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File: Z-8595
Planner: T. Macbeth

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| TO: | CHAIR AND MEMBERS PLANNING & ENVIRONMENT COMMITTEE |
| FROM: | JOHN M. FLEMING MANAGING DIRECTOR, PLANNING AND CITY PLANNER |
| SUBJECT: | APPLICATION BY: CITY OF LONDON AMENDMENT TO ZONING BY-LAW Z.-1, SECTION 1.3 – DEEMED CONFORMITY OF USES AND COMPLIANCE WITH REGULATIONS PUBLIC PARTICIPATION MEETING ON SEPTEMBER 19, 2016 |

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| RECOMMENDATION |
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That, on the recommendation of the Managing Director, Planning and City Planner, the proposed by-law attached hereto as Appendix "A" **BE INTRODUCED** at the Municipal Council meeting on September 27, 2016 so that:

- a) The existing "Section 1.3 – Deemed Conformity of Uses and Compliance with Regulations" of Zoning By-law No. Z.-1 **BE DELETED** and **BE REPLACED** with a new "Section 1.3 – Non-Conforming Uses"; and
- b) Sections 4.16(1) and 45.3(2) of Zoning By-law Z.-1 **BE AMENDED** in conformity with clause a) above to delete references to "Section 1.3 – Deemed Conformity of Uses and Compliance with Regulations" and replace with references to "Section 1.3 – Non-Conforming Uses".

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| PREVIOUS REPORTS PERTINENT TO THIS MATTER |
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None

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| PURPOSE AND EFFECT OF RECOMMENDED ACTION |
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The purpose and effect of the recommended action is to delete "Section 1.3 – Deemed Conformity of Uses and Compliance with Regulations" of the Zoning By-law Z.-1 in its entirety and replace with a new Section 1.3 that is consistent with the *Planning Act* provisions regarding Non-Conforming Uses. Other Zoning By-law references to Section 1.3 are also to be amended accordingly.

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| RATIONALE |
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There are inconsistencies between the non-conforming uses provisions of the *Planning Act* and the "deemed conformity" provisions of the City's Zoning By-law Z.-1. The result is that through interpretations and applications of the existing Section 1.3, there is the potential for ambiguity which may either limit the status of non-conforming uses or limit the City's ability to enforce the regulations of Zoning By-law Z.-1. The use of wording that is consistent with the provisions of the *Planning Act* will clarify the intent of this section of the by-law, and align the City's definition of non-conforming uses with Provincial legislation.

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BACKGROUND

Zoning By-law Z.-1 includes provisions dealing with “Non-Conforming Uses”. These provisions exempt existing land uses from the zoning regulations of a subsequent Zoning By-law which was introduced after the date the land uses were legally established. Non-conforming uses are often referred to as “grand-fathering”. In Zoning By-law Z.-1, non-conforming uses are addressed in Section 1.3, “Deemed Conformity of Uses and Compliance with Regulations”.

In accordance with Section 34(9) of the *Planning Act*, the status of non-conforming uses is established when certain conditions are met. Section 34(9) reads as follows:

No by-law passed under this section applies,

- (a) to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purposes on the day of the passing of the by-law, so long as it continues to be used for that purpose; or*
- (b) to prevent the erection or use for a purpose prohibited by the by-law of any building or structure for which a permit has been issued under subsection 8(1) of the Building Code Act, 1992, prior to the day of the passing of the by-law, so long as the building or structure when erected is used and continues to be used for the purpose for which it was erected and provided the permit has not been revoked under subsection 8(10) of that Act.*

As such, the conditions under which a land use may be provided non-conforming status are when: (1) the land, building or structure was being used for a lawful purpose on the date of passing of the current zoning by-law; and (2) the land, building or structure continues to be used for that lawful purpose without interruption.

There are inconsistencies between the non-conforming uses provisions of the *Planning Act* and the “deemed conformity” provisions of the City of London Zoning By-law Z.-1. The City’s Zoning By-law is somewhat more permissive and complex than the provisions of the *Planning Act*. There is also the potential, through certain interpretations, to create ambiguity which may limit the status of non-conforming uses or limit the City’s ability to enforce the regulations of Zoning By-law Z.-1. Such issues, as further identified below, are the rationale for this amendment to Section 1.3 of Zoning By-law Z.-1.

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| Date Application Accepted: February 22, 2016 | Agent: City of London |
| REQUESTED ACTION: Deletion and replacement of s. 1.3 of Zoning By-law Z.-1, and update related references in other sections of Zoning By-law Z.-1. | |

DEPARTMENT/AGENCY COMMENTS

Upper Thames River Conservation Authority (UTRCA)

No comments.

City of London - Environmental and Engineering Services Department

No concerns have been identified.

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| PUBLIC LIAISON: | Notice of Application was published in the <i>Public Notices and Bidding Opportunities</i> section of <i>The Londoner</i> on Thursday, March 3, 2016. | Zero (0) replies were received |
| Nature of Liaison: Zoning By-law Z.-1, "Section 1.3 – Deemed Conformity of Uses and Compliance with Regulations" – Possible Amendment to Section 1.3 of the Administration/Enforcement and Interpretation section of Zoning By-law Z.-1 to delete Section 1.3 and replace with new provisions that reflect current Planning Act provisions. Possible amendments to "Section 4.16 – Existing Uses Continued" of the General Provisions section of Zoning By-law Z.-1 may also be necessary to reflect any changes to Section 1.3 of the Zoning By-law, as amended. File: Z-8595. Planner: T. Macbeth (206 Dundas). | | |
| Responses: No responses received through public liaison in <i>The Londoner</i> . | | |

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| ANALYSIS |
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As noted in the Background section of the report, certain variations exist between the non-conforming use provisions of the *Planning Act* and the provisions of the City of London Zoning By-law Z.-1. In accordance with *Planning Act* section 34(9), the conditions under which a use is considered to be non-conforming are that it was used lawfully on the date of passing of the current zoning by-law and continues to be used for that lawful purpose without interruption.

Section 1.3 of Zoning By-law Z.-1, which is shown below in italics, does not meet all of the conditions of *Planning Act* section 34(9) and refers to "deemed conformity" rather than non-conforming uses:

1.3 DEEMED CONFORMITY OF USES AND COMPLIANCE WITH REGULATIONS

- 1) *Where any land, building or structure was lawfully used on the 30th day of June, 1993 for a purpose that, were it not for this provision, is prohibited by this By-law, that use is hereby deemed to be permitted by and in conformity with this By-law, despite anything in this By-law to the contrary, so long as the land, building or structure is used and continues to be used for that purpose.*
- 2) a) *Where any land, building or structure has been continuously used from the 1st day of July, 1973 until the 30th day of June, 1993 for a purpose that is prohibited by this By-law, that use is hereby deemed to be a lawful use on the 30th day of June, 1993.*

 b) *Any building or structure that has been constructed on land contrary to the regulations of this By-law or a predecessor thereto prior to the 1st day of July 1973 and the yards appurtenant thereto are unchanged to the 30th day of June 1993, is hereby deemed to have been constructed in compliance with the regulations to this By-law as of the 30th day of June, 1993. (Z.-1-95377)*
- 3) *Where the use of any land on the 30th day of June, 1993 was in compliance with the applicable regulations of the predecessor of this By-law or a minor variance thereto but, were it not for this provision, is not in compliance with one or more of the applicable regulations of this By-law, that use is hereby deemed to be in compliance with those regulations of this By-law, despite anything in this By-law to*

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the contrary, so long as that land

a) is used and continues to be used as it was on the 30th day of June, 1993, or

b) is used for a purpose that was permitted for that land on the 30th day of June, 1993 by the predecessor of this By-law or a minor variance thereto and that is also permitted for that land by this By-law.

4) *Where any building or structure was in existence and used in compliance on the 30th day of June, 1993 with the applicable regulations of the predecessor of this By-law or a minor variance thereto but, were it not for this provision, is not in compliance with one or more of the applicable regulations of this By-law, that building or structure is hereby deemed to be in compliance with those regulations of this By-law, despite anything in this By-law to the contrary, so long as that building or structure exists and so long as it*

a) is used and continues to be used as it was on the 30th day of June, 1993, or

b) is used for a purpose that was permitted for that building or structure on the 30th day of June, 1993 by the predecessor of this By-law or a minor variance thereto and that is also permitted for that building or structure by this By-law.

5) *Where any building or structure, a permit for which has been issued under Section 5 of the Building Code Act prior to the 1st day of July, 1993 is erected or used for a purpose that, were it not for this provision, is prohibited by this By-law, the erection or use of that building or structure for that purpose is hereby deemed to be permitted by and in conformity with this By-law and in compliance with its regulations, despite anything in this By-law to the contrary, so long as the building or structure when erected is used and continues to be used for the purpose for which it was erected and provided the permit has not been revoked under Section 6 of the Building Code Act. (O.M.B. File #R910387 - Appeal #9003-7, 9006-2, 9007-10, 9009-22 (June 4, 1993))*

As described in Section 1.3 above, Zoning By-law Z.-1 includes considerations which vary from the wording of the *Planning Act*. Variations in Section 1.3 include its “deeming into conformity” the land uses, buildings or structures that have been continuously used since the predecessor zoning by-law came into effect (July 1973) but without explicitly ensuring the buildings, structures or lands were used for a lawful purpose under the regulations of the applicable zoning by-law. Additionally Section 1.3 “deems into conformity” uses which were lawful save and except one or more of the applicable regulations of Zoning By-law Z.-1.

Deemed Conformity versus Non-Conforming Uses

Buildings or land uses being “deemed into conformity” with the current Zoning By-law presents some potential incongruity with “Non-conformity”. For example, there is a difference between the non-conforming “use” of land and the “intensity” of the non-conforming use. The distinction between “use” and “intensity of use” on non-conforming properties is notable in several legal decisions, including the influential Supreme Court of Canada decision in *Central Jewish Institute v. Toronto (City)* from 1948. In the *Central Jewish Institute* and many subsequent Ontario cases, the exemption from the zoning by-law applied to the use of the building in its entirety not to the intensity of the use conducted within the building. The intensity of the use, such as would occur in a private school with different semesters like the Central Jewish Institute, will inherently vary from time to time; however, the defined “use” as a “school” is what was determined to be granted legal non-conforming status.

Conversely, through Section 1.3 “deeming conformity” means that the use as well as the intensity of that use is legalized into the current zoning by-law, and as such some expansion permissions otherwise afforded “as of right” to non-conforming uses are removed. If the City’s

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municipal by-law enforcement officers interpret the “deeming of conformity” as such, the non-conforming use would instead be required to apply for variances or zoning by-law amendments through applications under the *Planning Act*, like a *lawful* land use rather than uses with *non-conforming* status. For property owners and land users, the language of Section 1.3 and “deeming conformity” presents the potential for uncertainty in zoning interpretations and municipal enforcement of Zoning By-law Z.-1.

Municipal Enforcement and De Facto Non Conforming Use Section

Section 1.3 could potentially limit landowners’ permissions afforded through non-conforming use status. Section 1.3 is the “non-conforming use” section of the City’s zoning by-law. Section 1.3 presents potential concerns regarding enforcement of the regulations of the Zoning By-law Z.-1. Enforcement issues occur, for instance, in the zoning interpretation of subsection 4, where a use that is consistent with the zoning by-law save and except “one or more of the applicable regulations” is deemed into conformity. This becomes an issue where, for instance, in the Greater Near Campus Neighbourhood (GNCN) area, zoning identifies a maximum number of bedrooms per dwelling unit, parking arrangements and other site-specific requirements. Deeming a building into conformity that contravenes the GNCN dwelling unit regulations or other regulations of the zoning by-law could either undermine the intent of this area-specific zoning, or leave uncertain the City’s interpretation of a property’s compliance when, for example, landowners’ applications are submitted to the City for residential rental unit licenses or rental license renewals or building permits for building alterations. Deeming a building, structure, or land into conformity is not consistent with the *Planning Act*.

The result of the ambiguity of Section 1.3 has been that the City has accepted affidavits from landowners or trades contractors to establish the use based on their recollection of the use and how long the use has existed. The affidavits have functioned in lieu of documentation relating to original construction or building alteration dates or zoning amendment dates for a given use of land or building.

The “deemed to conform” section of the by-law is problematic for a number of reasons. It is very difficult to determine and confirm specific land uses from more than four decades ago. There have been several examples where illegal uses were occurring in the 1960s on a small scale (e.g. car repair in a residential area) where the justification provided as per the “deemed to conform” provisions resulted in a conforming salvage yard land use. Verifying affidavits and evidence from over 40 years ago is difficult, time consuming and often unreliable. Relying on the provisions of the *Planning Act* to determine non-conforming land uses is preferable, and is a consistent practice in Ontario Municipalities.

Comparator Municipalities’ Approaches

In addition to the uncertainty presented by Section 1.3, Staff have also found that the City is fairly unique in its use of “deeming conformity” for the “non-conforming” section of the zoning by-law. Staff conducted a review of some comparator Ontario municipalities’ zoning by-laws and found that only one (1) of the comparator municipalities also used “deeming conformity” or “deemed compliance” synonymously with “non-conforming use” regulations. Comparator municipalities’ zoning by-laws reviewed include the Cities of: Ottawa; Kingston; Barrie; Markham; Vaughan; Burlington; Hamilton; Guelph; Cambridge; Waterloo; and Mississauga.

The only municipality reviewed which, similar to the City of London, states that its “legal non-complying lots, buildings, structures, parking areas, and driveways” are “deemed in compliance” with the regulations of the current zoning by-law, is the zoning by-law of the City of Mississauga (specifically Section 2.1.8 of Mississauga Zoning By-law No. 0225-2007). The remainder of the comparator Ontario municipalities rely more upon the language of “non-conformity” / “legal non-conformity” and the provisions of the *Planning Act*. This results in a zoning approach to non-conforming uses that provides greater certainty than the City’s current “deemed conformity” approach.

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As a result of the uncertainty, enforcement issues, and the alternative approaches demonstrated by comparator Ontario municipalities, it is recommended that Section 1.3 be deleted and replaced with wording from the provisions of the *Planning Act*, Section 34(9). The title of Section 1.3 is also recommended to be changed to “Non-Conforming Uses” to reflect the change in the regulation.

Other Related Sections of Zoning By-law Z.-1

In addition to Section 1.3 itself, references to Section 1.3 “deemed conformity of uses” are found in Section 4.16 and Section 45.3(2) of Zoning By-law Z.-1. Section 4.16 relates to existing land uses, and Section 45.3(2) relates to existing single detached non-agricultural dwellings within the Agricultural (AG) zone.

The existing uses section, Section 4.16, addresses the rebuilding and repair of lawful uses; extensions or additions to lawful uses; the application of the zoning by-law on consents to sever vacant parcels of land; and, the application of the zoning by-law for consents or conveyance of land for the purposes of development. The Agricultural zone Section 45.3(2) addresses lot requirements for lots containing single detached dwellings which existed prior to the passing of Zoning By-law Z.-1, thus legal non-conforming dwellings. No substantive changes would be required to these sections in order to align with the recommended revised Section 1.3.

The recommended changes to Section 4.16 and Section 45.3(2) are minor and would consist of changes to the references to Section 1.3 and its title. Thus references to “Section 1.3 (Deemed Conformity of Uses and Compliance with Regulations)” would be changed to “Section 1.3 (Non-Conforming Uses)”.

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| RECOMMENDATION |
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Inconsistencies exist between the language and interpretations of “non-conforming uses” provisions of the *Planning Act* compared to the “deemed conformity” provisions of the City of London Zoning By-law Z.-1. The result is that the Zoning By-law does not fully reflect the intent of the *Planning Act*. Also, through certain interpretations and applications of Section 1.3, there is the potential for ambiguity which could either limit the permissions of landowners with non-conforming properties or buildings, or else limit the City’s ability to enforce the regulations of Zoning By-law Z.-1. This has resulted in interpretation and enforcement issues. Most comparator municipalities in Ontario rely on *Planning Act* provisions rather than local municipal regulations to address the issue of non-conforming uses. It is recommended that Section 1.3 of Zoning By-law Z.-1 be deleted and replaced with wording consistent with Section 34(9) of the *Planning Act*, as shown below and as attached in the by-law Appendix ‘A’.

Section 1.3 is recommended to be changed to the following:

1.3 NON-CONFORMING USES

- (a) *No zoning by-law passed applies to prevent the use of any land, building or structure for any purpose prohibited by the zoning by-law if such land, building or structure was lawfully used for such purposes on the day of the passing of this zoning by-law, so long as it continues to be used for that purpose; or*
- (b) *No zoning by-law passed applies to prevent the erection or use for a purpose prohibited by the by-law of any building or structure for which a permit has been issued under subsection 8(1) of the Building Code Act, 1992, prior to the day of the passing of the by-law, so long as the building or structure when erected is used and continues to be used for the purpose for which it was erected and provided the permit has not been revoked under subsection 8(10) of the Building Code Act, 1992.*

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Related references to Section 1.3, found in Sections 4.16 and 45.3(2) of Zoning By-law Z.-1 are also recommended to be amended to reflect the updated title of Section 1.3 as “Non-Conforming Uses”.

This Zoning By-law Amendment will not operate retroactively. Furthermore, all decisions of the City are legally required to comply with the *Planning Act* legislation.

Acknowledgements:

This report was prepared with assistance and concurrence from City divisions, including: Municipal Law Enforcement, Zoning & Public Property Compliance, and Legal Services.

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| PREPARED BY: | SUBMITTED BY: |
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| TRAVIS MACBETH, MCIP, RPP PLANNER II, LONG RANGE PLANNING AND RESEARCH | GREGG BARRETT, AICP MANAGER, LONG RANGE PLANNING AND RESEARCH |
| RECOMMENDED BY: | |
| | |
| JOHN M. FLEMING, MCIP, RPP MANAGING DIRECTOR, PLANNING AND CITY PLANNER | |

August 25, 2016
 TM/tm

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Planner: T. Macbeth**

**Bibliography of Information and Materials
Z-8595**

Request for Approval:

City of London Zoning By-Law Amendment Application Form, completed by City of London, February 18, 2016.

Reference Documents:

Ontario. Ministry of Municipal Affairs and Housing. *Planning Act, R.S.O. 1990, CHAPTER P.13*, as amended.

Ontario. Ministry of Municipal Affairs and Housing. *Provincial Policy Statement*, 2014.

City of London. *Official Plan*, June 19, 1989, as amended.

City of London. *Zoning By-law No. Z.-1*, May 21, 1991, as amended.

City of Barrie. *Comprehensive Zoning By-law 2009-141*, as amended.

City of Burlington. *Zoning By-law 2020*, as amended.

City of Cambridge. *Zoning By-law 150-85*, as amended.

City of Guelph. *Zoning By-law 1995-14864*, as amended.

City of Hamilton. *Zoning By-law 05-200*, as amended.

City of Kingston. *Restricted Area Zoning By-law. By-law 8499*, as amended.

City of Markham. *Zoning By-law 177-96*, as amended.

City of Mississauga. *Zoning By-law No. 0225-2007*, as amended.

City of Ottawa. *Zoning By-law No. 2008-250*, as amended.

City of Vaughan. *Zoning By-law Number 1-88*, as amended.

City of Waterloo. *Zoning By-law 1108*, as amended. *Zoning By-law 1418*, as amended.

Kagan, I. "But I Do Not Want To Be Legal." *Municipal and Planning Law Reports*. 13 MPLR (2d).

Correspondence: (all located in City of London File No. Z-8595)

City of London -

Turk, R., City of London Environmental and Engineering Services Department / Development Services. Memo to T. Macbeth. March 21, 2016.

Departments and Agencies -

Creighton C., UTRCA. E-mail to T. Macbeth. March 17, 2016.

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Appendix "A"

Bill No. (number to be inserted by Clerk's Office)
2016

By-law No. Z.-1-16 __

A by-law to amend By-law Z.-1 to delete "Section 1.3 – Deemed Conformity of Uses and Compliance with Regulations" and replace with "Section 1.3 – Non-Conforming Uses" and replace related references to Section 1.3.

WHEREAS the City of London has applied to amend Zoning By-law Z.-1 to delete "Section 1.3 – Deemed Conformity of Uses and Compliance with Regulations" and replace with "Section 1.3 – Non-Conforming Uses", and amend related references to Section 1.3 in accordance with the amendment to Section 1.3;

AND WHEREAS this rezoning conforms to the Official Plan;

THEREFORE the Municipal Council of The Corporation of the City of London enacts as follows:

- 1) Section 1.3 – Deemed Conformity of Uses and Compliance with Regulations to By-law No. Z.-1 is amended by being deleted in its entirety and replaced by adding the following:

1.3 NON-CONFORMING USES

- (a) *Nothing in this by-law applies to prevent the use of any land, building or structure for any purpose prohibited by the zoning by-law if such land, building or structure was lawfully used for such purposes on the day of the passing of this zoning by-law, so long as it continues to be used for that purpose; or*
- (b) *Nothing in this by-law applies to prevent the erection or use for a purpose prohibited by the by-law of any building or structure for which a permit has been issued under subsection 8(1) of the Building Code Act, 1992, prior to the day of the passing of the by-law, so long as the building or structure when erected is used and continues to be used for the purpose for which it was erected and provided the permit has not been revoked under subsection 8(10) of the Building Code Act, 1992.*

- 2) Section Number 4.16(1) to By-law No. Z.-1 is amended by deleting "Section 1.3 (Deemed Conformity of Uses and Compliance with Regulations)" and replacing with "Section 1.3 (Non-Conforming Uses)".
- 3) Section Number 45.3(2) to By-law No. Z.-1 is amended by deleting "Legal Conforming Provisions in Section 1.3 (Deemed Conformity of Uses and Compliance with Regulations)" and replacing with "Non-Conforming Provisions in Section 1.3 (Non-Conforming Uses)".

This By-law shall come into force and be deemed to come into force in accordance with Section 34 of the *Planning Act, R.S.O. 1990, c. P13*, either upon the date of the passage of this by-law or as otherwise provided by the said section.

Agenda Item # Page #

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PASSED in Open Council on September 27, 2016.

Matt Brown
Mayor

Catharine Saunders
City Clerk

First Reading - September 27, 2016
Second Reading - September 27, 2016
Third Reading - September 27, 2016