

## **Nonconforming Uses**

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Nonconforming uses are generally divided into three categories:

1. *Lots*: The size, frontage, or other dimensions associated with a lot;
2. *Uses*: Principal and accessory uses of a lot or within the buildings thereon; and
3. *Structures*: The location and extent of buildings and structures on a lot, with respect to the required yards, density limitations, lot coverage, or other dimensional standards.

A nonconforming use is one that does not comply with present zoning provisions but which existed lawfully and was created in good faith prior to the enactment of the zoning provision. A nonconforming structure is one in which the size, dimension or location on the lot was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption, revision or amendment. (Black's Law Dictionary, 5<sup>th</sup> Edition). A nonconforming lot is a preexisting lot of record which does not comply with dimensional standards, such as size or frontage, of the zoning ordinance.

The right to maintain nonconforming uses is meant to protect property owners from a retrospective application of zoning ordinances and to allow property owners to continue using and enjoying their property when their uses were lawful prior to the enactment of a zoning ordinance. *Guy v. Town of Temple*, 157 N.H. 642 at 650 (2008). RSA 674:19 protects that right by providing that zoning ordinances shall not apply to existing structures or uses, thereby creating a

right to continue the prior lawful use of land. Due to the fact that the general policy of zoning law is to limit the extension and enlargement of nonconforming uses, we strictly construe provisions that permit the continuance of such uses, and the party asserting that a proposed use is not new or impermissible bears the burden of proof. Therefore, an extension and enlargement that substantially changes the nature and purpose of the nonconforming use is not permitted.

Even at the time of a change or enactment of a new zoning restriction, the use of land considered a pre-existing non conforming use can continue indefinitely as long as its original use has not been discontinued or abandoned, unless its use is harmful to the public health or welfare.

RSA 674:28 States as follows:

- I. All nonconforming properties in active use when an interim ordinance is passed and adopted may continue indefinitely in their present use.**
  
- II. Any and all nonconforming property may be altered and expanded as the business and conditions warrant; providing, however, that any such expansion does not make any existing conforming structure nonconforming within the terms of the interim ordinance; nor shall such expansion bring any building within 35 feet of an abutter's building; nor shall the height exceed the limits as defined in RSA 674:25, IV, (d); nor shall the use of such property be materially altered in purpose.**
  
- III. Any and all nonconforming property which is partially or totally destroyed by reason of obsolescence, fire or other act of**

**God may be restored, remodeled and operated if done within 2 years; providing, however, that proximity to a lot line or right-of-way may be no nearer than the lesser of the original building and the setbacks defined in RSA 674:25,**

**IV. (a)-(c), and the height does not exceed the limits set forth in RSA 674:25, IV, (d).**

Some Examples of Non-Conforming Uses:

**Ex:** Jane Doe inherited a vacant parcel of land located in a residential district from her grandmother in 1954. At the time, there was no Zoning Ordinance in effect. In 1965, a Zoning Ordinance was enacted which required all residential properties to be a minimum of two acres in size. Jane's lot is only 1.5 acres. Due to the small size of her parcel, Jane would be unable to build on this lot under the requirements of the Zoning Ordinance. Her property, however, is grandfathered. This is an example of a nonconforming lot.

**Ex:** Jane and John Doe purchased a home located in a residential zone in 1956 and have continued to live there since that time. In 1987, the area in which their property was situated was rezoned as an industrial zone. Because Jane and John established their home on the property prior to the change in zoning they may continue to use their property as a residence. This is an example of a nonconforming use.

**Ex:** John Doe is the owner of a 2 acre parcel of land with a home situated on it. At the time he purchased the land, there were no maximum housing requirements for a lot this size. Since that time, the Zoning Board of Adjustment has created an ordinance that limits the square footage of a home to 2,000 square feet. John Doe's home is 2,150 square feet. The building is grandfathered. This is an example of a nonconforming structure.

Zoning Boards of Adjustment generally do not favor further expansion of a preexisting nonconforming use- allowing the applicants to maintain such a non-conforming use while establishing a further non-conforming use is in direct contradiction to the public interest. While a property may maintain its nonconforming use indefinitely, the owner cannot further expand the nonconforming nature of the property. It is in the public interest to reduce non-conforming structures and properties whenever possible.

An important topic regarding nonconforming uses is abandonment. Many municipalities have ordinances that discuss when a nonconforming use can be terminated. Typically a nonconforming use is deemed to be abandoned when the property is used for a use permitted by the zoning ordinance. Additionally, a nonconforming structure could be deemed abandoned if, after its damage and/or destruction, it is not rebuilt within the required allowable time frame.

Abandonment depends upon the concurrence of two factors: (1) an intention to abandon or relinquish the use, and (2) some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the use. *Lawlor v. Town of Salem*, 116 N.H. 61, 62 (1976).