

NONCONFORMITIES

Fact Sheet

Summer 2019

Nonconformities are created when a local government adopts for the first time or amends an existing zoning ordinance with requirements that differ from those imposed by a previous zoning ordinance. Uses, structures, and lots can each become nonconforming if certain requirements change. Nonconformities are often referred to as “grandfathered,” and may continue unless abandoned or destroyed. However, limits are generally imposed on changes or improvements to nonconformities. Transferring the property, by sale, will, or otherwise, to a new owner does not impact the nonconformity. The Board of Zoning Appeals is responsible for reviewing decisions regarding nonconforming uses, structures, and lots.

Nonconforming Uses & Structures

Nonconforming uses are created when a use lawfully exists prior to the adoption or amendment of a zoning ordinance and one of the following changes occurs:

- Change (A): Permitted by Right → Conditional Use
- Change (B): Permitted by Right → Prohibited Use
- Change (C): Conditional Use → Prohibited Use

Nonconforming structures are those that were lawfully erected prior to the adoption or amendment of a zoning ordinance, but that no longer meet the dimensional or setback requirements of the current zoning ordinance. Zoning ordinances can include provisions on the abandonment, change in use, enlargement or extension, and rebuilding of nonconformities when partially or totally destroyed.

Abandonment

Nonconforming uses may become prohibited if abandoned for a certain amount of time. In West Virginia, the abandonment period is one year. Nonconforming uses created by Change (A) must apply for a conditional use permit to resume operation after being abandoned for a period of one year. Nonconforming uses created by Changes (B) and (C) must cease after being abandoned for a period of one year. Evidence of abandonment might include utilities being disconnected or the expiration of a business license.

Zoning ordinances include three types of uses:

Permitted by Right uses are allowed in a zoning district, although a permit may be required to ensure compliance with the ordinance. If no zoning ordinance exists, all uses are permitted by right.

Conditional Uses are allowed in a zoning district, but may not be appropriate in all locations, and additional requirements may be required to prevent adverse impacts on the community. A conditional use permit must be obtained from the Board of Zoning Appeals, which may attach additional requirements.

Prohibited Uses are uses not allowed in the zoning district.

Change in Use & Enlargement or Extension

Local governments may allow for one nonconforming use to be replaced with another nonconforming use, typically of equal or lesser intensity. For example, a fast food restaurant could convert to a coffee shop. Local governments also may allow for the enlargement or extension of a nonconforming use or structure. In addition, nonconforming uses created by Change (A) may apply for a conditional use permit to enlarge or extend beyond that otherwise allowed for nonconforming uses.

Several options for allowing the enlargement or extension of a nonconforming use or structure are available to communities. Some examples include:

- Unlimited enlargement or extension of nonconforming structures so long as nonconformities are not increased. For example, a building that does not conform to the required front setback could put an addition on the rear of the building so long as the rear setback is met.
- Principal residential structures may be enlarged or extended so long as nonconformities and the number of dwelling units are not increased.
- Nonconforming uses may enlarge or extend within a conforming principal structure to areas designed to accommodate the use prior to becoming nonconforming, or up to 25% (or another chosen percentage) of the nonconforming use's original floor area, whichever is greater.

In the alternative, the enlargement or extension of a nonconforming use or structure may be subject to a set of review standards that consider the adverse effects on nearby properties, traffic, and other public health, safety, and welfare concerns.

Rebuilding

When nonconforming structures are damaged by natural causes, such as fire or flood, zoning ordinances may limit whether and how those structures may be rebuilt. For example, a zoning ordinance may permit only those structures damaged by less than 50% of the appraised value of the structure prior to damage to rebuild within the same building footprint.

Nonconforming Lots

Nonconforming lots (sometimes referred to as “substandard lots”) are those parcels that have been legally subdivided prior to the enactment of a zoning ordinance or amendment and which cannot meet the requirements of the zoning ordinance or amendment and make reasonable use of the land. In most situations, the landowner would have to obtain a variance (permission to do what the zoning ordinance prohibits) to build on a nonconforming lot. However, communities may include adjustments to minimum lot size, frontage, and setbacks in their zoning ordinances to allow development of nonconforming lots without the need to obtain a variance. Nonconforming adjacent lots under common ownership may be required to merge under a zoning ordinance to form a conforming lot.