishing the use elsewhere
  5. Whether the use is significantly nonconforming
  6. Compatibility with the existing land use patterns and densities of the surrounding neighborhood
  7. The possible threat to public health, safety, or welfare; and

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8. Any other relevant factors.

## CASE STUDY – West Oakland Policies for Non-Conforming Truck Use Transition

The City of Oakland has a current amortization ordinance in place targeting scrap metal and adult entertainment uses, requiring these to be moved out of residential areas within a minimum time frame of one-year. Oakland also has a targeted graduated intervention “Deemed Approved” policy to address nuisance nonconforming uses (sections 17.156 and 17.157). This policy specifically applies to alcoholic beverage sales and hotels/rooming houses with the goal to assess the levels of non-conformity and willingness of owners to abide by stricter operating conditions against the threat of amortization. Both Oakland policies have been effective in removing identified egregious nonconforming uses in the city.

As far as addressing air pollution sources, the AB 617 [West Oakland Community Action Plan](#) (WOCAP) began outlining a pilot nonconforming use policy to address the cumulative impacts from truck repair, truck yards, truck fueling and similar truck-related businesses within or immediately adjacent to residential uses.<sup>2</sup> In West Oakland, there were three identified nonconforming truck uses within a 500 ft. residential-commercial buffer zone outside of the core industrial manufacturing zones for which this pilot policy would apply. Although this pilot non-conforming truck amortization policy has not yet been implemented, the WOCAP emphasized the intention for the city to address nonconforming uses in an “accelerated manner.” The Air District has also agreed to provide emissions data and technical support to assist in these efforts as well as to ensure that any relocated businesses do not cause exposure issues at any proposed new locations.

The proposed policy is intended to include graduated levels of intervention and enforcement action in reference to identified non-conforming truck uses:

- **“GOOD”** – Notify, update, or apply new conditions as applicable. Have them sign a good neighbor agreement. Lessen window for transfer “grandfather – status” to 6-months if the use is no longer permitted at all.
- **“BAD”** – Notify and hold a public evidentiary hearing. Provide opportunity for agreement to directly and immediately mitigate nuisance or polluting conditions within a minimum 1-year period (or a “reasonable time” as determined by hearing/Planning Commission considering specific factors).
- **“UGLY”** – Amortize within a minimum 6-month period (potential extension to 1-year with immediate mitigations put in place). Nonconforming uses that are an imminent threat to public health or safety may be terminated immediately.

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<sup>2</sup> The plan includes specific policies (#4-6) for incentivizing and study the relocation of certain polluting sources such as truck yards, refueling businesses that are currently non-conforming with zoning.