



City of Harrisonburg, Virginia
Department of Planning & Community Development

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Building Inspections
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November 1, 2018

TO THE MEMBERS OF CITY COUNCIL
CITY OF HARRISONBURG, VIRGINIA

SUBJECT: Public hearing to consider amending Article E, Nonconforming Buildings and Uses of the Zoning Ordinance by replacing the entire section with new and updated language to regulate nonconforming uses and buildings within the City.

EXTRACT FROM MINUTES OF HARRISONBURG PLANNING COMMISSION MEETING
HELD ON: October 10, 2018

Chair Way read the request and asked staff to review.

Mrs. Banks said article E. Nonconforming Buildings and Uses of the Zoning Ordinance addresses uses and structures that at one time were legally compliant with the Zoning Ordinance before changes were made to the Zoning Ordinance that caused the use or structure to become out of compliance. These pre-existing uses are often not in conformance with future land uses described in the Land Use Guide of the Comprehensive Plan and limit the effectiveness of the Zoning Ordinance. Virginia State Code Section 15.2-2307 addresses nonconforming uses, allowing the use to continue, if done so lawfully, however, it also enables localities to limit nonconforming uses and structures.

A nonconforming use is a lawful use existing at the time of the enactment or subsequent amendment of the Zoning Ordinance which does not conform to the current zoning regulations prescribed in the district in which it is situated (this is the proposed new definition for nonconforming use). The prior legally existing use may continue so long as the then existing or more restricted use is not discontinued for more than two years. In cases of nonconforming occupancy, for example, if current zoning regulations limits a dwelling unit a to only have a family or no more than two unrelated persons, but has nonconforming occupancy of four unrelated persons, if the dwelling unit maintains an occupancy of three unrelated persons for more than two years, then the dwelling unit has lost its ability to legally have four unrelated persons and cannot return to an occupancy of four; it may continue occupancy with three unrelated persons. However, note that a property which was illegally over-occupied before and after an occupancy regulation change does not give the property owner the right to claim nonconformity. For example, if current zoning regulations limits a dwelling unit to only have two unrelated persons, and prior zoning regulations allowed a maximum of four unrelated persons, but the owner has illegally allowed eight unrelated people to reside in the dwelling unit both prior to and after the effective date of the zoning regulation that reduced the maximum number of occupants allowed, then the dwelling unit did not comply with prior occupancy regulations (it was illegal) and thus a nonconforming status does not apply.

In short, a use on a property can either be:

1. Legal (two types)
 - a. Conforming
 - b. Nonconforming
2. Illegal

In *City of Chesapeake v. Gardner Enterprises*, the Supreme Court of Virginia explained that “the purpose of [nonconforming use laws] is to preserve rights in existing lawful buildings and uses of land, subject to the rule that public policy opposes the extension and favors the elimination of nonconforming uses.” *Chesapeake v. Gardner Enterprises*, 253 Va. 243, 248 (1997). Further, “nonconforming uses are not favored in the law because they detract from the effectiveness of a comprehensive zoning plan.” *Id.*

Nonconforming uses follow the general rule that “a person claiming an exemption from the law must establish his right to the exemption.” *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 575 (1979). The Supreme Court of Virginia has explained the rationale for placing the burden of proof on the property owner rather than the zoning administrator: “ordinarily, the land user knows more than the zoning authority about the nature and extent of the use of the land since imposition of a zoning restriction and thus has better access to evidence of whether the current use is a lawful nonconforming use.” *Id.* at 574-75.

A nonconforming structure is lawful structure existing at the time of the enactment or subsequent amendment of the Zoning Ordinance which does not conform to the current zoning regulations prescribed in the district in which it is situated (this is the proposed new definition for nonconforming structure). Nonconformities for structures relate to the characteristics of the structure itself, such as setbacks and height.

In June 2018, the Board of Zoning Appeals heard three appeal cases which dealt with nonconforming uses. The Board determined on the final case that the City Zoning Ordinance is unclear regarding when a nonconforming use was lost. The draft ordinance has been re-written to provide clarity to when nonconforming uses are no longer legal uses and to better match Virginia State Code Section 15.2-2307, which refers to nonconforming properties. Changes were made to Sections 10-3-20, 10-3-21, 10-3-22, and 10-3-24 and are summarized below

1. Clarified in the definitions of “nonconforming use” and “nonconforming structure” that nonconformities were at one time a lawful, conforming use, and to better match language in Virginia State Code. The definition of “nonconforming lot” was removed as it is not used in the Zoning Ordinance.
2. Clarified that the continuance of nonconforming uses shall only be continued if all three of the following statements are true, as stated in Virginia State Code: (a) the then-existing or a more restricted use continues; (b) such use is not discontinued for more than two (2) years; and, (c) the buildings or structures are maintained in their then structural condition.
3. Explained that the burden of proof is on the property owner.
4. Used the reserved area in Section 10-3-21 to organize and explain the difference between nonconforming structures and nonconforming uses.
5. Explained that enlarged or extended is referencing the size, character or intensity of the use, and that this enlargement or extension terminates the nonconformity. Also added language to clarify that increasing occupancy or dwelling units does constitute as an enlargement.
6. Added language to explain that structures with nonconforming uses may be structurally altered if a zoning verification letter has been written documenting the existence and extent of the nonconforming use (this provides a baseline for staff to judge if an expansion or enlargement occurred), and if the structural alteration does not increase or extend the square footage.
7. Added language to explain that a use shall not be discontinued if the structure that was occupied by the use was destroyed or damaged by a natural disaster or act of God.
8. Retitled and reworded the nonconforming buildings section, Section 10-3-22, to match the Virginia State Code language.

After preparing this staff report and the proposed language for the ordinance amendment, staff noticed some changes that needed to be corrected in the language. Within Section 10-3-24 – Definitions, we

define nonconforming structures; however, we use the language nonconforming buildings within Section 10-3-22. Staff believes it is important to maintain the same wording within the definition as well as the specific regulating section of the ordinance; therefore, we are asking to change Section 10-3-22 Nonconforming buildings to read Nonconforming structures.

Ms. Dang added that Article E is titled Nonconforming Uses and Buildings and we should also update that language for the same reason.

Chair Way asked if there were any questions for staff regarding the amendment.

Mr. Colman asked why are we removing nonconforming lot.

Mrs. Banks said we do not use the term nonconforming lot anywhere in the Zoning Ordinance.

Mr. Colman said we had a BZA case where we allowed the applicant to adjust a property line, but it created a nonconforming lot. The variance was to allow a nonconforming lot.

Mrs. Banks said that is why you have variances to allow for deviation from the required lot size and area.

Mr. Colman said after we approved that request it became a nonconforming lot.

Mr. Baugh asked what made the lot in the BZA case nonconforming.

Mr. Colman said it was too small.

Mr. Baugh said this nonconforming amendment is dealing with uses and buildings within a legitimate zoning district that has been changed. So, we are using the same terminology, but if it is going through the BZA process, it is not nonconforming if it is granted a variance. A variance makes it conforming. But the use of the term nonconforming in a BZA case is not something that was created by a zoning ordinance change.

Mr. Fletcher said I agree with your points with one exception, which is the one about a zoning ordinance change. Take the Sunset Heights area – those lots were developed as 25-foot wide lots and you could buy up two, three, six, however many you wanted to construct your home. Those lots were allowed to be platted to that dimension because that is what the R-1 zoning allowed. The zoning regulations changed and now the ordinance requires an 80-foot wide lot in R-1. So, there was a zoning ordinance change that made those lots nonconforming. The other thing is the parcels along the fringes of the City that were annexed in; there was no baseline for those parcels. They were nonconforming when they came into the City.

Mr. Baugh said what I thought I was hearing from staff was that the reason you thought that we could get rid of the nonconforming lot definition was, not that there is no such thing as a nonconforming lot; but, that there may not be such a thing as a nonconforming lot that is really relevant in this context.

Ms. Dang said then do we want to keep the definition or not?

Mr. Fletcher said honestly, it would not hurt to keep the definition.

Mr. Finnegan said I have a question about 10-3-21(a). What is catching my attention here is the phrase *intensity of the use*; are we just talking about occupancy?

Mrs. Banks said not always, the focus may have been on occupancy, but it is not always that.

Mr. Fletcher said I can give an example. This actually came out of a court case from some years past. Say you have nonconforming storage of junk, vehicles, things like that and you had the ability to store three vehicles, then suddenly you have 30 vehicles stored. The intensity of that nonconformity has increased, and this is an interpretation of the Zoning Administrator, but have they intensified to a point that they have enlarged that nonconformity and now it is taking up more property or they are being stored in

portions of the property where they were not previously stored. There are lots of scenarios other than occupancy.

Mr. Finnegan asked is the intention of the language “that nonconforming status of such use shall terminate and become unlawful,” to be punitive and be used as a deterrent. Is that the intent of the language?

Mr. Fletcher replied that is always the intention of the nonconforming clauses; you want to get rid of nonconforming uses. You want the uses to be conforming. It is right here in the staff report *Chesapeake v. Gardner Enterprises, (1997)* “nonconforming uses are not favored in the law because they detract from the effectiveness of a comprehensive zoning plan.”

Chair Way said at this time I will open the public hearing and ask if anyone wishes to speak in favor or in opposition to the amendment request.

Mr. Julian Pena said he is a Harrisonburg resident and although he did not come tonight to speak on this amendment specifically, he does have a question about the intensity language. Mrs. Banks discussed that if the intensity were to reduce, say from four to three residents, they would no longer be allowed to have the four in the future. How is the intensity measured? The reason I mention this is because in the ordinance I know there are specific rules that say you can have four unrelated persons living in a home or two unrelated persons, but I have never seen anything about three unrelated persons. So how can you go from four down to three?

Mrs. Banks said using occupancy as an example, if you have a home and it is nonconforming to occupancy because it has four unrelated persons residing in the home and the zoning district only allows two, the nonconforming use may continue. But if you change the occupancy of four unrelated persons to three unrelated persons for a period of more than 24 consecutive months, you lose the ability to go back to four unrelated persons and must remain at three. If you completely stop the use altogether for a period of more than 24 months you lose your nonconformity and cannot go back. After 24 months you have lost the ability to go back to the original nonconformity.

Mr. Baugh said that is State law, that is not something that we have the ability to amend and that is not what we are doing here tonight. What the State law says is that once the rules have now made what you are doing illegal, nonconforming, grandfathered, you can continue what you are doing as long as you do not do more, but if you do less for 24 consecutive months then you are bound by what you have reduced it to.

Mr. Pena said so for example you are in the R-4 zoning and now you are going down to an R-2 zoning, so you can no longer go back up to the R-4.

Mr. Baugh said if you change the zoning that is an entirely different thing. We are discussing when you do not change the zoning district, but, a change that occurs within the zoning district.

Mr. Pena said thank you, that answers my question.

Chair Way asked if there was anyone else desiring to speak. Hearing none, he closed the public hearing and asked Planning Commission for discussion and where do we stand with keeping the definition of nonconforming lot.

Mr. Baugh said the statute talks about nonconforming uses. If it is an undeveloped lot, then there is no use for you to consider nonconforming lot in this specific text.

Mr. Fletcher said the definition is irrelevant to the context of what we are talking about tonight. I can see both sides and I can understand the point of keeping it within the definitions.

Mr. Finnegan said I would like to go back to 10-3-21(a) again and clarify that the nonconforming status of such use shall terminate. The word shall mean that it is not up to the BZA or some other body to determine this, it shall terminate. If that is the case, I do not think I can support this amendment with that language. I feel that there should be some flexibility for people. This language is not in the original language that we are striking.

Mr. Fletcher said that is why we are making these changes, we have been interpreting it that way. We have had cases go to the BZA that have reinforced our interpretation.

Mr. Colman moved to recommend approval of the Zoning Ordinance amendment to Article E with the suggested changes by staff regarding buildings and structures and with the retention of the definition of lot, nonconforming.

Mrs. Whitten seconded the motion.

Chair Way called for a roll call vote on the motion.

Commissioner Fitzgerald – yes.

Commissioner Whitten – yes.

Commissioner Colman – yes.

Commissioner Baugh – yes.

Commissioner Finks – yes.

Commissioner Finnegan – no.

Chair Way – yes.

The motion passes on a 6-1 vote.

Chair Way said this will go to City Council on November 13th.

Respectfully Submitted,

Alison Banks

Alison Banks
Senior Planner