



City of Harrisonburg, Virginia  
Department of Planning & Community Development

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Building Inspections  
Engineering  
Planning & Zoning

To: Eric Campbell, City Manager  
From: Adam Fletcher, Director – Department of Planning and Community Development; and  
Harrisonburg Planning Commission  
Date: November 13, 2018  
Re: Zoning Ordinance Amendment to Article E Nonconforming buildings and uses

**Summary:**

Public hearing to consider amending Article E, Nonconforming Buildings and Uses of the Zoning Ordinance by changing the title of Article E to “Nonconforming Uses and Structures” and replacing the entire article with new and updated language to regulate nonconforming uses and structures within the City. Article E describes conditions that must be met for nonconforming uses and structures to legally continue, and also conditions that would result in the termination of nonconforming status. Additionally, the following amendments are proposed to definitions in Section 10-3-24 of the Zoning Ordinance: (1) the “Nonconforming use” definition will be replaced with “Any lawful use existing at the time of the enactment or subsequent amendment of this chapter which does not conform to the current zoning regulations prescribed in the district in which it is situated.”, (2) “Structure, nonconforming” will be changed to “Nonconforming structure” and its definition is proposed to be “Any lawful structure existing at the time of the enactment or subsequent amendment of this chapter which does not conform to the current zoning regulations prescribed in the district in which it is situated.”

**Background:**

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.

### **Key Issues:**

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.

**Environmental Impact:**

N/A

**Fiscal Impact:**

N/A

**Prior Actions:**

N/A

**Alternatives:**

- (a) Recommend approval of the Zoning Ordinance amendment request as submitted by staff; or
- (b) Recommend denial of the Zoning Ordinance amendment request.

**Community Engagement:**

As required, the request was published in the local newspaper twice advertising for Planning Commission's public hearing for the Zoning Ordinance amendment and twice advertising for the City Council's public hearing for the Zoning Ordinance Amendment. The advertisement was published as shown below:

*Zoning Ordinance Amendment – Nonconforming Uses and Structures*

Public hearing to consider amending Article E, Nonconforming Buildings and Uses of the Zoning Ordinance by changing the title of Article E to "Nonconforming Uses and Structures" and replacing the entire article with new and updated language to regulate nonconforming uses and structures within the City. Article E describes conditions that must be met for nonconforming uses and structures to legally continue, and also conditions that would result in the termination of nonconforming status. Additionally, the following amendments are proposed to definitions in Section 10-3-24 of the Zoning Ordinance: (1) the "Nonconforming use" definition will be replaced with "Any lawful use existing at the time of the enactment or subsequent amendment of this chapter which does not conform to the current zoning

regulations prescribed in the district in which it is situated.”, (2) “Structure, nonconforming” will be changed to “Nonconforming structure” and its definition is proposed to be “Any lawful structure existing at the time of the enactment or subsequent amendment of this chapter which does not conform to the current zoning regulations prescribed in the district in which it is situated.”

In addition, adjoining property owners were notified of the public hearing; the property was posted with signage advertising the request; and a notice was provided on the City’s website at <https://www.harrisonburgva.gov/public-hearings>.

**Recommendation:**

Staff recommends alternative (a) to recommend approval of the Zoning Ordinance amendment request as submitted by staff.

**Attachments:**

1. Extract (5 Pages)
2. Proposed Zoning Ordinance Amendments (5 pages)

**Review:**

Planning Commission recommended (6-1) alternative (a) approval of the Zoning Ordinance amendment request as submitted by staff.