

## CHAPTER 16 - LAND USE ORDINANCE

### Article VIII - Nonconforming Situations

#### *Section 16-121 Definitions.*

(A) Unless otherwise specifically provided or unless clearly required by the context, the words and phrases defined in this section shall have the meaning indicated when used in this article.

(1) ***Dimensional Nonconformity.*** A nonconforming situation that occurs when the height, size, or minimum floor space of a structure or the relationship between an existing building or buildings and other buildings or lot lines does not conform to the regulations applicable to the district in which the property is located.

(2) ***Effective Date of This Chapter.*** Whenever this article refers to the effective date of this chapter, the reference shall be deemed to include the effective date of any amendments to this chapter if the amendment, rather than this chapter as originally adopted, creates a nonconforming situation.

(3) ***Expenditure.*** A sum of money paid out in return for some benefit or to fulfill some obligation. The term also includes binding contractual commitments to make future expenditures as well as any other substantial changes in position.

(4) ***Nonconforming Lot.*** A lot existing at the effective date of this chapter (and not created for the purposes of evading the restrictions of this chapter) that does not meet the minimum area requirement of the district in which the lot is located.

(5) ***Nonconforming Project.*** Any structure, development, or undertaking that is incomplete at the effective date of this chapter and would be inconsistent with any regulation applicable to the district in which it is located if completed as proposed or planned.

(6) ***Nonconforming Sign.*** A sign (see Section 16-272 for definition) that, on the effective date of this chapter, does not conform to one or more of the regulations set forth in this chapter, particularly Article XVII, Signs.

(7) ***Nonconforming Use.*** A nonconforming situation that occurs when property is used for a purpose or in a manner made unlawful by the use regulations applicable to the district in which the property is located. (For example, a commercial office building in a residential district may be a nonconforming use.) The term also refers to the activity that constitutes the use made of the property. (For example, all the activity associated with operating a retail clothing store in a residentially zoned area is a nonconforming use.)

(8) ***Nonconforming Situation.*** A situation that occurs when, on the effective date of this chapter, an existing lot or structure or use of an existing lot or structure does not conform to one or more of the regulations applicable to the district in which the lot or structure is located. Among other possibilities, a nonconforming situation may arise because a lot does not meet minimum acreage requirements, because structures exceed maximum height limitations, because the relationship between existing buildings and the land (in such matters as density and set-back requirements) is not in conformity with this chapter, or because land or buildings are used for purposes made unlawful by this chapter. Nonconforming signs shall not be regarded as nonconforming situations for purposes of

this article but shall be governed by the provisions of Sections 16-286 and 16-287. [Amended April 10, 1985]

***Section 16-122 Continuation of Nonconforming Situations and Completion of Nonconforming Projects.***

(A) Except as otherwise specifically provided in this chapter, nonconforming situations that were otherwise lawful on the effective date of this chapter may be continued, subject to the restrictions and qualifications set forth in Sections 16-123 and 16-129.

(B) Nonconforming projects may be completed only in accordance with the provisions of Section 16-128.

***Section 16-123 Nonconforming Lots.***

(A) When a nonconforming lot can be used in conformity with all of the regulations applicable to the intended use, except that the lot is smaller than the required minimums set forth in Section 16-181, then the lot may be used as proposed just as if it were conforming. However, no use (e.g., a two-family residence) that requires a greater lot size than the established minimum lot size for a particular zone is permissible on a nonconforming lot.

(B) When the use proposed for a nonconforming lot is one that is conforming in all other respects but the applicable setback requirements (Section 16-184) cannot reasonably be complied with, then the entity authorized by this chapter to issue a permit for the proposed use, (the administrator, board of adjustment, or board of commissioners) may allow deviations from the applicable setback requirements if it finds that:

- (1) The property cannot reasonably be developed for the use proposed without such deviations;
- (2) These deviations are necessitated by the size or shape of the nonconforming lot; and
- (3) The property can be developed as proposed without any significantly adverse impact on surrounding properties or the public health or safety.

(C) For purposes of subsection (B), compliance with applicable building setback requirements is not reasonably possible if a building that serves the minimal needs of the use proposed for the nonconforming lot cannot practicably be constructed and located on the lot in conformity with such setback requirements. However, mere financial hardship does not constitute grounds for finding that compliance is not reasonably possible.

(D) This section applies only to undeveloped nonconforming lots. A lot is undeveloped if it has no substantial structures upon it. A change in use of a developed nonconforming lot may be accomplished in accordance with Section 16-126.

(E) Subject to the following sentence, if, on the date this section becomes effective, an undeveloped nonconforming lot adjoins and has continuous frontage with one or more other undeveloped lots under the same ownership, then neither the owner of the nonconforming lot nor his successors in interest may take advantage of the provisions of this section. This subsection shall not apply to a nonconforming lot if a majority of the developed lots located on either side of the street where such lot is located and within 500 feet of such lot are also nonconforming. The intent of this subsection is to require nonconforming lots to be combined with other undeveloped lots to create conforming lots under the circumstances specified

herein, but not to require such combination when that would be out of character with the way the neighborhood has previously been developed.

***Section 16-124 Extension or Enlargement of Nonconforming Situations.***

(A) Except as specifically provided in this section, no person may engage in any activity that causes an increase in the extent of nonconformity of a nonconforming situation. In particular, physical alteration of structures or the placement of new structures on open land is unlawful if such activity results in:

- (1) An increase in the total amount of space devoted to a nonconforming use; or
- (2) An increase in nonconformity. For the purposes of this Article, an increase in nonconformity shall refer to any improvement or expansion which contravenes the density, dimensional or other requirements of the Land Use Ordinance. Structures or portions of structures which are nonconforming may not be extended or expanded in any fashion.

EXPLANATORY NOTE: For purposes of illustration, and not limitation, a deck, or any portion thereof, which is nonconforming for failing to comply with applicable setback requirements may not be altered so as to make it a porch as that would constitute an increase in nonconformity. Neither shall a nonconforming porch be altered to create an enclosed space with the exception that mesh screening may be added. *[Amended November 10, 2009]*

(B) Subject to subsection (D) a nonconforming use may be extended throughout any portion of a completed building that, when the use was made nonconforming by this chapter, was manifestly designed or arranged to accommodate such use. However, subject to Section 16-128 (authorizing the completion of nonconforming projects in certain circumstances), a nonconforming use may not be extended to additional buildings or to land outside the original building.

(C) Subject to Section 16-128 (authorizing the completion of nonconforming projects in certain circumstances), a nonconforming use of open land may not be extended to cover more land than was occupied by that use when it became nonconforming, except that a use that involves the removal of natural materials from the lot (e.g., a sand pit) may be expanded to the boundaries of the lot where the use was established at the time it became nonconforming if ten percent or more of the earth products had already been removed at the effective date of this chapter.

(D) Notwithstanding subsection (A), any structure used for single-family residential purposes be replaced with a similar structure, so long as the replacement does not create new nonconformities or increase the extent of existing nonconformities with respect to such matters as setback and parking requirements. (For example, a single-story dwelling that encroaches into one or more applicable setbacks may be replaced within the previous building footprint. However, a second story may only be built if the applicable setbacks are met.) This paragraph is subject to the limitations stated in Section 16-127 (abandonment and discontinuance of nonconforming situations). *[Amended September 14, 2004 and November 10, 2009]*

(E) Notwithstanding subsection (A), whenever: (i) there exists a lot with one or more structures on it; and (ii) a change in use that does not involve any enlargement of a structure is proposed for such lot; and (iii) the parking requirements of Article XVIII that would be applicable as a result of the proposed change cannot be satisfied on such lot because there is not sufficient area available on the lot that can practicably be used for parking, then the proposed use shall not be regarded as resulting in an impermissible extension or enlargement of a nonconforming situation. However; the applicant shall be required to comply with all applicable parking requirements that can be satisfied without acquiring additional land, and shall also be required to obtain satellite parking in accordance with Section 16-298 if: (i) parking

requirements cannot be satisfied on the lot with respect to which the permit is required; and (ii) such satellite parking is reasonably available. If such satellite parking is not reasonably available at the time the zoning or special or conditional use permit is granted, then the permit recipient shall be required to obtain it if and when it does become reasonably available. This requirement shall be a continuing condition of the permit.

(F) Historic Properties. Notwithstanding the limitations contained in paragraph (A), above, certain historic properties on which one or more nonconforming uses are taking place may be permitted to expand the structures and other facilities, such as patios, vehicular use areas, and the like, pertaining to said nonconforming uses by means of a conditional use permit as specified herein.

(1) The exception contained herein applies only to any property which is listed as a landmark on the National Register of Historic Places or listed as a contributing property in an historic district listed on the National Register of Historic Places and on which a nonconforming use has taken place continuously since prior to the effective date of the Land Use Code. For purposes of this paragraph, the effective date of the Land Use Ordinance shall be the date the use was first rendered nonconforming by the Land Use Code.

(2) The owner of an historic property, as defined herein, may apply for a conditional use permit to expand the structures and facilities associated with a nonconforming use in accordance with the procedures and standards contained in Section 16-54, above. The following standards, in addition to those contained in Section 16-54, shall govern issuance of such permit.

(a) Any expansion shall comply with the development and dimensional standards, such as setbacks, building height, signage, etc., of the zoning classification in which the property is situated.

(b) Any expansions of the existing structure shall not cumulatively exceed 50 percent of the gross floor area of the structure as of the effective date of this ordinance, or the effective date the property qualifies for the historical designation as specified in paragraph (1).

© Any expansion shall be congruous with the special historic character of the existing structure. *[Amended June 10, 2008]*

### ***Section 16-125 Repair, Maintenance and Reconstruction.***

(A) Minor repairs to and routine maintenance of property where nonconforming situations exist are permitted and encouraged and may require a Zoning Permit or Conditional Use Permit. Major renovation may be done only in accordance with a Zoning Permit issued pursuant to this section. Major renovation takes place when the costs of renovation would exceed fifty percent of the appraised valuation of the existing structure. *[Amended August 11, 1992, and December 10, 2002]*

(B) If a structure located on a lot where a nonconforming situation exists is damaged by fire, natural disaster, or act of God, to an extent that the costs of repair or replacement would exceed fifty percent of the appraised valuation of the pre-damaged structure, then the damaged structure may be repaired or replaced only in accordance with a zoning permit or conditional use permit issued pursuant to this section. A structure damaged by fire, natural disaster, or act of God, may be built back to the existing building footprint and may be enlarged as provided in Section 16-124. This subsection does not apply to structures used for single-family residential purposes, which structures may be reconstructed pursuant to a

zoning permit just as they may be enlarged or replaced as provided in subsection 16-124(E). *[Amended December 10, 2002]*

(C) For purposes of subsections (A) and (B):

(1) The "cost" of renovation or repair or replacement shall mean the fair market value of the materials and services necessary to accomplish such renovation, repair; or replacement.

(2) The "cost" of renovation or repair or replacement shall mean the total cost of all such intended work, and no person may seek to avoid the intent of subsections (A) or (B) by doing such work incrementally.

(3) The "appraised valuation" shall mean either the appraised valuation for property tax purposes, updated as necessary by the Watauga County tax model since the date of the last valuation, or the valuation determined by a North Carolina state certified general appraiser. *[Amended December 10, 2002]*

(4) Subsections (A) and (B) do not apply to structures located in a designated Flood Hazard Area. The repair, maintenance, or reconstruction of structures in a Flood Hazard Area may only be completed pursuant to Article XVI, Part I. Flood Damage Prevention, of this chapter. *[Amended December 10, 2002]*

(D) The permit issuing authority shall issue a permit authorized by this section if it finds that, in completing the renovation, repair or replacement work: *[Amended December 10, 2002]*

(1) No violation of Section 16-124 will occur; and

(2) The permittee will comply to the extent reasonably possible with all provisions of this chapter applicable to the existing structure and use. This subsection does not apply to structures used for single-family residential purposes, which structures may be reconstructed pursuant to a zoning permit just as they may be enlarged or replaced as provided in subsection 16-124(E). Also, the application of this subsection shall not cause a permittee to lose his right to continue a nonconforming use. *[Amended December 10, 2002]*

Compliance with a requirement of this chapter is not reasonably possible if compliance cannot be achieved without adding additional land to the lot where the nonconforming situation is maintained or moving a substantial structure that is on a permanent foundation. Mere financial hardship caused by the cost of meeting such requirements as paved parking does not constitute grounds for finding that compliance is not reasonably possible.

### ***Section 16-126 Change in Use of Property Where a Nonconforming Situation Exists.***

(A) A change in use of property that is sufficiently substantial to require a new zoning, special use, or conditional use permit in accordance with Section 16-46 may not be made except in accordance with subsections (B) through (D). However, this requirement shall not apply if only a sign permit is needed.

(B) If the intended change in use is to a principal use that is permissible in the district where the property is located, and all of the other requirements of this chapter applicable to that use can be complied with, permission to make the change must be obtained in the same manner as permission to make the initial use of a vacant lot. Once conformity with this chapter is achieved, the property may not revert to its nonconforming status.

(C) If the intended change in use is to a principal use that is permissible in the district where the property is located, but all of the requirements of this chapter applicable to that use cannot reasonably be complied with, then the change is permissible if the entity authorized by this chapter to issue a permit for that particular use (the administrator, board of adjustment or board of commissioners) issues a permit authorizing the change. This permit may be issued if the permit issuing authority finds, in addition to any other findings that may be required by this chapter, that:

(1) The intended change will not result in a violation of Section 16-124; and

(2) All of the applicable requirements of this chapter that can reasonably be complied with will be complied with. Compliance with a requirement of this chapter is not reasonably possible if compliance cannot be achieved without adding additional land to the lot where the nonconforming situation is maintained or moving a substantial structure that is on a permanent foundation. Mere financial hardship caused by the cost of meeting such requirements as paved parking does not constitute grounds for finding that compliance is not reasonably possible. And in no case may an applicant be given permission pursuant to this subsection to construct a building or add to an existing building if additional nonconformities would thereby be created.

(D) If the intended change in use is to another principal use that is also nonconforming, then the change is permissible if the entity authorized by this chapter to issue a permit for that particular use (administrator, board of adjustment, or board of commissioners) issues a permit authorizing the change. The permit issuing authority may issue the permit if it finds, in addition to other findings that may be required by this chapter, that:

(1) The use requested is one that is permissible in some zoning district with either a zoning, special use, or conditional use permit; and

(2) All of the conditions applicable to the permit authorized in subsection (C) of this section are satisfied; and

(3) The proposed development will have less of an adverse impact on those most affected by it and will be more compatible with the surrounding neighborhood than the use in operation at the time the permit is applied for.

### ***Section 16-127 Abandonment and Discontinuance of Nonconforming Situations.***

(A) When a nonconforming use is (i) discontinued for a consecutive period of 180 days, or (ii) discontinued for any period of time without a present intention to reinstate the nonconforming use, the property involved may thereafter be used only for conforming purposes.

(B) If the principal activity on property where a nonconforming situation other than a nonconforming use exists is (i) discontinued for a consecutive period of 180 days, or (ii) discontinued for any period of time without a present intention of resuming that activity, then that property may thereafter be used only in conformity with all of the regulations applicable to the preexisting use unless the entity with authority to issue a permit for the intended use issues a permit to allow the property to be used for this purpose without correcting the nonconforming situations. This permit may be issued if the permit issuing authority finds that eliminating a particular nonconformity is not reasonably possible (i.e., cannot be accomplished without adding additional land to the lot where the nonconforming situation is maintained or moving a substantial structure that is on a permanent foundation). The permit shall specify which nonconformities need not be corrected.

(C) For purposes of determining whether a right to continue a nonconforming situation is lost pursuant to this section, all of the buildings, activities, and operations maintained on a lot are generally to be considered as a whole. For example, the failure to rent one apartment in a nonconforming apartment building for 180 days shall not result in a loss of the right to rent that apartment or space thereafter so long as the apartment building as a whole is continuously maintained. But if a nonconforming use is maintained in conjunction with a conforming use, discontinuance of a nonconforming use for the required period shall terminate the right to maintain it thereafter.

(D) When a structure or operation made nonconforming by this chapter is vacant or discontinued at the effective date of this chapter, the 180-day period for purposes of this section begins to run at the effective date of this chapter.

### ***Section 16-128 Completion of Nonconforming Projects.***

(A) All nonconforming projects on which construction was begun at least 180 days before the effective date of this chapter as well as all nonconforming projects that are at least twenty-five percent completed in terms of the total expected cost of the project on the effective date of this chapter may be completed in accordance with the terms of their permits, so long as these permits were validly issued and remain unrevoked and unexpired. If a development is designed to be completed in stages, this subsection shall apply only to the particular phase under construction.

(B) Except as provided in subsection (A), all work on any nonconforming project shall cease on the effective date of this chapter, and all permits previously issued for work on nonconforming projects may begin or may be continued only pursuant to a zoning, special use, conditional use, or sign permit issued in accordance with this section by the individual or board authorized by this subchapter to issue permits for the type of development proposed. The permit issuing authority shall issue such a permit if it finds that the applicant has in good faith made substantial expenditures or incurred substantial binding obligations or otherwise changed his position in some substantial way in reasonable reliance on the land use law as it existed before the effective date of this chapter and thereby would be unreasonably prejudiced if not allowed to complete his project as proposed. In considering whether these findings may be made, the permit issuing authority shall be guided by the following, as well as other relevant considerations:

(1) All expenditures made to obtain or pursuant to a validly issued and unrevoked building, zoning, sign, or special or conditional use permit shall be considered as evidence of reasonable reliance on the land use law that existed before this chapter became effective.

(2) Except as provided in subdivision (B)(1), no expenditures made more than 180 days before the effective date of this chapter may be considered as evidence of reasonable reliance on the land use law that existed before this chapter became effective. An expenditure is made at the time a party incurs a binding obligation to make that expenditure.

(3) To the extent that expenditures are recoverable with a reasonable effort, a party shall not be considered prejudiced by having made those expenditures. For example, a party shall not be considered prejudiced by having made some expenditure to acquire a potential development site if the property obtained is approximately as valuable under the new classification as it was under the old, for the expenditure can be recovered by a resale of the property.

(4) To the extent that a nonconforming project can be made conforming and that expenditures made or obligations incurred can be effectively utilized in the completion of a conforming project, a party shall not be considered prejudiced by having made such expenditures.

(5) An expenditure shall be considered substantial if it is significant both in dollar amount and in terms of (i) the total estimated cost of the proposed project, and (ii) the ordinary business practices of the developer.

(6) A person shall be considered to have acted in good faith if actual knowledge of a proposed change in the land use law affecting the proposed development site could not be attributed to him.

(7) Even though a person had actual knowledge of a proposed change in the land use law affecting a development site, the permit issuing authority may still find that he acted in good faith if he did not proceed with his plans in a deliberate attempt to circumvent the effects of the proposed ordinance. The permit issuing authority may find that the developer did not proceed in an attempt to undermine the proposed ordinance if it determines that (i) at the time the expenditures were made, either there was considerable doubt about whether any ordinance would ultimately be passed, or it was not clear that the proposed ordinance would prohibit the intended development, and (ii) the developer had legitimate business reasons for making expenditures.

(C) The permit issuing authority shall not consider any application for the permit authorized by subsection (B) that is submitted more than sixty days after the effective date of this chapter. The permit issuing authority may waive this requirement for good cause shown, but in no case may it extend the application deadline beyond one year.

(D) The administrator shall send copies of this section to the persons listed as owners for tax purposes (and developers, if different from the owners) of all properties in regard to which permits have been issued for nonconforming projects or in regard to which a nonconforming project is otherwise known to be in some stage of development. This notice shall be sent by certified mail not less than fifteen days before the effective date of this chapter.

(E) The permit issuing authority shall establish expedited procedures for hearing applications for permits under this section. These applications shall be heard, whenever possible, before the effective date of this chapter so that construction work is not needlessly interrupted.

(F) When it appears from the developer's plan or otherwise that the nonconforming project was intended to be or reasonably could be completed in stages, segments, or other discrete units, the permit issuing authority shall not allow the nonconforming project to be constructed or completed in a fashion that is larger or more extensive than is necessary to allow the developer to recoup and obtain a reasonable rate of return on the expenditures he has made in connection with that nonconforming project.

### ***Section 16-129 Nonconforming Signs.***

(A) Notwithstanding any other provision of this article, (but subject to any more stringent requirements set forth in Article XVII), a nonconforming sign that exceeds the height or size limitations of Article XVII by more than ten percent or that is nonconforming in some other way shall, within one year following the effective date of this chapter, be altered to comply with the provisions of this chapter (particularly Article XVII) or be removed. If the nonconformity consists of too many freestanding signs or an excess of total sign area, the person responsible for the violation may determine which sign or signs need to be altered or removed to bring the development into conformity with the provisions of Article XVII.

(B) If a sign that is nonconforming under this chapter was also nonconforming under the town's previously adopted zoning ordinance, then the one year period specified in subsection (A) shall be

considered to have started on the date such sign became nonconforming under the previously adopted zoning ordinance.

(C) Within three months after the effective date of this chapter, the administrator shall make every reasonable effort to identify all the nonconforming signs within the town's planning jurisdiction. He shall then contact the person responsible for each such sign (as well as the owner of the property where the nonconforming sign is located, if different from the former) and inform such person: (i) that the sign is nonconforming; (ii) how it is nonconforming; (iii) what must be done to correct it and by what date; and (iv) the consequences of failure to make the necessary corrections. The administrator shall keep complete records of all correspondence, communications, and other actions taken with respect to such nonconforming signs.

(D) This section applies to all signs, including off-premises signs.

*Sections 16-130 through 16-134 Reserved.*

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