

CHAPTER 10: NONCONFORMITIES

10.1 GENERAL PROVISIONS

- 10.1.1 Purpose
- 10.1.2 General Policy
- 10.1.3 Determination of Nonconformity Status
- 10.1.4 Change of Ownership or Tenancy
- 10.1.5 Exception Due to Variance or Modification
- 10.1.6 Damage or Destruction
 - (A) Exception for Setbacks for Detached Dwellings
- 10.1.7 Continuation, Maintenance, and Minor Repair
- 10.1.8 Enlargement, Expansion, Alteration, or Major Repair
 - (A) Applicability
 - (B) Site and/or Subdivision Plans
 - (C) Findings
 - (D) Other Considerations
 - (E) Conditions
 - (F) Limits on Expansion
 - (G) Limits on Requirements
 - (H) Exception for Setbacks for Detached Dwellings
 - (I) Nonconforming Buffers or Streetscapes
- 10.1.9 Enforcement of Requirements

10.2 NONCONFORMING STRUCTURES AND/OR SITES

- 10.2.1 Re-Use or Redevelopment of Existing Nonconforming Structures and/or Sites

10.3 NONCONFORMING USES

- 10.3.1 Abandonment or Cessation of Use
- 10.3.2 Abandonment or Cessation of Use; Town Center (TC) District
- 10.3.3 Manufactured Homes on Individual Lots
- 10.3.4 Change of Use
- 10.3.5 Signs for Nonconforming Uses
- 10.3.6 Nonconforming Adult Businesses

10.4 NONCONFORMING LOTS OF RECORD

- 10.4.1 Nonconformity Related to Lots of Record
- 10.4.2 Exception for Single-Family Dwelling
- 10.4.3 Adjacent Lots in Single Ownership

10.5 NONCONFORMING SIGNS

- 10.5.1 Nonconforming Signs Protected
- 10.5.2 Nonconforming Pole Signs
- 10.5.3 Limitations on Nonconforming Signs
 - (A) Discontinued Sign
 - (B) Routine Repairs and Maintenance
 - (C) Change of Copy
 - (D) Other Sign Permits on Premises
 - (E) Required Removal

Chapter 10: NONCONFORMITIES**10.1 GENERAL PROVISIONS****10.1.1 Purpose**

The purpose of this chapter is to regulate and limit the development and continued existence of legal uses, structures, lots, and signs established either prior to the effective date of this Ordinance or the effective date of future amendments to this Ordinance that no longer conform to the requirements of this Ordinance. All such situations are collectively referred to as "nonconformities."

10.1.2 General Policy

While nonconformities may continue, the provisions of this chapter are designed to curtail substantial investment in nonconformities to bring about their eventual improvement or elimination in order to preserve the integrity of this Ordinance and the character of the Town and its extraterritorial jurisdiction. Any nonconforming use, structure, lot, or sign that lawfully existed as of the effective date of this Ordinance and that remains nonconforming, and any use, structure, lot, or sign that becomes nonconforming as a result of any subsequent rezoning or amendment to the text of this Ordinance, may be continued or maintained only in accordance with the terms of this chapter. This chapter also is intended to reduce vacancies, promote appropriate redevelopment and re-use of existing structures and lots, and set forth requirements.

10.1.3 Determination of Nonconformity Status

In all cases, the burden of establishing that any nonconformity is a legal nonconformity shall be solely upon the owner of such nonconformity, not the Town.

10.1.4 Change of Ownership or Tenancy

Changes of ownership, tenancy, or management of an existing nonconformity are permitted but such nonconformities shall continue to be subject to the provisions of this chapter.

10.1.5 Exception Due to Variance or Modification

This chapter shall not apply, however, to any development standard or feature that is the subject of a variance or modification granted by the Zoning Board of Adjustment or Town Council. Where a variance or modification has been granted for a development standard that does not otherwise conform to the requirements of this Ordinance, that development standard shall be deemed conforming.

10.1.6 Damage or Destruction

If a nonconforming use, structure containing a nonconforming use, nonconforming structure, or nonconforming sign is destroyed by any means to an extent greater than fifty (50) percent of its replacement cost at the time of destruction, then such use, structure, or sign shall not be re-established unless it is made to conform to the requirements of this Ordinance, except as provided below.

(A) Exception for Setbacks for Detached Dwellings

If destroyed by any means to an extent greater than fifty (50) percent of its replacement cost at the time of destruction, detached dwellings with setbacks made nonconforming by either

of the following shall be required to meet the lesser of current required building setbacks or building setbacks that were required at the time of subdivision or site plan approval:

- (a) the installation of roadways or other easements/property line adjustments created or enacted by a governmental entity,
- (b) a change to the street classification in the Comprehensive Transportation Plan that increases the width of the right-of-way from which the setback is measured.

10.1.7 Continuation, Maintenance, and Minor Repair

The continuation of a nonconforming use or structure and the maintenance or minor repair of a structure containing a nonconforming use or of a nonconforming structure are permitted, provided that the continuation, maintenance, or minor repair does not extend or expand the nonconforming use or structure. For the purposes of this section, "maintenance or minor repair" shall mean:

- (A) Repairs that are necessary to maintain and to correct any damage or deterioration to the structural soundness or interior appearance of a building or structure without expanding or altering the building or structure;
- (B) Maintenance of land areas to protect against health hazards and promote the safety of surrounding land uses; and
- (C) Repairs that are required to remedy unsafe conditions that cause a threat to public safety.

10.1.8 Enlargement, Expansion, Alteration, or Major Repair

(A) Applicability

- (1) Enlargement, expansion, alteration, or major repair of a nonconforming structure or nonconforming use shall be deemed a "special use" and shall occur only if approved by the Town Council in accordance with the procedures and standards set forth in Section 3.8 of this Ordinance and also the requirements of this section.
- (2) However, the re-use or redevelopment of a nonconforming structure or nonconforming site that houses a conforming use shall not be required to obtain a special use permit or undergo site and/or subdivision plan review if the requirements of Section 3.11 are met.

(B) Site and/or Subdivision Plans

Site and/or subdivision plans, which shall be reviewed concurrently with the application for a special use, shall be required for the following activities under this section:

- (1) Re-establishment of a nonconforming use following abandonment of a previous non-conforming use.
- (2) Any enlargement, expansion, alteration or major repair of a nonconforming structure or a conforming structure on a nonconforming site when such structure houses a nonconforming use, or when such structure houses a conforming use and the provisions of Section 3.11 are not applicable.

- (3) Establishment of a nonconforming use with a greater intensity (based on the Tables of Permitted Uses in Section 5.1 of this Ordinance) subsequent to an existing non-conforming use, whether cessation occurred or not.

(C) Findings

After holding the hearing on the special use, the Town Council shall determine whether to approve the proposed enlargement, expansion, alteration, or major repair. The Town Council shall not approve the proposed activity unless and until it finds, based on the evidence and testimony received at the hearing or otherwise appearing in the record of the case, that the proposed enlargement, expansion, alteration, or major repair meets the standards of review set forth in Section 3.8.3, *Approval Criteria*, of this Ordinance, as well as the following:

- (1) The nonconforming use allowed to continue remains compatible with adjacent land uses and the Comprehensive Plan;
- (2) That all access roads and entrance or exit drives to the nonconformity will be adequate with respect to automotive and pedestrian safety and convenience, traffic flow, and control and access in the case of fire or other emergency;
- (3) That all off-street parking, loading, refuse collection, and other service areas will be adequate with respect to automotive and pedestrian safety and convenience, traffic flow, and economic, noise, glare, odor, and other impacts on adjoining properties;
- (4) That all water, wastewater treatment, schools, fire and police protection, and other necessary public and private utilities and services will be adequate with respect to their location, availability, and compatibility with adjoining properties;
- (5) That all landscaping, screening, and fencing will be adequate, with respect to the effectiveness of their type, dimensions, and character, will be adequate with respect to minimizing the economic, noise, glare, odor, and other impacts of the nonconformity on adjoining properties and other properties in the neighborhood;
- (6) That the type, size, and intensity of the proposed special use, including such considerations as storage of items and arrangement, the size of the site and the location of the use upon it, and the hours of operation and numbers of people who are likely to utilize or be attached to the use, will be adequate with respect to minimizing the impact of the nonconformity upon adjoining properties, other properties in the neighborhood, and the purposes of the zoning district in which the property is located; and
- (7) Surface drainage will be adequate with respect to on-site and off-site erosion, siltation, pollution, flooding, or other detrimental effects of the nonconformity.

(D) Other Considerations

In determining whether the proposed extension, alteration, or major repair will substantially injure the value, use, and enjoyment of other properties, the Town Council shall also consider and balance:

- (1) The possible detriment or benefit to the owner of the nonconformity resulting from denying the approval, from approving the request but requiring that the nonconformity be brought wholly or partially into compliance, or from approving the request;

- (2) The possible detriment or benefit to the owners of nearby properties resulting from denying the approval, from approving the request but requiring that the nonconformity be brought wholly or partially into compliance, or from approving the request; and
- (3) The possible detriment or benefit to the general public resulting from denying the approval, from approving the request but requiring that the nonconformity be brought wholly or partially into compliance, or from approving the request.

(E) Conditions

The Town Council may impose any conditions on approval of the request, including appropriate time limits for meeting those conditions, as it deems necessary to mitigate any potential hazards or problems, or to bring the nonconformity into compliance to the extent necessary to protect the rights and interests of nearby property owners and the general public.

(F) Limits on Expansion

If the Town Council permits a non-conforming use to expand, then the following shall apply:

- (1) The area of such expansion shall not exceed twenty-five (25) percent of the area of the existing non-conforming use, unless otherwise allowable in this Section;
- (2) Radio, TV, and telecommunication towers may be expanded by more than twenty-five (25) percent to permit the co-location of a second or subsequent user or communications sending or receiving device so that the need for an additional tower is eliminated. Only the Town Council may permit the expansion of a non-conforming communication tower in a residential or non-residential zoning district, and then only by approving a Special Use Permit (see Section 3.8);
- (3) Land uses listed in Table 5.1-2 in a use category of "Vehicles and Equipment" or "Warehouse and Freight Movement" legally-established prior to July 1, 2003 located on parcels within the HMXD (High Intensity Mixed Use) and MXD (Mixed Use) subdistricts of the Town Center (TC) District (see Section 4.2) shall not be considered as nonconforming uses, and as such may be allowed to expand beyond twenty-five (25) percent without a Special Use Permit (see Section 3.8).

(G) Limits on Requirements

In acting upon applications for such special uses, the Town Council shall not order the discontinuation or termination of nonconformity. If an application is denied, then the continuation, maintenance, and minor repair of the nonconformity shall still be allowed in accordance with the terms of this chapter.

(H) Exception for Setbacks for Detached Dwellings

- (1) Detached dwellings with setbacks made nonconforming by the adoption of this Ordinance are exempt from the requirements of this section if the following findings can be made:
 - (a) The proposed addition or alteration will either meet current setback requirements or will not encroach any further into the required setback than the existing structure; and

- (b) If the proposed alteration or addition is located on the side of the existing dwelling, there is a minimum distance of fifteen (15) feet between the side of the existing structure and the nearest dwelling on the adjoining property.
 - (2) Detached dwellings with setbacks made nonconforming by the installation of roadways or other easements/property line adjustments created or enacted by a governmental entity are also exempt from the requirements of this Section, and shall not be required to address the findings in (H)(1) above.
- (I) **Nonconforming Buffers or Streetscapes**
- (1) In situations where existing buffers or streetscapes are made nonconforming through the actions of a governmental entity (i.e. road-widening projects) such actions shall not render an existing lot nonconforming.
 - (2) In certain situations, the Planning Director may require the governmental entity whose actions affected an existing buffer or streetscape to mitigate for the removal of existing vegetation on a case-by-case basis.

10.1.9 Enforcement of Requirements

The Town may withhold necessary permits, inspections, or other approvals to ensure compliance with this chapter.

(Ord. No. 2009-LDO-04, 7-23-09; Ord. No. 2012-LDO-08, 10-11-12; Ord. No. 2013-LDO-04, 9-26-13; Ord. No. 2014-LDO-03, 8-14-14; Ord. No. 2017-LDO-01, 1-24-17)

10.2 NONCONFORMING STRUCTURES AND/OR SITES

10.2.1 Re-Use or Redevelopment of Existing Nonconforming Structures and/or Sites

Re-use or redevelopment of certain vacant existing nonconforming structures and/or sites can be accomplished through the Re-Use/Redevelopment Plan provisions in Section 3.11.

(Ord. No. 04-001, 1-8-04; Ord. No. 06-009, 4-27-06; Ord. No. 2009-LDO-04, 7-23-09)

10.3 NONCONFORMING USES

10.3.1 Abandonment or Cessation of Use

Except as modified elsewhere in this Ordinance, if a nonconforming use is discontinued for one hundred eighty (180) calendar days or more, then the property shall thereafter be occupied and used only for a conforming use. If a nonconforming use of property is discontinued, but re-established within one hundred eighty (180) calendar days, then the nonconforming use may continue, if the nature and degree of the nonconformity will not be changed or increased from that which existed before the nonconforming use was discontinued.

10.3.2 Abandonment or Cessation of Use; Town Center (TC) District

The following provisions apply to nonconforming uses within the Town Center (TC) District:

- (A) The requirements of Section 10.3.1 shall not apply to nonconforming single-family dwellings located in any subdistrict within the Town Center district.

- (B) If a nonconforming use listed in Table 5.1-2 in a use category of "vehicles and equipment" or "warehouse and freight movement" within the HMXD (High Intensity Mixed Use) and MXD (Mixed Use) subdistricts of the Town Center (TC) zoning district is discontinued for one hundred eighty (180) calendar days or more, then such uses may not be re-established.

10.3.3 Manufactured Homes on Individual Lots

Non-conforming manufactured homes in place prior to July 1, 2003 which are removed from an individual lot may be removed and replaced with a manufactured home; and may be moved around or relocated within the boundaries of the lot upon which they were located provided the manufactured home and the lot were lawfully permitted as of July 1, 2003. However, if active use or operation of the non-conforming manufactured home is discontinued for one hundred eighty (180) calendar days or more, then the use of the non-conforming manufactured home shall thereafter conform to the requirements of this Ordinance.

10.3.4 Change of Use

- (A) Any nonconforming use may be changed to a conforming use by securing all approvals and permits that this Ordinance requires for the intended or resulting use. No nonconforming use may be changed to another nonconforming use.
- (B) However, the establishment or replacement of residentially used structures on land zoned for non-residential use shall be prohibited unless a rezoning to an appropriate residential district is approved first.

10.3.5 Signs for Nonconforming Uses

Nonconforming uses located in residential districts may erect non-illuminated wall signs only. Such signs shall conform in all ways with the standards set forth in Chapter 9.

10.3.6 Nonconforming Adult Businesses

Such uses shall not be rendered non-conforming in situations where any of the following apply:

- (A) Any adult business that fails to comply with the location requirements of this Ordinance (see Section 5.2.3(M)) but that was lawfully operating before December 9, 1993 shall not be deemed to be in violation of this Ordinance.
- (B) An adult business operating lawfully is not rendered in violation of this Ordinance by the subsequent location of a church, public or private elementary school, child day care or nursery school, public park, residential district, or an establishment having a North Carolina ABC license within one thousand (1,000) feet of the sexually oriented business.
- (C) If a nonconforming adult business is discontinued for a period of thirty (30) consecutive days or more, then the property shall be thereafter occupied and used only for a conforming use. If a nonconforming use of property is discontinued, but re-established within thirty (30) days, then the nonconforming use may continue, provided that the nature and degree of the nonconformity will not be changed or increased from that which existed before the nonconforming use was discontinued.

(Ord. No. 2010-LDO-03, 2-25-10; Ord. No. 2011-LDO-01, 1-11-11)

10.4 NONCONFORMING LOTS OF RECORD**10.4.1 Nonconformity Related to Lots of Record**

- (A) No use or structure shall be established on a lot of record that does not conform to the lot area and lot width requirements established in this Ordinance for the zoning district in which it is located, except as otherwise set forth in this Section 10.4.
- (B) The prohibition on development in paragraph (A) shall not apply to lots that are rendered nonconforming by government action (such as by identification of right-of-way), or by other action outside the control of the property owner. In cases where the Town approved a recombination plat that increases the size of one (1) residential lot while reducing another below the minimum lot size and such error is not discovered until after plat recordation and conveyance of the non-conforming lot to an innocent purchaser, such non-conforming lot shall be deemed to be conforming for the purposes of maintaining its pre-existing status as a buildable lot, subject to other provisions of this Ordinance.
- (C) If the nonconformity is due to failure to meet streetscape or buffer standards, the party whose actions rendered the streetscape or buffer non-conforming shall be responsible for bringing the streetscape back into compliance to the maximum extent practicable if required by the Planning Director.

10.4.2 Exception for Single-Family Dwelling

Notwithstanding the limitation in subsection 10.4.1 above, a nonconforming lot that exists prior to the effective date of this Ordinance or was approved by Wake County as a buildable lot prior to annexation in to the Town of Cary, may be used for a single-family dwelling, provided that:

- (A) The lot is located in a residential district in which dwellings are permitted; and
- (B) The proposed single family dwelling can meet all the required setbacks for the district; and
- (C) No new dwelling unit may be added to a nonconforming lot that already has one (1) or more individual dwelling units.

10.4.3 Adjacent Lots in Single Ownership

If two or more adjacent and vacant nonconforming lots are in single ownership at any time, and such lots individually have less frontage or area than the minimum requirements of the district in which such lots are located, then such lots shall be considered and treated as a single lot or several lots that meet the minimum requirements of this Ordinance for the district in which such lots are located. Any construction, replacement, or enlargement of a single-family dwelling shall require a recombination of all necessary lots in order to achieve compliance with the provisions of this section.

(Ord. No. 2007-21, 12-13-07; Ord. No. 2011-LDO-04, 11-17-11)

10.5 NONCONFORMING SIGNS

It is the policy of the Town to encourage and, to the maximum extent practicable, require that all signs within the Town be brought into compliance with the requirements of this Ordinance.

10.5.1 Nonconforming Signs Protected

A sign that was lawfully erected prior to January 13, 2000 but which does not conform to one (1) or more aspects of the requirements of this chapter, may remain in use subject to the requirements of this section and other applicable requirements of LDO Chapters, with the exception of nonconforming pole signs or billboards. Further, any nonconforming sign or any new sign that is part of a Master Sign Plan (formerly known as a Uniform Sign Plan) within a Planned Development may be installed, replaced, maintained and repaired provided that the Master Sign Plan was approved prior to January 13, 2000, and the sign is installed in accordance with the Master Sign Plan or in accordance with Chapter 9, whichever is applicable.

10.5.2 Nonconforming Pole Signs

Signs or signage which meet the definition of a pole sign (including billboards) in this Ordinance are considered to be nonconforming, and shall be removed or replaced with signage which conforms to the requirements of this Ordinance no later than July 1, 2006. Existing lawfully-placed signs associated with an approved Master Sign Plan shall be exempt from this provision. Owners of record for such signs shall be notified of the nonconformity via mailed notice.

10.5.3 Limitations on Nonconforming Signs

(A) Discontinued Sign

A discontinued sign related to a use or business that ceases to exist or operate for a continuous period of ninety (90) days shall be considered nonconforming and shall not be reused for sign purposes unless and until it is in full conformity with the provisions of this chapter, subject to issuance of a new sign permit.

(B) Routine Repairs and Maintenance

Repairs and maintenance of nonconforming signs, such as repainting and electrical repairs, shall be permitted, provided that repainting shall not include a change of copy or color, and provided further that no repairs shall be permitted where the cost of the repairs exceeds one thousand dollars (\$1,000.00) or fifty percent (50%) of the replacement cost of the sign.

(C) Change of Copy

No change of copy shall be permitted without bringing the sign into full conformance with Chapter 9 and with the applicable Master Sign Plan or Uniform Sign Plan, except as provided below:

- (1) Sign panels or sign blades in existing non-conforming cabinet signs may be replaced, and copy may be changed on non-conforming changeable copy signs, provided that:
 - (a) the sign was constructed or installed in conformance with standards applicable at the time of construction or installation;

- (b) for illuminated cabinet signs, the background of the sign panel is opaque; and
- (c) colors used in the sign area comply with the applicable Section of Chapter 9 of this Ordinance.

(D) Other Sign Permits on Premises

For single-occupant properties, the issuance of a sign permit for a new or replacement sign shall be subject to the condition that all nonconforming signs on that property shall be removed or brought into conformance as part of the work of installing the new or replacement sign. For multi-occupant properties, the issuance of a sign permit for a new or replacement sign for any individual occupant shall be subject to the condition that all nonconforming signs for that occupant shall be removed or brought into conformance as part of the work of installing the new or replacement sign. This section shall not apply to the issuance of a permit for a temporary sign.

(E) Required Removal

Where an amendment to a previously approved site and/or subdivision plan is proposed, approval of such plan shall be contingent upon removal of all nonconforming signs on the site. For example, if an existing retail establishment proposes a building addition or parking expansion, then any nonconforming signs on the property must be brought into compliance as a condition of approval of the amended site plan.

PRINCIPLES OF INTERPRETATION

- If a hotel were the sole occupant of a property, then replacement of a wall sign would mean that a nonconforming ground sign would also have to be replaced.
- If a shopping center replaced a nonconforming ground sign, then all nonconforming ground signs would need to be replaced, provided such ground signs were not located on a separate parcel.
- If a video store within a shopping center replaced a wall sign, then no other tenants within the shopping center would have to replace their nonconforming signs.
- If an insurance office within a multi-tenant office building replaced its wall sign, then no other tenant within the office building would have to replace its nonconforming signs.

(Ord. No. 2009-LDO-3, 5-14-09; Ord. No. 2011-LDO-04, 11-17-11; Ord. No. 12-LDO-01, 2-23-12; Ord. No. 2016-LDO-02, 12-8-16)

