

ACCESSORY USES AND STRUCTURES

Spring 2020

Definition¹

An accessory use or structure (hereinafter, "use" means "use or structure") is a use that is found on the same lot as the principal use and is *subordinate*, *customary*², and *incidental* to the principal use. A principal use is the primary use of a parcel of land. An accessory use cannot exist without a principal use and must be located on the same lot as the principal use. Accessory uses may accompany many types of principal uses and exist in all zoning districts. Accessory uses allow for additional beneficial uses of property, while still safeguarding the character of the district.

- To be *subordinate*, the use or structure must be proportionally smaller than the principal use or structure.
- To be *customary*, the use or structure must be commonly or habitually found in connection with the principal use or structure.
- To be *incidental*, the use or structure must be reasonably related to the principal use or structure.

Zoning Accessory Uses and Structures

If a community's zoning ordinance does not mention accessory uses, courts will still infer the right to have uses that are subordinate and customarily incidental to the principal use. Notably, what is considered to be customarily incidental can still evolve over time. For instance, renewable energy structures, such as wind turbines and solar panels were likely not customary 20 years ago, but are becoming increasingly common. To avoid uncertainty surrounding the nature of any particular accessory use or structure, communities may explicitly allow or prohibit specific accessory uses or structures.

Certain accessory uses or structures are more protected by law than others:

- Antennas and satellite dishes used for residential purposes are protected by federal law. Homeowners and renters have the right to install antennas and satellite dishes on their property where they have "exclusive use or control," and local governments cannot restrict or delay the installation or use of such antennas or satellite dishes.³
- The First Amendment protects citizens from laws that abridge freedom of speech, and signs are considered a form of speech. Specifically, displaying signs from one's residence has been described as "an important and distinct medium of expression" by the Supreme Court of the United States. Thus, for example, regulations prohibiting or excessively limiting real estate signs and limiting residences to two political signs have been found unconstitutional.
- Courts generally give more leeway with respect to accessory uses associated with educational and religious organizations and these uses are presumed to serve the public interest if they are incidental to the principal use. For example, accessory uses for churches may include daycare centers, playgrounds, and activity buildings, and accessory uses for educational organizations may include approved dormitories, athletic facilities, and school bus repair facilities, among others.

Example

A single-family home is a common principal use in a residential district, and a home occupation is a common accessory use to a single-family home.

- To be *subordinate*, the home occupation must utilize less space than the use of the single-family home as a dwelling.
- To be *customary*, the home occupation must be a type of business that is normally found in the home. A small daycare is likely customarily associated with a home, but an auto repair shop is not
- To be *incidental*, the home occupation must be a business that can reasonably be run out of the home without changing the nature of the neighborhood, for example, by generating excessive traffic or noise

Accessory structures such as fences and detached garages are common accessory structures to single-family homes, whereas billboard signs are not.

Implementation

While accessory uses allow property to be more fully utilized, local governments should be cognizant that accessory uses can be abused to increase the intensity of the use of land, expand nonconforming uses, or change the use of the land entirely. Local governments can choose from five different approaches to regulate accessory uses and structures:

1. Allow all accessory uses that are subordinate and customarily incidental to the principal use or structure,
2. Specifically list permitted accessory uses for each zoning district and prohibit the rest,
3. Provide a non-exhaustive list of accessory uses that are permitted or prohibited in each zoning district, but allow other uses not specifically listed that are subordinate and customarily incidental,
4. Provide general guidelines, as opposed to specific lists, on what constitutes an accessory use or structure, paired with examples of permitted accessory uses and structures, *or*
5. Make all accessory uses conditional uses so that they require conditional use permits.

Local governments may use different approaches for different zoning districts within the same community, as accessory uses can cause different issues in commercial and industrial districts compared to residential districts.

Examples of Common Accessory Uses and Structures

Principal Use	Common Accessory Uses and Structures
Single-family residential	Fence, swimming pool, detached garage, home occupation, sign, accessory dwelling unit
Farm	Agritourism, barn
Fast food restaurant	Drive-through, parking lot, sign
Gas station	Car wash, parking lot, sign
Bank	ATM machine, drive-through



Footnotes

¹ West Virginia Code does not define accessory use, nor is there any relevant case law in West Virginia on accessory uses or structures.

² "Customary," as a characteristic of accessory uses and structures, is also referred to as "customarily incidental."

³ Over-the-Air Reception Device ("OTARD"). Rule 47 C.F.R. § 1.40000.