

QUICKNOTES

Managing Zoning Nonconformities

In zoning, a nonconformity is an existing lot, structure, or use that fails to comply with existing standards. Legal nonconformities are lots, structures, or uses that either predate zoning or were in conformity with the zoning standards in effect at the time of their establishment, while illegal nonconformities were noncompliant when established.

Most discussions of zoning nonconformities focus exclusively on legally nonconforming lots, structures, or uses. This is because legal nonconformities may remain a part of the community fabric indefinitely, but illegal nonconformities have no protection from code enforcement actions to bring them into compliance. Consequently, in the sections below the term nonconformity refers only to a legal nonconformity.

Zoning changes often result in a net increase in nonconformities. Some common nonconformities in older communities include building setbacks or lots that are too small and corner stores in areas zoned for exclusive residential use. While it makes sense to assume that all nonconformities are undesirable and should be brought into compliance, in reality community members often don't mind if some nonconformities continue or even expand.

Background

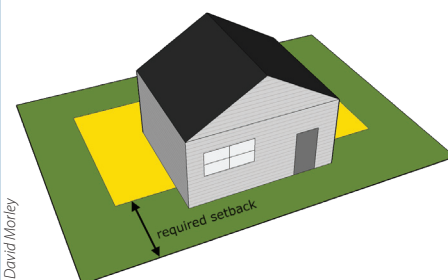
Communities have typically applied zoning standards prospectively. In other words, new standards only apply to new development. Existing nonconforming lots, structures, and uses can continue under new zoning standards. The early framers of zoning law did this on purpose to take the sting out of new regulation. In fact, it's unlikely that zoning would have caught on if all property owners were required to immediately extinguish nonconformities. However, this grandfathered status comes with limitations.

These limitations are most relevant in situations where owners want to modify or expand a structure or use or rebuild after a fire, flood, or storm. Generally, property changes that cross a certain threshold, whether physical or monetary, trigger a requirement that an owner must bring the property into compliance with the current zoning standards. The purpose of these triggers is to encourage redevelopment that is in line with the community's vision for the zoning district. But, as a side effect, these building and use limitations can actually slow the pace of change. Owners may be reluctant to make costly conforming improvements, and banks are typically hesitant to make loans on nonconforming properties. Because nonconforming status creates a barrier to reinvestment, it is important for communities to carefully consider how new zoning standards will affect the types and location of nonconformities.

Not all nonconformities have negative effects on adjacent properties or the larger community. In fact, in some instances, continuance or expansion of a nonconformity does not threaten public health or safety and may even be preferable to the alternative of disinvestment. For this reason, it makes sense for communities to treat nonconformities that are relatively benign differently than those likely to have significant detrimental effects. The following sections contain three broad recommendations for managing nonconformities through zoning.

Recommendation 1: Rezone to Minimize Nonconformities

When communities map new zoning districts, multiple contiguous blocks or even entire neighborhoods may be rendered nonconforming. If the intended goal is to facilitate dramatic redevelopment of these areas, this may make sense. But, if the structures and uses in these neighborhoods are generally viewed as desirable, widespread nonconformities may be a sign that the new districts are a poor fit for older areas of the community.



David Morley

The home in this illustration would be a nonconforming structure, since it does not comply with the minimum front setback.



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In these instances it makes sense to change the zoning to minimize nonconformities. This can be accomplished by remapping mature neighborhoods to a more appropriate zoning district, adjusting the use permissions or dimensional standards of the current district to better match existing conditions, or creating a new zoning district that fits the character of these areas. All of these approaches have the net effect of reducing inadvertent nonconformities and decreasing the likelihood of hardships for property owners.

Recommendation 2: Sanction Benign Nonconformities

For nonconformities that are not geographically concentrated, it often makes sense to distinguish between those that pose a significant potential threat to public health or safety and those that are largely benign. Examples of benign nonconformities may include small deviations from required setbacks or lot area requirements, unlisted uses that are similar to explicitly permitted uses, and minor shortfalls in off-street parking spaces.

While each community will need to establish its own criteria for what constitutes a benign nonconformity, the most effective way to sanction the continuance or expansion of these lots, structures, or uses is to state this tolerance clearly in the zoning ordinance. This may be as simple as adding a provision to a new set of zoning standards that authorizes the expansion or rebuilding of any existing development, subject to the standards in effect when the lot, structure, or use was established. Or communities may want to create a special permit process that allows local officials to grant conforming status on a case-by-case basis. Both of these approaches remove the stigma associated with nonconformance, which is especially important to lenders.

Recommendation 3: Phase Out Detrimental Nonconformities

In contrast to a benign nonconformity, a detrimental nonconformity has a high probability of eventually harming public health or safety. Consequently, zoning should encourage the elimination of detrimental nonconformities. Examples of detrimental nonconformities may include a bar or restaurant with late-night hours in a quiet residential district or a heavy industrial use in a floodplain.

As communities try to phase out potentially harmful nonconformities, they usually focus on limiting expansion and preventing rebuilding or reoccupancy. Typically, this means prohibiting any building expansions or site modifications that do not reduce or eliminate the nonconformity, changing one nonconforming use for another, reestablishing a nonconforming use or structure after a period of vacancy, or reconstructing a severely damaged or demolished nonconforming structure.

In instances where continuance of a nonconformity poses an especially acute risk to public health and safety, communities may take more drastic measures. These measures include nuisance abatement actions, amortization schemes that require conformance after a specified period of time, or public buy-outs for willing sellers. Because these options carry significant legal risks for local governments, local officials should always engage competent legal counsel before taking action.

Summary

Nonconforming lots, structures, and uses are a natural byproduct of new zoning standards. While most zoning ordinances encourage phasing out nonconformities, not all nonconformities pose risks to public health and safety. Instead of treating all nonconformities the same, it makes more sense to distinguish between benign and detrimental nonconformities. Communities can transform benign nonconformities into conforming lots, structures, or uses through rezoning, explicit exemptions from new standards, or special permit processes. And they can expedite the elimination of detrimental nonconformities through strict limits on expansion, rebuilding, or reoccupancy.

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RECOMMENDED READING

1. Published by the American Planning Association

Easley, V. Gail. 2009. "Distinguishing Between Detrimental and Benign Nonconformities." *Zoning Practice*, November. Available at www.planning.org/zoningpractice.

Rosenthal, Deborah. 2010. "Nonconforming Uses: Part 1." *The Commissioner*, Fall. Available at www.planning.org/thecommissioner.

Rosenthal, Deborah. 2011. "Nonconforming Uses: Part 2." *The Commissioner*, Winter. Available at www.planning.org/thecommissioner.

2. Other Resources

Elliott, Donald L. 2008. *A Better Way to Zone: Ten Principles to Create More Livable Cities*. Washington, D.C.: Island Press. Available at <http://islandpress.org/ip/books/book/islandpress/B/bo7003715.html>.

Markham, Lynn and Diane Milligan. 2005. *Zoning Nonconformities: Application of New Rules to Existing Development*. Stevens Point, Wis.: Center for Land Use Education. Available at www.uwsp.edu/cnr-ap/clue/Documents/Zoning/Zoning_Nonconformities.pdf.