

Nonconformities: Dealing With Uses

by Mark White, AICP, Esq.



Nonconformities are a thorny issue when updating or administering zoning regulations. In most communities, there are uses or situations predating zoning or other land development regulations that do not conform to the current standards.

Nonconformities come in different categories. For example:

- A use that is no longer allowed in the zoning district is a “nonconforming use.”
- A recorded lot that no longer complies with minimum lot area requirements is a nonconforming lot.
- A building that encroaches into a required yard or exceeds maximum building heights is a nonconforming structure.
- A development with insufficient parking or landscaping, or buildings that do not comply with current design standards, is a nonconforming situation.

Nonconformities are normally protected in zoning ordinances to varying degrees, but are not favored because they interfere with the implementation of plans and zoning regulations. As a result, communities have developed a variety of tools to control — or eliminate — nonconformities.

But what about nonconformities that are an asset to their locations? For example, a nonconforming grocery store in a residential zoning district could give residents the ability to walk to the store. A nonconforming restaurant in an industrial district could give employees a place to eat lunch. What if the store or restaurant wants to expand or change its operations? How can a community allow these uses to exist without impairing neighborhood character, or without taking up land needed for industrial uses?

This article focuses on the issue of nonconforming uses. Most land use decisions deal with nonconforming uses, and there are well-established tools to control or eliminate the uses. However, the article also addresses ways to accommodate nonconformities — or to avoid the issue altogether — in ways that respect planning policies and neighborhood character.

Tools that Control Nonconforming Uses

The law assumes that nonconforming uses are a necessary evil. Communities must recognize them, but can keep them from getting out of control. If a community is happy with its zoning districts and wants them fully implemented, it can control or eliminate nonconforming uses by –

- Prohibiting their expansion,
- Providing that any change in the use must conform to the new district regulations,
- Providing that, if the use changes, it can never change back to the nonconforming use, or
- Specifying that the nonconforming use is terminated if it is abandoned (for example, ceasing operations for one year or knocking down the building) or destroyed by natural causes (such as a fire, flood, or similar involuntary conditions).

Communities can also get more aggressive, adopting tools to proactively terminate nonconforming uses. These include:

- **Amortization requirements**, which provide that the use must end within a given time period after it becomes nonconforming — for example, within one year after it is no longer allowed in the district, and
- **Certification or registration requirements**, which require the owner to register the use within a given time period after it becomes nonconforming, or cease operations. This requirement gives property owners a written verification that their nonconformity is protected. At the same, when the deadline to register expires, planners have a way to tell where, and the degree to which, nonconformities exist at given locations. This provides useful information when considering regulatory changes, such as changing the zoning map or removing uses from a district.

These more aggressive tools are not allowed in some states. For example, Missouri considers amortization a taking of property. However, Missouri does allow communities to require registration, and also puts a heavy burden of proof on property owners to document when their nonconforming uses were established and that they were lawful when established. Consult with your municipal attorney about your state's enabling laws and judicial decisions.



Tools that Accommodate Nonconforming Uses

Even if your state law allows an aggressive approach to terminating nonconforming uses, is that a good idea? An aggressive approach can face stiff political resistance, and can eliminate some uses that, while not complying with the letter of zoning district regulations, are a benefit to the neighborhood or even consistent with plan policies.

What's more, some of the traditional approaches to nonconforming uses may create a perverse incentive for the use to stay. For example, a provision that a nonconforming use cannot revert back if the use is changed to a conforming use may discourage a property owner from bringing their property into compliance with the zoning district regulations. This is because they are giving up a right that that cannot get back. If the property owner is free to restore the nonconformity, they need not fear that coming into compliance with the zoning terminates their existing rights.

If your community wants a more flexible approach to nonconformities, there are several ways to accommodate them. One is to continue to characterize such uses as nonconforming, but allow them to continue or expand. This is based on the theory (described by Michael Brough in American Planning Association's 1985 model *Unified Development Ordinance*) that "nonconforming uses do not fade away — they simply become more run-down and shabby looking." Allowing them to continue enables the business or development to continue to invest in property maintenance, and provide jobs, goods, and services to the neighborhood.

Solutions that recognize, but accommodate, nonconformities include:

- Allowing the use to expand with a variance from the Board of Zoning Adjustment.

This provides some community oversight, but also requires proof of hardship. This test is usually difficult to meet, and focuses the case on economic rather than planning issues.

- Allowing the use to expand with discretionary review, such as a special exception (typically approved by the Board of Zoning Adjustment) or a conditional or special use permit.

As with variances, this provides community oversight, and is tied more directly to comprehensive planning and neighborhood issues. The downside is that it can be expensive for

the applicant, uncertain for the applicant and neighbors, and take up valuable staff and decision maker time.

- Providing that nonconforming uses are treated as conforming for purposes of continuance or expansion, while providing for the termination of the nonconforming use if it is changed (to another kind of use), abandoned, or destroyed and not rebuilt during a given time period.

This allows the nonconforming use to remain economically viable. However, if it discontinues — and neighbors make investments without knowing about the prior nonconformity — those investments are protected. In addition, the party who owns the nonconformity has advance notice that they cannot leave the nonconformity dormant for an indefinite time period.

- Setting out clear rules about the degree of expansion.

Zoning regulations can provide clear, numeric limits for the expansion of nonconformities, and zoning administrators can approve the expansion without requiring a hearing before the board of zoning adjustment, planning commission, or elected officials. To work well, the rules should be clear, and the community should consider tailoring them to given nonconforming uses that implement plan policies. Examples may include small commercial uses that provide services to residential neighborhoods, multi-family units that provide housing opportunities, social service uses, and similar categories.

The downside of each of these approaches is that the use continues its nonconforming status. This can become an issue with lenders, who are usually reluctant to extending financing to businesses that are defined as illegal by local ordinance.

Tools that Can “Circumvent” the Nonconforming Use Question

There are also ways by which a community can avoid defining uses no longer allowed in the district as conforming, while ensuring that they comply with local planning policies. This approach — what you might call tools that circumvent the nonconforming use question — includes:

- Spot zoning, which places the use in a zone that allows it.

There are clear disadvantages to this approach. While spot zoning is not usually per se illegal, it does expose the zoning map to litigation and, perhaps, resolution of the matter by judges rather than by planners. However, clear planning policies that recognize that benefits of non-residential uses in residential neighborhoods, for example, are typically respected by the courts. For example, as far back as 1943 the Utah Supreme Court upheld a Salt Lake City zoning map that provided small commercial “utility zones” in residential zoning districts, recognizing that close

access to these goods and services was a legitimate public purpose (*Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704 (Utah 1943)).¹

- Defining preexisting uses as conforming.

For example, in a single-family district, townhouses that were in place before a given date could be defined as a permitted use. This allows those uses to continue, or expand, at their existing location. However, it does prohibit their establishment in other parts of the district.

- Establishing rules that allow a given number of uses, or spacing of uses, in a district.

This would simply recognize the existence of uses that are not typically allowed in the district, but ensure that they do not proliferate in a way that undermines the district's character. For example, a community could provide that up to two corner grocers are allowed in a residential district, limit them to one per block, or provide that they must be spaced at least 400 feet apart. This would limit the number of corner grocers and avoid the establishment of a de facto commercial district, while giving neighborhoods access to food and necessities in nearby, perhaps walkable, locations.

Summing Up:

Nonconforming uses are a sticky wicket in zoning regulations. They can undermine plan implementation, and perpetuate uses that are incompatible with neighborhood character. However, planners are increasingly recognizing that in certain situations they can be assets for a neighborhood. With modern comprehensive plans recognizing “smart growth” and “sustainable” principles such as walkable streets and neighborhoods with a rich fabric of uses, communities may want to rethink the traditional approach to nonconformities.

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Notes:

1. Another possible disadvantage is that, once the district is applied, the property becomes eligible for any use in the district. While the existing use (such as a corner store) might provide a neighborhood asset, other uses in the district (such as a large car dealership) might not. Communities can deal with this by writing caveats to avoid compatibility issues — such as not allowing dealerships within a given districts from residential district boundaries. However, for many commercial districts, this is a legitimate concern.