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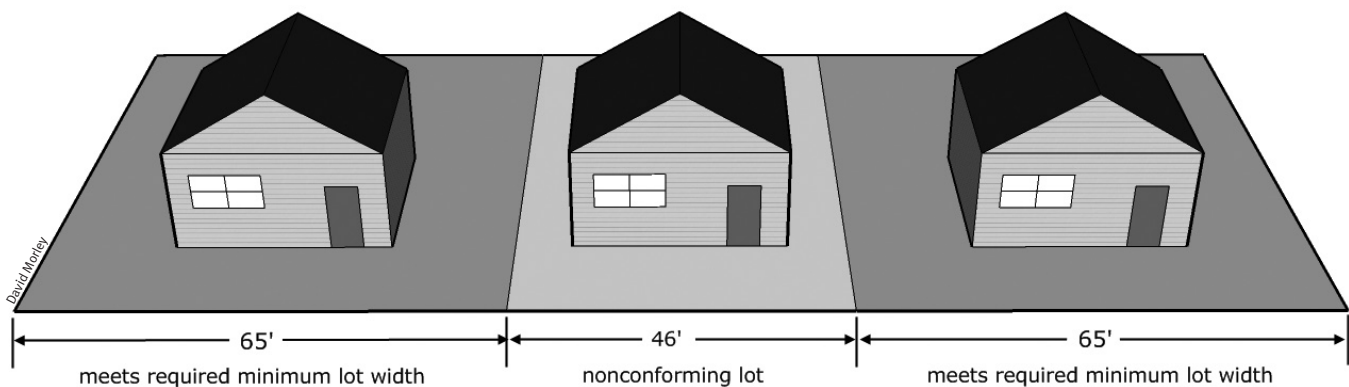
PRACTICE NONCONFORMITIES



Distinguishing Between Detrimental and Benign Nonconformities

By V. Gail Easley, FAICP, and David A. Theriaque

Local governments routinely adopt new or revised zoning regulations to establish minimum standards for the use of land and standards for development on the land.



➡ A nonconforming lot does not comply with current dimensional standards such as minimum area, width, depth, or frontage.

With the adoption of new standards for use and development, many existing uses, structures, site design features, and lots may no longer meet the current standards.

The concept of nonconformities arises from adopting new codes for areas that already have some development, which is the case for almost every jurisdiction in the country. When land is used for activities that are no longer permissible under the zoning regulations, the local government typically allows the preexisting use to continue if it was permissible when it was first established. Likewise, when development is in place and the provisions of the zoning regulations render the lot or one or more site design features out of compliance with current standards, the local government typically “grandfathers” the development if it was in compliance when first established. Grandfathering is another word used to describe nonconformities, which means the local government is granting legal status to the use or development, but with limitations.

An existing use or development that was not in compliance when a local government enacts new regulations is not eligible for grandfathered status. Indeed, each claim of grandfathered status must meet this threshold question: Was the use or development in compliance with the existing regulations? If not, such use or development is not entitled to any protection from the new regulations. Rather, it is subject to code enforcement proceedings to bring it into compliance with the newly adopted regulations.

This issue of *Zoning Practice* addresses legal nonconformities of use and development standards, but does not address signs. There are many issues pertaining to signs, including First Amendment rights, which are too complex to include in this article. Code enforcement of unlawful uses is also a topic for another issue.

WHY DO LOCAL GOVERNMENTS GRANDFATHER USES AND STRUCTURES?

When zoning was in its infancy, planners expected that there would be few nonconformi-

ties and those that existed would naturally go away over time. Because of the nonconformities’ protected status as grandfathered uses, however, they continued to prosper due to the prohibition on other such uses in that zoning district. In essence, such nonconforming uses were provided with monopolies.

Additionally, zoning was perceived as a prospective matter that would not apply to uses which were already in existence. Moreover, in light of the uncertainty regarding whether the courts would uphold zoning regulations, any attempt to apply the new zoning regulations to existing uses and development was perceived as increasing the likelihood that a court would invalidate such regulations. Allowing nonconformities to continue also reduced the amount of public opposition to the concept of zoning regulations.

These concerns hold true today. From a public policy perspective, local governments are rightfully concerned about the public outcry that would occur if grandfathered status was not applied to existing uses and development. Imagine

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About the Authors

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the uproar that would occur if all existing nonconforming uses were required to cease immediately upon the adoption of new zoning regulations.

Similarly, even though the concept of zoning is well established in the court system, the courts protect existing uses and development from immediate compliance with the adoption of new zoning regulations through various legal doctrines such as takings law, vested rights, and concepts of equity and justice.

Despite these good reasons to allow nonconformities to continue, nonconformities often undermine what a community is seeking to achieve when it establishes specific allowable uses and development standards for a zoning district. Therefore, it is important to determine the best way to eliminate, reduce, or continue nonconforming situations.

UNDERSTANDING THE JARGON

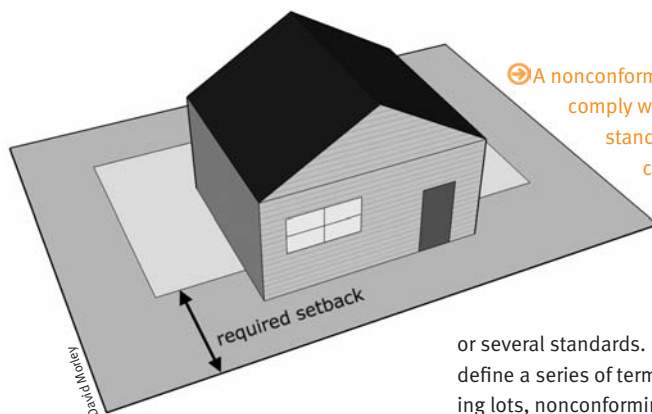
In order to be clear about the concepts, a few terms pertaining to nonconformities are explained here:

Nonconforming use. Use means the activity carried out on the land. When a use is nonconforming, it means that the existing use is not authorized for the zoning district in which it is located. However, even when the use is nonconforming, the structure housing the use is not necessarily nonconforming. In fact, there may be no structures involved at all. For example, a field in an agricultural zone might be used for parking although parking is not an authorized principle use.

A review of the Planning Advisory Service Report 521/522, *A Planners Dictionary*, reveals that many local governments include structures, lots, and site design features within the definition of nonconforming use. However, we make a clear distinction between use and site design or development standards when

- accessory structures, such as dumpsters, pools, pool enclosures, sheds, recreational facilities, or greenhouses.

When new design standards are adopted to govern the location, height, dimensions, number, or other design requirements, existing development may no longer conform to one



applying the term *nonconformity*. We believe it is important to distinguish between the activity (use) and the design standards that apply to buildings, structures, site features, and lots.

Nonconforming development standards.

Site development standards pertain to:

- lots, meaning the area or dimensions;
- structures, primarily the principal building(s) on a site;
- required design features, such as parking lots, loading areas, or stormwater facilities; and

or several standards. Local governments often define a series of terms, such as nonconforming lots, nonconforming parking, nonconforming dimensional requirements, and so forth. The key factor is that all such nonconformities pertain to development or design standards, as distinguished from use.

Detrimental nonconformities. Many people believe that nonconformities are inherently detrimental or cause harm in some way. However, based on our experiences and discussions with practitioners over the last several years, it seems clear that nonconformities may or may not be detrimental. Consequently, we believe that nonconformities should be separated into two categories—“detrimental” and “benign.”

Detrimental nonconformities are those that have a negative impact on the health and safety of the public. Examples include uses involving hazardous materials, such as gasoline stations in single-family neighborhoods; uses that produce significant noise, such as body shops or paint shops; uses that have been deemed incompatible, such as adult entertainment establishments near schools; or uses that have large trip generation characteristics, such as drive-through restaurants.

Detrimental nonconformities clearly have the potential for harm and should be subject to limitations leading to their eventual removal or

not a single concept to be routinely cited as the basis of regulation. Rather, health and safety are the basis of protection from injury, illness, danger, and other harm. Public welfare is concerned with nuisance, economic interests, convenience, and community character. While benign nonconformities may have some negative impact, the local government has determined that the negative impact is small and does not threaten the public health and safety. For example, the amount of deviation from a dimensional requirement may be so small as to be unnoticeable, such as an encroachment of only a few inches into

compliance with all remaining development standards. Such exceptions are not consistent with the idea that the nonconformity should be eliminated eventually.

- *Prohibiting or limiting a change of use* except when the new use is considered conforming or less nonconforming, often based on development standards to support the use. In this latter situation, a good example is parking. When the use requires the same or fewer parking spaces, the impact from the change of use is not increased.
- *Requiring the combination of adjacent nonconforming lots.* When a lot has less area than



Photos by John Svoboda

➡ Detrimental nonconformities threaten the public welfare. Nearby residents no longer have the quiet enjoyment of their homes due to noise, lights, odor, or increased traffic.

modification into compliance with current standards. This concept forms the basis for most regulation of nonconformities.

Benign nonconformities. When development fails to meet current design standards but the nonconformity is not harmful, there is little or no need to limit the development from expansion, redevelopment, or other activities. Local governments often struggle with this issue because, in most cases, *all* nonconformities are treated alike. The authors recommend that local governments establish a second category of nonconformities—benign nonconformities—with different standards that do not necessarily lead to eventual removal of the nonconforming situation. A nonconformity is considered benign when it does not have a negative impact on the health and safety of the public but may have a negative impact on the public welfare. Examples may include a lack of landscaping, too few parking spaces, or minimal deviations from dimensional standards.

The separation of nonconformities into detrimental and benign is based on the idea that “public health, safety, and welfare” is

a required setback. A benign nonconformity can also arise from inconvenience, such as too few parking spaces. The local government should categorize a nonconformity as benign when there is no need to eliminate it to protect the public from harm.

CURRENT APPROACHES TO REGULATING NONCONFORMITIES

Most regulation of nonconformities is based on the eventual elimination of the situation. This approach leads to regulations such as the following:

- *Prohibiting or limiting the expansion of a building* when the building itself is nonconforming or when the building, even though meeting the development standards, houses a nonconforming use. The idea is that, while routine maintenance is permissible, such a limitation will prevent continued investment into a situation that should not exist. However, many local governments allow a building’s expansion if it does not increase the degree of nonconformity. An example is a building with a nonconforming front setback where an expansion is proposed to the rear of the building in

required for development, and the same owner has two or more contiguous lots, a typical regulation requires the lots to be combined to create one conforming lot. On the other hand, many regulations allow the development of a lot that is nonconforming as to area, provided that all other standards for development are met. This latter situation is a good example of the concept of a benign nonconformity.

- *Providing that a discontinued nonconforming use cannot resume.* Local governments set a time limit on the ability of an owner to resume a nonconforming use. Typical regulations allow six months or one year of cessation; at the end of this time only a conforming use is permissible. During the latest economic downturn, however, many nonconforming uses went out of business. To avoid empty properties and encourage another similar—even if nonconforming—business to move in, some local governments have looked for ways to extend that time limit. One way is to consider the use “continuing” if the property is actively offered for sale or rent.
- *Providing that a nonconforming building that is vacant for a specified period of time is*

not reoccupied until the nonconformity is eliminated and the entire site is brought into compliance with the standards. Again, typical regulations allow six months or one year of vacancy before requiring that the building or other development features are brought up to current standards. Similar to the cessation of use situation, many local governments are extending the time limit if properties are actively offered for sale or rent.

- *Requiring that buildings and other development features that are destroyed are reconstructed only in compliance with current standards.* Most local governments allow reconstruction to the current conditions if there is a determination that the loss of the building is not due to an act of nature and that the loss is less than 50 percent of the value of the building. Therefore, a partially destroyed building can be rebuilt in its same nonconforming situation.
- *Amortizing the nonconformity.* In some instances, a local government establishes a time frame within which the nonconformity must cease. The basis for doing so is to allow the property owner an opportunity to recover his

A local government may wish to avoid the creation of nonconformities through greater attention to creating mixed use districts or the use of flexible design standards and overlay districts.

unsafe by the local government, with the result that elimination or reduction of the nonconformity is not the goal. Further, as planning practice moves away from the rigid separation of uses for the sake of strict uniformity within a district, we recognize that variation is not only acceptable but also is often desirable. Compatible development does not demand sameness. Rather, the public seeks and planners provide mixed use options in modern zoning codes. Increasingly, we see the need to focus on impact, character, compatibility, and urban form—which means that a nonconformity may not be unwelcome in a neighborhood.

A local government may wish to avoid the creation of nonconformities through greater attention to creating mixed use districts or the

standards are intended to reflect urban form rather than prescriptive and uniform dimensions. This contemporary approach avoids nonconforming uses and provides diversity and variation in design rather than the sameness planners and the public seek to avoid.

Another approach that we often use is to create an overlay for a specific neighborhood. A typical example is an older subdivision, established when lots and yards were smaller. The current residential zoning district requires a larger lot area, greater lot width, and larger setbacks; all the older houses and lots become nonconforming. Under typical nonconforming standards, additions to the houses are not allowed because the purpose of the nonconforming provisions is to eliminate, not continue



Photos by Kris Morley

⌚ Some nonconforming uses create detrimental impacts to their neighborhoods due to noise, traffic, electronic interference, lights, and odors. These impacts can be compounded by structural nonconformities such as inadequate parking, setbacks, buffers, and landscaping.

economic investment before being required to cease the nonconformity. This approach has been used for many different types of uses, such as gas stations in residentially zoned areas, adult entertainment facilities, junk yards, concrete plants, commercial uses, and billboards. The length of the amortization period is based frequently upon the economic life of the nonconformity.

REGULATING BENIGN NONCONFORMITIES

The distinguishing characteristic of the benign nonconformity is that the type and degree of nonconformity are not considered harmful or

use of flexible design standards and overlay districts. A neighborhood or other identifiable geographic unit may contain uses that would be nonconforming in a traditional zoning district, which seeks uniform uses. However, when nonconforming uses are desirable, the government should consider a mixed use district. This avoids the creation of nonconforming uses and may also achieve a vibrant, diverse neighborhood that benefits the community.

Planning practices include many examples of flexible design standards, such as context-sensitive standards, performance standards, or compatibility standards. Such stan-

dards and expand, the nonconforming situation. Flexible standards may not be a good fit in this situation. However, the creation of the "old neighborhood overlay," with standards that recognize the existing situation, keeps a stable neighborhood in conformance and allows property improvements with no special procedures or requirements other than compliance with the overlay standards.

Some practitioners have argued that flexibility is the necessary ingredient in regulating nonconformities. However, we believe that a local government does not need to examine nonconformity on a case-by-case basis. Instead,



Kris Morley

➡ This massage parlor in a low-density residential neighborhood is a detrimental nonconforming use. The traffic, lights, and noise generated by this use can have a harmful effect on the surrounding neighborhood.

it can decide up front which situations are detrimental and which, even if not sought out, are at least benign in their impact on the neighborhood. Again, the distinction is that detrimental nonconformities are harmful to the public health and safety while benign nonconformities have a potential negative impact on the public welfare.

Examples of benign nonconformities include:

- De minimis (i.e., negligible) deviations from a dimensional requirement, such as encroaching a few inches into a required setback, with no resulting negative impact on neighborhood character.
- A lot that fails to meet a dimensional or area requirement, but the deviation is small enough that the shortfall does not affect the neighborhood character.
- A change in the list of permissible or conditional uses, or eliminating an existing use that is not, in fact, objectionable. It may seem that the change in listed uses is an indication that those not listed are now objectionable. However, unless every existing lot with its existing use is examined during revision to the list of permissible uses, it is often the case that uses become nonconforming not as a matter of policy, but as a matter of oversight. Often, a use considered objectionable at adoption is no longer considered objectionable in later years as times, customs, and lifestyles change.
- Nonconformities arising from a government action, such as the loss of a required front yard for road widening. While the district regulations may require the yard, most properties along the road have the same situation, so the encroachment does not negatively impact that portion of the neighborhood.

- De minimis deviations from a standard, such as required parking spaces, which do not create a negative impact on the surrounding area.

A local government must decide for itself the degree of deviation from a standard that is de minimis. It must also decide how to define the character of a neighborhood and how much change to a lot, its use, or development would have a negative impact. All such determinations are based on impact to public welfare and not public safety or health, where a stricter standard applies.

Such a determination is not unusual for a local government, as the consideration of impact on neighborhood character and deviation from required standards is routine in variance requests and consideration of conditional uses. In fact, we believe that benign nonconformities are similar to variances in that the end result authorizes a deviation from

the standards in a manner consistent with the public interest.

DISTINGUISHING BETWEEN DETRIMENTAL AND BENIGN NONCONFORMITIES IN THE REGULATIONS

Many local governments adopt regulations for nonconformities and include exceptions to those regulations, as described earlier. This approach does not establish clear bases for the exceptions, which are often added on a piecemeal basis to address a particular situation. We recommend the creation of two categories of nonconformities at the outset. Such distinctions make it clear when the nonconformity must be eliminated to protect the public health and safety and can provide a basis for amortizing the nonconformity. The second category, benign nonconformities, still requires specific consideration, but is not intended for elimination.

Regulations that are adopted after a deliberative process can clearly describe those situations which are both nonconforming and detrimental. In such cases, it should be the policy and goal of the local government to eliminate such nonconformities. A detrimental nonconformity is presumed to be harmful to the abutting properties, the surrounding neighborhood, or the community as a whole. If this is the case, regulations should clearly lead to elimination of the nonconformity for the protection of the public.

Therefore, appropriate regulations for detrimental nonconformities would do the following:

- Prohibit *any expansion* of the principal building, accessory buildings, or site features. Continued investment in the property is contrary to the intent to eliminate the nonconformity.



John Svoboda

➡ Benign nonconformities are often unnoticed because the nonconformity is so similar to surrounding uses. Thus, there is no harm to the public in the continuation of the nonconforming situation.

- Prohibit *any addition* of site features, unless such features actually reduce the nonconformity. An example of this would be adding parking when part of the nonconformity is that there are too few parking spaces. Another example is the addition of landscaping, either to the parking lot or the entire site, when part of the nonconformity is failure to have required landscaping.
- Prohibit *any extension* of the use to other parts of buildings or the site that were not occupied by the nonconforming use at the time the regulations changed.
- Prohibit a change of use to any use that is not permissible in the zoning district.
- Establish the shortest feasible time for vacancy before new occupancy requires compliance with the current standards.
- Establish the strictest feasible limit on reconstruction after a disaster to ensure that the reconstruction conforms to current standards.
- Establish the strictest feasible limit on reconstruction following voluntary demolition to ensure that the reconstruction conforms to current standards.

This procedure ensures an opportunity for public participation and allows for the addition of conditions to approval. For example, a property that is nonconforming due to a de minimis setback deviation and lack of adequate landscaping is eligible for expansion. However, the board can require that the landscaping be brought to current standards as a condition of approval of the building expansion. The setback nonconformity continues unchanged. The public welfare is improved and the property owner can make economic use of the property.

Thus, appropriate regulations for benign nonconformities would do the following:

- Allow expansions of the principal building, accessory buildings, or site features, provided that the expansions are conforming to current standards.
- Allow the addition of site features that conform to current standards.
- Allow extension of the use to other parts of buildings or the site.

Georgia, also has an overlay district to avoid creation of nonconformities, although it is not labeled a nonconforming overlay, as is the case in San Leandro. Lompoc, California, classifies nonconformities into groups A and B to distinguish detrimental from nondetrimental situations.

CONCLUSIONS

This article makes the case for two categories of nonconformities—detrimental and benign—with separate regulations for each category. While the initial basis for nonconformities continues to exist, many local governments are seeking ways to retain and even encourage the continuance of nonconformities that are not harmful or unsafe. The distinction between nonconformities that are detrimental and destined for elimination and nonconformities that are benign and even desirable renders the regulations more meaningful for property owners and easier to administer by the local government.

Increasingly, we see the need to focus on impact, character, compatibility, and urban form—which means that a nonconformity may not be unwelcome in a neighborhood.

In contrast, the local government may determine that a benign nonconformity is not harmful to the abutting properties or surrounding neighborhood, but is contrary to the public welfare in some way. Just as a variance is a process to authorize a deviation from development standards, recognition of a benign nonconformity authorizes a deviation from development standards and does not require elimination of the nonconformity.

We further recommend that changes to benign nonconformities should not be permissible by right, but rather must be authorized by a board of adjustment, similar to the process for authorizing a variance. The justification for granting a variance is different than the justification for changes to benign nonconformities. Therefore, a change to property categorized as a benign nonconformity should not be authorized as a variance. However, we recommend that the *process* for the two situations, variances and modifications to benign nonconformities, could be similar.

- Allow a change of use to a permissible or conditional use in the zoning district.
- Allow vacancy of the property for any period of time, provided that the property is properly maintained to ensure safety.
- Allow reconstruction to restore existing conditions following a disaster.

The idea of categorizing nonconformities as detrimental and benign is a new way of labeling nonconformities, but it is not an altogether new idea. For example, Cape Canaveral, Florida, allows some nonconformities to be modified through a special permit. In establishing this provision, the city recognizes that some nonconformities do not have a detrimental impact on the community. San Leandro, California, has a list of exceptions to nonconformity provisions along with an overlay district for nonconforming situations. Identifying exceptions to the nonconformity provisions is a typical method of addressing benign, or nondetrimental, nonconforming situations. Lowndes County,

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NONCONFORMITIES?

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