

Article 10 Nonconformity

10.1. General

10.1.1. Intent and Purpose

The adoption and occasional amendment of the Newton Zoning Ordinance and Zoning Map, including the adoption of the City's first zoning ordinance in 1922, can cause previously lawfully conforming lots, buildings, structures, uses, site characteristics, and signs to become nonconforming to new regulations. This section explains the impact of this nonconforming status on the continuation and/or expansion of nonconforming properties.

The purpose of this Article is to establish rules for properties where some aspect of the property, such as the lot, structure, or use of land, are non-conforming. This Article describes the circumstances under which such aspects of a property may continue and how changes to nonconforming uses or structures may be permitted to occur.

10.1.2. Definition.

- A. **Nonconformity.** A situation where a use of land, a structure, a lot, or some other aspect or characteristic of real property was legally created or legally commenced prior to the adoption of this Ordinance or an amendment to it, where such use or structure no longer conforms to one or more requirements of this Ordinance or ordinance amendment.

10.1.3. Applicability

- A. No amendment to this Zoning Ordinance shall affect any building, structure, or use lawfully in existence or lawfully begun prior to the first publication of notice of the public hearing on such ordinance amendment required by M.G.L. Chapter 40A, Section 5.
- B. An amendment to this ordinance shall apply to any change or alteration to a building, structure, or use permitted, or where no permit is required, commenced following the first publication of notice of the public hearing on such ordinance amendment required by M.G.L. Chapter 40A, Section 5.
- C. No amendment to this ordinance shall affect any previously issued building permit or special permit provided that construction work under such a permit must be commenced within 6 months after it is issued and the work, whether under such permit or otherwise lawfully begun is continued through to completion as continuously and expeditiously as it is reasonable.
- D. Notwithstanding paragraph A, all applications for site plan approval or special permits which were filed with the City Clerk on or before [date of adoption] and which were approved subsequent to that date shall be subject to the provisions of the Newton Zoning Ordinance in effect immediately before [date of adoption].
- E. A structure or use that was not lawful at the time it was commenced shall not be entitled to the nonconformity protections of this Article 10 and shall be subject to all provisions of this ordinance and any amendments thereto.

10.1.4. General Provisions

A. Basic Rules.

1. Preexisting nonconforming lots, structures, or uses may continue in the same form and use so long as the nonconformity remains otherwise compliant with this Ordinance.
2. Status as a preexisting nonconformity runs with the lot, structure, use, lot characteristic, or sign and is not affected by changes in tenancy, ownership, or management.
3. Any modification that increases an existing nonconformity or creates a new nonconformity is prohibited, except by Section 6 Finding according to Sec 11.7.
4. A nonconformity in any one aspect of the property does not affect the other conforming aspects of the property.
5. A nonconformity resulting from exceeding a maximum standard, does not prevent the modification, alteration, development, or redevelopment of a property within the limit of the preexisting nonconformity.
6. Any modification to a property that results in greater compliance with this Ordinance is permitted.

B. Determination of Nonconforming Status.

1. The Commissioner of Inspectional Services shall determine whether a property owner has provided reliable evidence of nonconforming status.
2. The burden of proving that a lot, structure, use, site characteristic, or sign is a preexisting nonconformity rests entirely with the property owner.
3. Applicants applying for development review required by this ordinance may be required to submit evidence of a prior permit or other documentation showing that the lot, structure, use, site characteristic, or sign was legally platted, built, or established prior to the effective date of this Ordinance or to any amendment to this Ordinance that created a nonconformity.

C. Casualty

Lawfully existing nonconforming uses and structures destroyed by fire, explosion, weather, flooding, or act of public enemy may be reconstructed or restored by right, subject to the following:

1. There shall be no increase in the degree of nonconformity from the state existing prior to destruction.
2. Reconstruction or restoration shall be started within a period of 2 years of the date of destruction and shall be continued in a timely fashion until completed.
3. No building permit shall be issued until the Commissioner of Inspectional Services has issued a zoning consistency determination.

D. Abandonment.

1. Lawfully existing nonconforming uses and structures are considered abandoned and may not be reestablished when one or more of the following occurs:
 - a. A nonconforming building or structure is not used for a period of 2 or more years.

- b. A nonconforming use is discontinued, with or without the intent to abandon, for a period of 2 or more years.
 - c. A nonconforming use is changed to a conforming use or a use protected under MGL 40A, Section 3.
 - d. The equipment or furnishings necessary for the operation of the nonconforming use have been removed and not replaced for a period of 2 or more years.
 - e. Utilities, such as water, gas, or electricity to the property have been disconnected for 2 or more years.
 - f. Reconstruction or restoration does not start within a period of two years from the date of destruction (See Sec. 10.1.4.C.2).
2. Should any of the above conditions for abandonment be met, the nonconforming use or structure shall not be reestablished or resumed unless it has been brought into conformance with this Ordinance.

10.2. Nonconforming Lots

10.2.1. Nonconforming Lot, defined.

A nonconforming lot is a lot that was lawfully established but that no longer complies with applicable lot standards because of the adoption or amendment of this Ordinance.

10.2.2. Unbuildable Lots.

- A. A lot is not considered unbuildable if the lot is noncompliant with the ordinance as to setback and/or lot standards:
1. Solely as a result of a taking of a portion of the lot for a public purpose, or
 2. As a result of a conveyance of a portion of the lot by the owner thereof to the City of Newton, any other body politic, or any agency or department thereof, in lieu of such a taking.

10.2.3. Alteration of Buildings Containing One or Two Units on Nonconforming Lots.

In the following circumstances, the reconstruction, extension, alteration or change (collectively “alteration”) to a 1 or 2 unit residential building on a nonconforming lot will not be considered an increase in the nonconformity and will be permitted by right if:

1. The alteration is to a structure which complies with all current setback and lot standards and requirements of the building type, but is located on a lot with insufficient frontage, where the alteration will also comply with all of these current requirements; or
2. The alteration is to a structure that complies with all current lot standards and requirements of the building type, but is located on a lot that does not allow sufficient setbacks, where the alteration will also comply with all of these current requirements. Setbacks may be reduced by:
 - a. First reducing the minimum distance of such dwelling house from the rear lot line to not less than 7½ feet; and

- b. Second, if necessary, reducing the minimum distance of such dwelling house from the front lot line to not less than 15 feet, unless the district regulations permit a front setback of less than 15 feet.

10.2.4. Residential Uses on Nonconforming Lots.

Any nonconforming lot that, at the effective date of this Ordinance, lot frontage requirements of this Ordinance, but complies with any such standards or their equivalent in force at the time the lot was lawfully laid out by duly recorded plan or deed may be built upon for residential use, provided that such lot is in a district zoned for residential use under the provisions of this Ordinance, that the proposed building type allows no more than 1 or 2 residential units, and the lot meets one of the following additional conditions:

A. Nonconforming Lot in Single and Separate Ownership.

A nonconforming lot held in single and separate ownership, which at the time of its creation had an area of 5,000 square feet or more and a frontage of 50 feet or more, may be built upon by right. For purposes of this Section 10.4.2, “single and separate ownership” means that the owner of a specific lot does not have a sufficient ownership interest in an adjacent lot to control the use and disposition of that lot. Where 1 or more owners can control the use and disposition of adjacent lots, such lots shall be deemed to be in “common ownership.”

10.3. Nonconforming Buildings and Structures

10.3.1. Nonconforming Structure, defined.

A principal building, or accessory building or structure, other than a sign, that was lawfully built but that no longer complies with applicable standards because of the adoption or amendment of this Ordinance.

10.3.2. Ordinary Repair and Maintenance.

Normal maintenance of a nonconforming building or structure including, but not limited to painting, roof replacement, re-siding, window replacement, and other improvements that are deemed to be cosmetic or de minimus in nature by the Commissioner of Inspectional Services, are permitted.

10.3.3. Alterations of Nonconforming Principal Building Types.

- A. An alteration of a preexisting building that is not a type permitted in a zoning district is prohibited, except as follows:
 1. Any building component allowed for any building type permitted within the same district may be added if approved by a Section 6 Finding, and
 2. An alteration that makes a building more similar to a permitted building type, thereby reducing the nonconformity, may be allowed by a Section 6 Finding.
- B. The modification of a permitted building type that is nonconforming as to siting on the lot is subject to the following:

1. If a building that is a permitted building type is in a nonconforming location with respect to any minimum setback line, it may be expanded by a Section 6 Finding, provided that:
 - a. Through fenestration layout, landscape screening, and/or other permitted means, the proposed modification does not reduce the privacy of an abutting residential property beyond that created by the current nonconformity.
2. If a building that is a permitted building type is in a nonconforming location with respect to any maximum setback line, it may be expanded within the parameters of the building type and is not considered nonconforming.

C. Section 6 Findings to Extend or Modify a Nonconforming Building or Structure

1. In its discretion to approve or deny a Section 6 Finding authorizing the modification of a nonconforming structure, the Zoning Board of Appeals shall not authorize any modification to an existing nonconforming structure that increases the degree of an existing nonconformity of the structure unless it finds that the alteration is not substantially more detrimental to the neighborhood (see Sec. 11.7).
2. In considering a Section 6 Finding to authorize modification of a nonconforming structure, the ZBA shall consider the following criteria in addition to any general criteria for a Section 6 Finding:
 - a. The extent and nature of the proposed alteration
 - b. Conformance to the purpose and intent of the zoning district and the Ordinance
 - c. Consistency of the proposed alterations with the character of neighboring structures
 - d. The need to minimize impermeable lot surface to the maximum extent practical
 - e. Whether conforming alterations can meet the demonstrated need of the applicant with minimal increase in the nonconformity.

10.4. Nonconforming Uses

10.4.1. Nonconforming Use, defined.

A nonconforming use is a use that was lawfully established but that no longer complies with applicable standards because of the adoption or amendment of this Ordinance.

10.4.2. Change of Use.

- A. No nonconforming use of a structure or of land may be changed to another use unless the new use is permitted by this Ordinance in the district where the use is located.
- B. Whenever a nonconforming use of land or of a structure has been changed to a conforming use, it may not thereafter be changed to a nonconforming use.

- C. A nonconforming use may not be changed to a nonconforming use that is in a different use category from the existing nonconforming use (e.g. an existing Banking use may not be changed into a Restaurant in a district where neither is permitted).
- D. A nonconforming use may change to another nonconforming use that is in the same Use Category as the existing nonconforming use by Section 6 Finding granted by the Zoning Board of Appeals according to Sec 11.8.

10.4.3. Alterations to Use.

- A. An alteration that results in the increase of a nonconforming use of land or a structure may be permitted by a Section 6 Finding by the Zoning Board of Appeals.
- B. A nonconforming use is considered to be increased in circumstances such as the following:
 - 1. an increase in gross floor area or land area for that use
 - 2. an increase in the number of dwelling units
 - 3. a change from seasonal to full-time operation
 - 4. a substantial increase in the number of trips generated by the use.
 - 5. a change in hours of operation beyond the hours of 7:00am to 9:00pm
 - 6. a significant increase in the scale, scope, or nature of activities conducted on the premises
- C. In using its discretion to approve or deny a Finding authorizing alterations to a nonconforming use, the Zoning Board of Appeals must find that the application meets the following criteria:
 - 1. The requirements for a Section 6 Finding (see Sec. 11.8.2)
 - 2. The extent and nature of the proposed alteration
 - 3. The impact of the alteration to the neighborhood when compared to the existing nonconforming use.
 - 4. Consistency of the proposed alteration with the evolution of uses in neighboring structures.
 - 5. Whether conforming alterations could meet the demonstrated need of the Applicant with minimal increase in nonconformity

10.5. Nonconforming Site Characteristics

10.5.1. Nonconforming Site Characteristics, defined.

A nonconforming site characteristic is an improvement on a given lot, such as parking, landscaping, paving, etc. that is not a building or a structure, that was lawfully established but that no longer complies with applicable standards because of the adoption or amendment of this Ordinance.

10.5.2. Alterations

- A. Nonconforming parking lots shall not be expanded in violation or further violation of maximum parking requirements.
- B. Nonconforming landscape and permeable area shall not be further reduced.

10.5.3. Reduction of Nonconformity

Reviewing boards or officials may require nonconforming site characteristics to be brought into partial or full conformance with the provisions of this Ordinance as a condition applied to the grant of a discretionary or administrative approval.