

## ARTICLE 9 NONCONFORMITIES

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### 9.1. PURPOSE AND INTENT

There exist within the Town of Garner uses of land, structures, lots, site elements, and signs that were lawfully established prior to the date of adoption of this UDO, but that no longer conform to the standards of this UDO. It is the intent of this UDO to move nonconformities in the direction of conformity (wherever possible), permit ~~these~~ nonconformities to continue until they are removed (where necessary), ~~but~~ and not to encourage their survival except under the limited circumstances established in this article. The Planning Director may require conformance with specific provisions of this UDO where deemed necessary to resolve immediate or pending public safety concerns. The intent of this Article in resolving and bringing uses, structures, and activities into conformance with this UDO is to protect the public health safety and welfare.

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## **9.2. DEFINITIONS**

For the purposes of this Article and discussing nonconformities, the following definitions shall apply:

### 9.2.1. Abandoned

To cease, either intentionally or unintentionally, from actively using land, structures, or any premises for the intended or previous use, but excluding temporary periods of inactivity due to remodeling, maintaining, or otherwise improving a facility. Abandonment is often referenced to a specified time period.

This definition includes “abandon”, “abandonment”, and any other tense or version of the word “abandoned.”

### 9.2.2. Discontinued

To quit or cease, either intentionally or unintentionally, operation or activity associated with a use of land, structures, or any premises from their intended or previous use or to replace the previous use with a new use of a different kind or class. A change of occupancy, owner, or tenant does not constitute a discontinuance or change of use.

This definition includes “discontinue”, “discontinuance”, “ceased” (as it refers to a use, and any other tense or version of the word “discontinued.”

### 9.2.3. Intent to Resume

An “intent to resume” a use, operations, or activities may be demonstrated through continuous operation of a portion of the facility, by the maintenance of water, sewer, electric, and other utility service (as appropriate), or by other outside documentation such as proof of deliveries.

### ~~9.2.9.3.~~ **NONCONFORMING USES**

#### ~~9.2.1-9.3.1.~~ Normal Maintenance and Repair

Normal maintenance or repair of structures where nonconforming uses are located may be performed in any consecutive twelve-month period, to an extent not exceeding ~~fifteen (15) percent~~33% of the current assessed value of the structure. Such maintenance and repair shall not be allowed to increase the usable space of the structure occupied by the nonconforming use, except pursuant to this section.

#### ~~9.2.2-9.3.2.~~ Extension or Alteration

A. A nonconforming use may be extended throughout any portion of a completed building that, when the use was made nonconforming by this UDO, was manifestly designed or arranged to accommodate such use. However, a nonconforming use may not be extended to additional buildings or to land outside the original building.

B. 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 involving the removal of natural materials (e.g., a quarry) 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 UDO.

~~B-C.~~ For full description of standards for alterations or additions, see Figure 9.6-A.

#### ~~9.2.3-9.3.3.~~ Change in Use

A nonconforming use may be changed, modified, or expanded to any permitted use(s) in the subject district. The affected property may not then revert to a nonconforming use.

#### ~~9.2.4-9.3.4.~~ Single-Family Residential Nonconforming Uses

A structure used for a single- family residence and maintained as a nonconforming use may be enlarged or replaced with a similar structure of a larger size, so long as new nonconformities or an increase in the extent of existing nonconformities, such as parking requirements, are not created.

#### ~~9.2.5-9.3.5.~~ Continuation of Accessory Use

No use that is accessory to a principal nonconforming use shall continue after such principal use ~~shall have~~has discontinued, ceased, been abandoned, or terminated unless it conforms to all provisions of this UDO.

#### ~~9.2.6-9.3.6.~~ Discontinuance and Abandonment

A. A nonconforming use shall be presumed to be discontinued and abandoned, shall lose its nonconforming status, and shall not be

reestablished or resumed and thereafter be used only for conforming purposes, when any of the following has occurred:

1. The owner has indicated intent to abandon the use, delivered in writing to the Planning Director.

2. When a nonconforming use is abandoned or discontinued for a consecutive 180-day period or for a total of (180) calendar days in a 12-month period.

~~3.~~ At the point when the electric meter is pulled off or water service or other public utility service is terminated on a structure or lot due to any reason, provided that it is not replaced or reactivated within the 180-day period immediately following.

~~B.~~ When a use or use of land made nonconforming by adoption of this UDO is vacant or discontinued at the effective date of this UDO, the 180-day period begins to run at that date.

~~C.~~ All of the buildings, activities, and operations maintained on a lot are generally to be considered as a whole in determining whether a right to continue a nonconforming situation is lost pursuant to this section. However, 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.

Commentary: 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 whole is continuously maintained.

### ~~9.3.9.4.~~ **NONCONFORMING STRUCTURES**

#### ~~9.3.1.9.4.1.~~ Normal Maintenance and Repair

Normal maintenance or repair of nonconforming structures may be performed in any consecutive twelve-month period, to an extent not exceeding ~~fifteen (15) percent~~33% of the current assessed value of the structure. Such maintenance and repair shall not be allowed to increase the usable space of the structure, except pursuant to this section.

#### ~~9.3.2.9.4.2.~~ Alteration or Additions

Alterations or additions to a nonconforming building or structure may be permitted as long as the alterations or additions do not increase the nonconformity of the structure related to the building setback line, height limitations, yard or other provisions regulating the size and placement of buildings and structures for the district in which the nonconforming structure is located. For full description of standards for alterations or additions, see Figure 9.7-A: Required Site Element Upfits.

#### ~~9.3.3.9.4.3.~~ Reconstruction

##### A. Nonresidential Structures

1. If a nonresidential building or structure ,including any accessory structures, is damaged by reason of fire, flood, explosion, earthquake, or other extraordinary circumstance, may be repaired, reconstructed, and used as before if the damage does not exceed 50 percent of its replacement value as determined by the Building Official, and if the repairs and reconstruction are done within twelve (12) months from the time such damage occurred. Notwithstanding the foregoing, no illegal use shall be re-established.
2. If a nonresidential building or structure, including any accessory structures, is damaged and if such damage is greater than 50 percent of its replacement value as determined by the Building Official, such building or structure may only be reconstructed to conform with the standards in the district in which it is situated.

##### B. Residential Structures

1. If a residential building or structure, including any accessory structures, is damaged by reason of fire, flood, explosion, earthquake, or other extraordinary circumstance, it may be repaired, reconstructed, and used as before if the damage does not exceed fifty (50) percent of its replacement value as determined by the Building Official, and if the repairs and reconstruction are done within twelve (12) months from the time such damage occurred.

2. If a residential building or structure (including any accessory structure) is damaged greater than fifty (50) percent of its replacement value as determined by the Building Official, such building or structure may be repaired, reconstructed, and used as before if the repairs and reconstruction are done within twelve (12) months from the time such damage occurred. ~~The Planning Director may require conformance with specific provisions of this UDO where deemed necessary to resolve public safety concerns.~~ Notwithstanding the foregoing, no illegal use shall be re-established.

~~9.3.4.9.4.4.~~ 9.4.4. Unsafe Building or Structure

If a nonconforming building or structure or portion thereof is declared to be an unsafe structure per G.S. § 160D-1119, it shall thereafter be rebuilt only in conformance with the standards of this UDO and the building code.

~~9.3.5.9.4.5.~~ 9.4.5. Discontinuance and Abandonment

- A. When a structure made nonconforming by this UDO is vacant or discontinued at the effective date of this UDO, the 180-day period begins to run at that date.
- B. If such nonconforming structure on a property is abandoned for a period of 180 consecutive days, any subsequent use of that property shall conform to current zoning district regulations. See 9.2.1. for full definition of abandonment.
- ~~B. If the principal activity on property where a nonconforming structure exists is discontinued for a consecutive period of 180 days then that property may thereafter be used only in conformity with all of the regulations applicable to the pre-existing use. 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 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. All of the buildings, activities and operations maintained on a lot are generally to be considered as a whole in determining whether a right to continue a nonconforming situation is lost pursuant to this section.

## ~~9.4.1.9.5.1.~~ **9.4.9.5. NONCONFORMING LOTS OF RECORD**

### ~~9.4.1.9.5.1.~~ 9.5.1. Applicability

This section applies only to undeveloped nonconforming lots of record. 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 9.2.3.

### ~~9.4.2.9.5.2.~~ 9.5.2. Uses

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 minimum set forth in Article 6, then the lot may be used just as if it were conforming. However, no use that requires a greater than minimum lot size for a particular zone ~~(e.g., a duplex)~~ is permissible on a nonconforming lot.

### ~~9.4.3.9.5.3.~~ 9.5.3. Setback Requirements

When the use proposed for a nonconforming lot is one that is conforming in all other respects but the applicable setback requirements located in Article 6 cannot reasonably be complied with, then the entity authorized to issue a permit for the proposed use may allow deviations from the setback requirements if it finds that:

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

### ~~9.4.4.9.5.4.~~ 9.5.4. Setback Hardship

For purposes of Section 9.5.3, compliance with applicable building setback requirements is not reasonably possible if a building serving the minimal needs of the proposed use cannot practicably be constructed and located on the lot in conformity with setback requirements. Financial hardship does not constitute grounds for finding that compliance is not reasonably possible.

### 9.5.5. Governmental Acquisition of Land

A lot, established under the provisions of this or previous town zoning ordinance, that is reduced in size by governmental action, such as acquisition for a right-of-way or other governmental use, shall not render the lot nonconforming.

### ~~9.4.5.9.5.6.~~ 9.5.6. Contiguous Nonconforming Lots

If, on the effective date of this UDO, an undeveloped nonconforming lot adjoins and has continuous frontage with one or more other undeveloped lots

Commentary: 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 existing neighborhood has been developed.

9.5 : Nonconforming lots of record~~1.1:~~

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under the same ownership, then the provisions of this section cannot be taken advantage of and the undeveloped lots shall be considered as one lot. This shall not apply if a majority of the developed lots on either side of the street and within 500 feet of the undeveloped lot are also similarly nonconforming.

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## ~~9.5. ABANDONMENT AND DISCONTINUANCE OF NONCONFORMING SITUATIONS.~~

### ~~9.5.1. Time Limit~~

~~When a nonconforming use is discontinued for a consecutive 180 day period, the property involved may thereafter be used only for conforming purposes.~~

### ~~9.5.2. Applicability~~

~~All of the buildings, activities and operations maintained on a lot are generally to be considered as a whole in determining whether a right to continue a nonconforming situation is lost pursuant to this section.~~

## 9.6. NONCONFORMING SIGNS

It is the intent of this section to provide a reasonable time for the elimination of nonconforming signs and sign structures. The provisions of this section shall apply to nonconforming signs. Nonconforming signs may remain in use, subject to the regulations of this section and all other applicable requirements.

### 9.6.1. Normal Maintenance and Repair

- A. Nonconforming signs may be repaired or renovated as long as the cost of such work does not exceed, within a twelve-month period, ~~fifty (50) percent~~33% of the value of such sign. A permit for such renovation or repair is required. Proof of value is required at the time of permit.
- B. The message of a nonconforming sign (sign face) may be changed, so long as a change in use has not occurred. If a change in use occurs, the sign must be brought into full conformity with this UDO.

### 9.6.2. Enlargement or Alteration

- A. No nonconforming sign shall be enlarged or altered in any manner that results in a greater degree of nonconformity.
- B. No modification of the structure of any nonconforming sign shall be permitted, except to bring the sign into conformity.
- C. Illumination may not be added to a nonconforming sign that previously was unilluminated.

### 9.6.3. Discontinuation of Business

If a nonconforming sign other than a billboard advertises a business, service, commodity, accommodation, attraction or other enterprise or activity no longer operating or being offered or conducted, that sign shall be considered abandoned and shall be removed within 90 days after such abandonment by the sign owner, property owner or other person having control of the property.

### 9.6.4. Billboards on Federal Aid Highways

Billboards on federal aid highways are protected by the State and Federal

Highway Beautification Acts and cannot be amortized and can be removed only upon payment of just compensation as defined by those Acts. \_\_\_\_\_

## 9.7. NONCONFORMING SITE ELEMENTS

A nonconforming site element is a site improvement that is required as part of an approval but does not exist, or was existing or lawfully established prior to this UDO being adopted or amended. Site elements include, but are not limited to access, parking, pedestrian amenities, landscaping, signage, and lighting.

### 9.7.1. Reduction of Nonconformity

No nonconforming site element shall be erected, replaced, or modified except to reduce or eliminate the nonconformity. Repair and maintenance of nonconforming site elements is permitted.

### 9.7.2. Applicability Matrix

Notwithstanding other portions of this Article, the following table summarizes the minimum requirements that shall be met when there are changes to existing nonconforming development and/or to nonconforming structures or uses. A ✓ indicates that compliance with all applicable standards of this UDO is required.

Commentary 01/01/2021: Previous interpretations have ruled that upper floor additions to structures can be constructed within the current (nonconforming) building footprint, provided all other criteria are met.

**Figure 9.7-A: Required Site Element Upfits**

	<u>Dimensional Standards</u>	<u>Building Design Standards</u>	<u>Sidewalks, Street Trees, &amp; Curb-and-Gutter</u>	<u>Tree Protection &amp; Landscaping</u>	<u>Parking Lot Landscaping</u>	<u>Buffers &amp; Screening</u>	<u>Outdoor Lighting</u>
<b><u>Existing Development</u></b>							
<u>Change of Use (from residential to nonresidential or mixed use)</u>		✓	✓	✓	✓	✓	✓
<b><u>Parking Area Expansion</u></b>							
<u>Less than 12 Spaces or &lt; 40% of Paved Area<sup>(a)</sup></u>			✓	✓	✓	✓	✓
<u>Expansion of ≥ 40% of Paved Area or 12 Spaces or More</u>			✓	✓	✓	✓	✓
<b><u>Building Expansion and/or Reconstruction</u></b>							
<u>&lt; 50% of Existing Floor Area</u>	✓ <sup>(a,b)</sup>	✓ <sup>(c)</sup>					✓ <sup>(a)</sup>
<u>≥ 50% of Existing Floor Area</u>	✓ <sup>(a,b)</sup>	✓ <sup>(c)</sup>	✓	✓	✓	✓	✓
<b><u>Notes:</u></b>							
<sup>(a)</sup> <u>For expanded/reconstructed portion only. For sidewalks and curb-and-gutter, this includes any areas of abutting right-of-way.</u>							
<sup>(b)</sup> <u>Exception: Maximum front setback should be met to the extent practical as determined by the Board</u>							

of Adjustment.

For expansions, reconstruction areas and all other walls facing public streets.

~~9.6.5.—~~

9.7.3. Compliance

(4) — If all site elements cannot be brought into compliance with the current requirements of this Chapter for reasons which include, but are not limited to site layout, space limitations, tree preservation, or other natural features, the Board of Adjustment may approve a Variance to deviate from site element dimensional requirements so long as the modifications to the elements are moving in the direction of conformity with the provisions of this Chapter.