

ZONING PRACTICE

AUGUST 2020



AMERICAN PLANNING ASSOCIATION

⊕ ISSUE NUMBER 8

PRACTICE NONCONFORMITIES



Everything Old Is New Again: Communities Explore Nuanced Approaches to Nonconformities

By Matthew Goebel, AICP

Zoning is mostly about the future: *Where can we open our new coffee shop? Can they really build those tall apartments next door?*

But no community is a blank slate, and zoning doesn't just look forward. It impacts the shops and apartments and signs and all the other parts of the built environment that already exist—many of which were legally established but would have to look and operate differently if they came in for review under current zoning rules (if they could be built at all). When you change the zoning, there may be buildings that are now too tall, lots that are now too small, or active businesses in neighborhoods where they now just don't fit, because they don't match what's nearby or don't fit the community's vision for the future.

Since the earliest days of zoning, local officials and planners have grappled with how to treat so-called “nonconformities.” Existing development has typically been permitted to continue under new zoning rules. That practice, grounded in a sense of fairness but also political reality, partly helps explain why communities are willing to change zoning rules in the first place. The challenge comes in trying to strike the right balance between what's already on the ground and how we want our communities to develop in the future. How should we accommodate existing development while also encouraging and requiring new projects that reflect current goals and plans?

Traditional approaches have allowed nonconformities to remain, subject to strict rules designed to bring about their quick removal or elimination. Modest repairs and maintenance are acceptable, but substantial modifications require full code compliance. For years, this was standard policy. “Nonconformities” was a section of the code that differed little from place to place, and often was carried forward substantially unchanged from one generation of an ordinance to the next, even in a major redraft.

Increasingly, however, local officials and planners recognize that all

nonconformities may not be so bad, and that a more nuanced approach is appropriate for a complex issue. During code rewrite projects, we have seen regulations for nonconformities shift to one of the more active areas of discussion. Tricky issues with redevelopment, community character and aesthetics, equity, and more come into play when talking about nonconformities.

This article surveys the creative ways that local governments are addressing nonconformities in their development codes today. A brief introduction generally describes nonconformities and traditional approaches to dealing with them. But this article does not reinvent the wheel. The general topic of nonconformities, their historical evolution, and the applicable law has been described well by many thoughtful planners already; see the bibliography for recommended additional reading. (This article also does not focus in detail on signs, which have their own constitutional issues and are covered in other articles.)

TYPES OF NONCONFORMITIES

A nonconformity is a lot, structure, use, sign, or some other site feature that does not meet current zoning requirements. While code drafters often try to limit the creation of new nonconformities when updating a zoning code, their creation is almost inevitable when a full suite of zoning tools is refreshed. Many municipal codes refer to “legal nonconformities” to distinguish situations that were legal upon their establishment but no longer meet updated code requirements. Only legal nonconformities, not those established unlawfully, are provided protection and may continue to exist, subject to conditions.

Classic examples of nonconforming uses are auto body shops, junkyards, and industrial uses that continue to operate in areas that have matured into commercial or even residential areas.

Nonconforming structures no longer meet various site requirements, such as maximum building height or minimum

setbacks. Examples abound and frequently are created when code drafters update dimensional standards like setbacks or, for example, when a new form-based code establishes a minimum building frontage requirement along a commercial strip with street-front parking. Nonconforming uses and structures are treated separately, but often coexist (Rosenthal 2010).

Nonconforming lots do not meet minimum lot standards like width, area, or frontage. In addition to uses, structures, and lots (and signs), various site conditions like off-street parking, landscaping, buffers, or exterior lighting can also be nonconforming and are the focus of a later section of this article.

Certain features can be exempted from the “nonconforming” label. For example, codes typically say that governmental actions, like a road-widening project, that reduce setbacks or take away parking spaces do not create nonconformities.

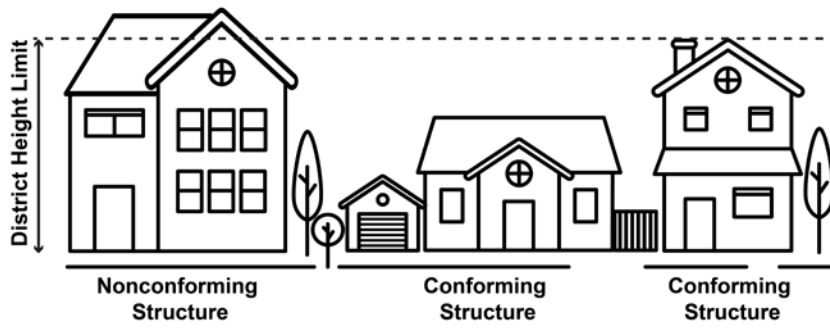
The property owner has the burden of demonstrating that a nonconformity is “legal” (i.e., that its original establishment, creation, or placement was lawful and has been maintained consistently over time). This can often be handled through an administratively issued permit, like a certificate of legal nonconforming status or zoning compliance



David Morley

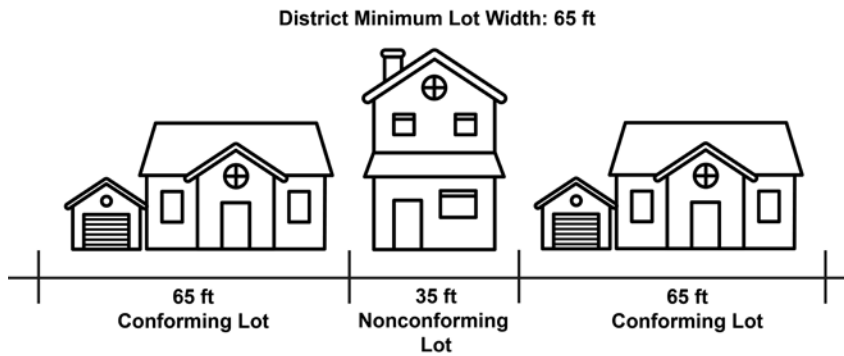
➡ A legally nonconforming auto repair shop in the middle of a residential district.

Designed by rawpixel.com/freepik



➡ Existing buildings that exceed district height limits are nonconforming structures.

Designed by rawpixel.com/freepik



➡ Existing lots that are narrower than the required minimum width for their zoning district are nonconforming lots.

certificate. Most often, this becomes an issue upon initiation of some development proposal. However, some communities require property owners to register nonconformities within a set period after adoption of a new code if they ever want to take advantage of the legal nonconforming status. Arlington, Texas, requires registration within 12 months after the date on which a use or building becomes nonconforming (§11.2.2).

TRADITIONAL APPROACHES FOR DEALING WITH NONCONFORMITIES

While communities develop tailored rules for each type of nonconformity (lots, structures, etc.), some general principles usually apply across the board. The most important of these is the authorization to continue indefinitely in productive use, subject to limits on expansion and change. Typically, a nonconforming use may only be changed to a conforming use. But some ordinances

authorize existing nonconforming uses to change to other nonconforming uses of the same general character, provided the new use is of equal or lesser intensity.

Minor repairs and maintenance are allowed; while nonconformities are discouraged and hopefully will eventually go away, no one wants them to fall into disrepair and become eyesores. Minor repairs might include work to maintain structural soundness, protect public health, or comply with updated building codes. Substantial modifications and expansions that would prolong the life of the nonconformity have traditionally been prohibited without bringing the use or structure into full code compliance, with few exceptions. The merits of a strict approach are clear: it most quickly brings about the change the community is seeking in its new plans and codes. A uniform approach that accelerates the general elimination of all nonconformities also is

the easiest to administer and is perceived as evenhanded. But, as many commentators have noted, strict thresholds on improvements can also discourage reinvestment and slow the pace of change.

Thresholds that Trigger Conformity

In certain instances, nonconformities pass a threshold where they must come into conformance. Destruction over a certain threshold, either as a percentage of physical size or value, usually requires rebuilding or reestablishment in line with current codes. For example, Denton, Texas, sets the threshold at 50 percent of gross floor area for partial damage or destruction of a nonconforming structure by fire or any other natural or accidental cause. Repair of any damage up to that threshold can be rebuilt to prior conditions and must be completed within 18 months; any damage exceeding that threshold requires complete rebuilding to current code standards (§1.5.4.C). Nearby McKinney, Texas, on the other hand, uses a monetary threshold: 50 percent of total appraised value (§146-40(f)).

Termination and Amortization

Legal nonconforming status can disappear in several ways. An owner might pursue upgrades or a rezoning to bring the activity or structure into conformance. Or general zoning rules might change again, and the use or structure complies with the new rules. A nonconformity also might be abandoned, or at least discontinued long enough, and it loses its protected status. Discontinuation periods range by community, anywhere from 30 days to two years; Denton’s one-year period is typical (§1.5.2.F). (Sometimes external factors lead to one-time or ongoing extensions of this period; perhaps we will see longer periods allowed following COVID-19 and the resulting economic disruptions.)

Where allowed by state law, communities seeking to eliminate nonconformities may seek to amortize them away, the most aggressive tool to remove a nonconformity. This involves establishing a time period within which the owner may recoup her investment, after which the nonconformity must be eliminated. Amortization provisions are not uncommon for signs (especially billboards), adult uses, and uses that are particularly discordant with an area’s current conditions or future land-use plans.

Where amortization is embraced, the zoning code typically sets up a general enabling framework that can then be applied to specific situations in the future. For example, McKinney, Texas, adopted rules in 2019 giving the city council general authority to direct the board of adjustment to set an amortization period for certain undefined nonconforming uses, which is a typical approach in Texas codes (§146-40(g)). At a public hearing, the board of adjustment must consider whether continued operation of the nonconforming use would have an adverse effect on nearby properties or the community welfare. Factors to consider range from general policy direction like the comprehensive plan to site-specific concerns like the character of the surrounding area and the traffic, environmental, and other impacts of the use in question. If the board finds adverse effects, a second hearing is held to determine an amortization period based on the owner's actual investment in the use before the time that the use became nonconforming. An in-depth study of financial records, as well as a physical property inspection, are authorized to help the board establish a reasonable recoupment period.

NUANCED APPROACHES TO NONCONFORMITIES

Increasingly we see communities explore more tailored alternatives, for various reasons. Regulations designed to bring about the elimination of nonconformities did not always have that effect. Sometimes, nonconformities are recognized as not being as bad as originally thought. Existing buildings and activities may not technically comply with the rules, but they still may be interesting and even thriving contributors to their community and local economies. Nonconforming situations may even help maintain unique character not possible through new development. And, if they were prohibited from expanding altogether, there might be not be anything to take their place. New (usually higher) standards might discourage infill and redevelopment, especially on challenging sites, and so officials are willing to tolerate nonconformities hanging around longer. Some communities with historic character may be especially prone to recognizing that nonconformities bring about a charm and character that comes from having aged gracefully over time (like Santa Fe, New Mexico).

Recognizing these factors, planners and local officials have embraced a range of nuanced approaches. Many distinguish the bad nonconformities from the perhaps not so bad, holding the former to stricter standards to phase them out more quickly, but allowing the latter more leeway to operate and even grow.

Discretionary Relief for Expansion

One of the first and most straightforward tools many communities explore to loosen the tight restrictions on nonconformities is to establish a process allowing for their expansion. A planning commission or board of adjustment is authorized to make the decision, often piggybacking on an existing conditional or special use approval process. In Cary, North Carolina, the zoning board of adjustment is empowered to approve such an expansion as a "special use," following a detailed consideration of the site, its context, and potential impacts on surrounding properties (§10.1.8).

Administrative Approval for Expansions

To streamline the approval of changes to nonconformities even further, some local governments allow these to be administrative decisions. Larimer County, Colorado, allows its planning director to consider and approve an extension, expansion, enlargement, or change in character of a nonconforming use (§4.8.11). Following a required preapplication conference, staff circulates the application to review agencies and surrounding property owners for review and comment. If neighbors raise concerns, the applicant and the neighbor(s) have the "opportunity to agree on a solution" within 14 days, unless an extension is requested by either party. The planning director issues a written determination, incorporating any negotiated solution from the applicant and neighbors, if applicable. While it may be appealed to the board of county commissioners, the decision is administrative.

Special Flexibility for Specific Uses and Districts

Some local governments carve out targeted allowances to their general nonconformity standards for certain uses to meet specific policy goals. Often, the exceptions involve single-family residential uses, whose advocates can be especially vocal in opposing

zoning changes that create nonconformities. In Sedona, Arizona, a new code adopted in 2018 allows automatic reductions to required setbacks for single-family dwellings on substandard width lots (§1.6E), an exception to the general rules applicable to nonconforming lots. The Arlington, Texas, ordinance exempts single-family dwellings from nonconformity restrictions based on both minimum lot size and setbacks (§11.3.2).

Arlington also calls out a different type of use for special treatment. Many auto-oriented uses on commercial corridors in the city became nonconforming following adoption of a unified development code in 2014 that encouraged a long-term transition to more pedestrian-friendly mixed use. To help cushion the change and also help stimulate economic activity, local officials carved out some flexibility for auto-oriented nonconformities. For example, the general restriction on rebuilding a nonconformity that is destroyed by more than 50 percent of its fair market value was waived for service stations, car washes, and used auto sales. (§11.2.5).

The special flexibility can also be tailored to specific areas or districts. For instance, Cary, North Carolina, sets a standard discontinuation period of 180 days for most nonconforming uses, after which the use may not be reestablished, but created an exception for single-family dwellings in the Town Center district (§10.3.2).

'Benign' Versus 'Significant' Nonconformities

Recognizing that some nonconformities are more impactful than others, planners look for alternatives to a one-size-fits-all approach. One option is to create different categories of nonconformities, each subject to different rules. Tiered standards acknowledge that some nonconformities can continue or expand without threatening public health or safety. Some communities may find it more realistic to allow such expansions rather than impose strict prohibitions that discourage reinvestment.

In Youngstown, Ohio, for example, the Redevelopment Code identifies a use, structure, lot, sign, or site improvement as preexisting if it was legally created but no longer complies with the code (§1105.05). Each such preexisting feature is categorized as "benign" or "significant." At the request of the property owner, the planning director reviews the feature to determine whether it

“creates or increases a material risk to public health or safety in the surrounding area.” A benign preexisting condition does not create or increase such risk, while a significant preexisting condition does. A feature is deemed significant until written notice of benign status is issued.

Benign preexisting features are given more flexibility and ability to continue. For instance, benign preexisting uses may be reestablished following discontinuance of two years, and they may be extended or expanded by addition of contiguous land (none of which are available for significant preexisting uses). A significant preexisting structure may be expanded only when certain conditions are met, including a reduction of risk to public health or safety, but this limitation does not apply to the expansion of a benign preexisting structure. This tiered approach puts into practice a proposal advocated in the May 2009 edition of *Zoning Practice* (Easley 2009).

Conferring Conformity for Specific Uses or Situations

The stigma attached to the “nonconforming” label can make it hard to find a lender. Hoping to mitigate this, sometimes code drafters lift a specific use or situation out of the nonconforming box altogether and simply deem it “conforming.” These types of solutions often emerge as part of a political agreement to help secure passage of an ambitious new zoning update. Denton, Texas, for example, worked several years on a major rewrite of both its development code and zoning map, crossing the finish line in 2019. Many upgrades to an outdated set of zoning districts were included in the final code, along with refinements to zoning district boundaries. To help reduce the number of nonconformities created, the adopted code deemed almost all residential uses and structures (single-family detached dwellings, townhomes, and duplexes) existing on the effective date of the code conforming (§1.5.2.1).

A New Category of ‘Compliant’ Uses and Structures

A similar technique came about when Denver adopted a citywide form-based code in 2010. Following some high-profile dustups with nonconforming uses looking to expand, city planners looked for a middle ground in

the new code in the regulation of nonconformities and came up with an alternative status—“compliant uses” and “compliant structures” (§12.5 et seq.). Similar to the Youngstown approach, the Denver code shakes up the traditional thinking about how to classify nonconformities. But rather than dividing nonconformities into categories, the Denver code identifies a new category of activities that does not fall under the “nonconformity” term and generally is afforded more flexibility to expand and continue than traditional nonconformities. The approach helps remove the stigma and financial consequences potentially associated with the “nonconforming” label.

The new legal status of “compliant use” is intended to provide greater flexibility than is available for nonconforming uses, especially in terms of the use’s continuation, expansion, or enlargement. A compliant use is one that was lawful prior to the adoption of or amendment to the code but, because of code amendments or because other uses are established closer to the legally established use than the code permits, do not comply with current use limitations. Compliant uses are legal uses and may continue indefinitely. While expansions generally are not allowed if the extent or degree of noncompliance with the code is increased, limited expansion may be approved administratively provided there is no increase in dwelling units, a reduction of the ratio of land area to the number of dwelling units, or “a change in any aspect

of or the character of the compliant use that increases the amount, extent, or degree of noncompliance.”

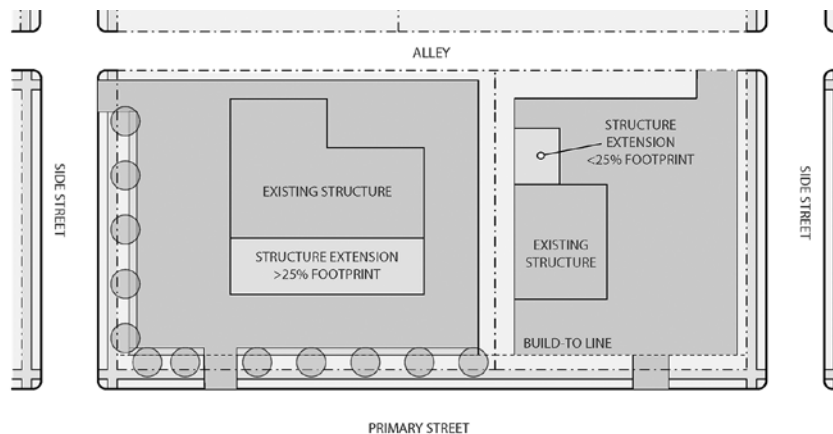
NONCONFORMING SITE FEATURES

Site features like off-street parking, landscaping, buffers, screening, or exterior lighting can also be nonconforming. In many code update projects, this actually may be the hottest area of discussion. Code updates often focus on raising the bar of development quality, and so even if the zoning districts and uses are not substantially overhauled, the development standards often do see significant change. Minimum off-street parking ratios might be revised, environmental controls might be beefed up, and building design standards might be introduced. Consequently, many properties may find they have a “nonconforming” label attached after a zoning update.

The debate comes when redevelopment projects must upgrade to meet new, higher standards. The balancing act is the same as for other types of nonconformities—implementation of new public policy versus respect for existing property rights and a reluctance to set the bar so high that additional investment is discouraged. The examples below illustrate a range of approaches by communities in striking the right balance.

A Light Touch to Regulating Nonconforming Site Features

Albany, New York, offers a straightforward



City and County of Denver Community Planning and Development

🔄 In Denver, “compliant structures” with parking located between a building or side street can expand up to 25 percent without having to comply with perimeter landscaping standards (§12.6-3.G).

approach that acknowledges nonconforming site features but does not make them an especially onerous burden to overcome. In its 2017 code, the city identifies certain site features that may be nonconforming, specifically off-street parking and loading; landscaping, screening, and buffering; and outdoor lighting (§375-5(F)(6)). Otherwise conforming land uses and structures on parcels where these features do not meet new standards may be expanded, revised, or redeveloped subject to certain conditions, including no increase in the degree of nonconformity and provision of new parking spaces to meet demands of the new use. However, full site compliance with all development standards is required with any increase of impervious surface area of 10 percent or more, any demolition of all or part of a primary structure, or the construction of a new primary structure.

Sliding Scale Based on Size of Improvements
Recognizing the site-specific challenges that may arise in dealing with a host of site features that may not meet current standards, some local governments try to offer flexibility so long as the overall bar is raised.

For all development in Arlington, Texas, any change in use or external addition to a structure existing on the effective date of the code must comply with all or portions of the code’s design and development standards to the maximum extent practicable, based on a sliding-scale approach (§5.1.3 et seq.). The table at right shows the approach with a selection of standards (see the full code provisions for the complete list).

The timeframe for calculating the cumulative amount of expansions is unlimited. Any exterior renovation must comply with the standards applicable to that renovation. For partial renovations, the zoning administrator may waive compliance if upgrades would be inconsistent with the overall design of the existing structure.

Some important exceptions apply; this recreation- and sports-oriented city exempts major sports complexes and amusement parks from the heightened standards, as well as planned developments (which incorporate their own baseline standards) and historic structures.

Sliding Scale Based on Improvement Value
Norfolk, Virginia, takes a similar tack as

A SLIDING SCALE FOR CODE COMPLIANCE FROM ARLINGTON, TEXAS

Extent of Addition	Required Compliances
<10% of size of structure	Screening (residential, mechanical/utility, service/loading) <ul style="list-style-type: none"> • Street trees (for nonresidential or mixed use) • Off-street parking (if additional spaces required) • Sign standards (if applicable to addition)
10–30% of size of structure	All above standards, plus: <ul style="list-style-type: none"> • Parking lot landscaping and screening • Residential design (character, exterior finish) • Nonresidential design (facade colors for building, covered entries)
>30% of size of structure	All above standards, plus: <ul style="list-style-type: none"> • Addition and site must comply with all development and design standards • Single-family residential must comply with all residential design standards, except roof pitch

Arlington, but Norfolk’s sliding scale is based on the value of improvements proposed, not their physical size. Norfolk’s code, adopted in 2017, focuses on off-street parking, landscaping, and screening of mechanical equipment (§6.5 et seq.). Any structural alteration of a building on a site that has one or more nonconforming site features, where the value of the proposed improvements exceeds 50 percent of the assessed value of the building, must make required improvements. For improvements totaling at least 50 but less than 75 percent of the structure value, a corresponding percentage must come into compliance; improvements totaling 75 percent or more of structure value must bring the three subject site features into full compliance with the current ordinance. The timeframe for calculating cumulative improvements is five years (versus the open-ended timeframe in Arlington).

For example, a commercial building with nonconforming street parking with an assessed value of \$100,000 proposes remodeling totaling \$50,000 (50 percent of the assessed value). If at the time of the remodel there were 10 spaces, but the ordinance would require 20 for the subject use, the applicant would be required to provide 50 percent of the 20 spaces, or 10 more spaces, bringing the total number of spaces on the site to 20 (and thus meaning the site would be in complete compliance).

A similar scale applies to expansions, setting the bar for partial compliance at 15 percent and full compliance at 50 percent. A safety-valve provision allows for a waiver in

cases where the site has physical constraints that prevent upgrading certain elements.

An Open-Ended Approach to Coming ‘Toward Compliance’

Anchorage, Alaska, landed on a creative and unusual approach. A new code adopted in 2015 introduced a range of development quality standards that had not been regulated before in Anchorage. Planners and local officials were looking for opportunities to raise the bar for development quality, but in a way that allowed maximum flexibility. The new code sidestepped the “nonconforming” label by designating any development that did not meet use-specific or design/development standards (except stream/water body protection) as “conforming” if legally established prior to code adoption (§21.12.060 et seq.).

However, new multifamily, commercial, commercial marijuana, community use, and industrial development that does not meet new code requirements must spend a portion of project costs on achieving compliance with new code standards. The requirement kicks in for projects that require some type of approval under the zoning ordinance and cost more than 10 percent of the assessed value of structure (or the assessed value of the land if no structure over 150 square feet exists). Such projects must spend a minimum 10 percent of total project costs on “bringing development toward compliance.” If full compliance can be achieved for under 10 percent, no additional monies must be spent. If the applicant chooses to spend over 15 percent, the excess may be credited

toward future improvements. The planning director, in consultation with the applicant, determines how the money should be spent, with a focus on “how to maximize the public benefit and minimize the economic impact to the property owner.” If there are no good or feasible options for how to spend the funds, the applicant may place the funds into a municipal account dedicated to public improvements.

CONCLUSIONS

This brief survey illustrates a variety of approaches in how local governments are striking a balance in dealing with nonconformities. There are fewer one-size-fits-all approaches and more nuanced experimentation underway.

For planners considering how best to strike the appropriate balance in their own communities, several considerations should be kept in mind:

- **Plan implementation.** A more aggressive approach that prioritizes the timely phasing out of nonconformities may be the quickest path to implement new plans and policies.
- **Different types of nonconformities.** Consider identifying the less impactful nonconforming situations and making it easier for them to continue and maybe even expand, and ultimately become conforming. Tools like a special permit process, rezoning, and exemptions from new standards can be effective ways to strike the right balance.
- **Uniformity and ease of administration.** How easy will it be to administer the preferred approach? While tailored strategies that apply different rules to different parts of the community or treat some uses differently than others may make sense from a policy perspective, they could require more time to administer, to explain to the public, and to enforce.
- **Pressure for infill and redevelopment, especially on challenging sites.** The relative pressure for redevelopment and infill can play a role in how nonconformities are treated. Would a lighter touch on expansion of nonconformities result in more community reinvestment?
- **Neighborhood opposition or support.** Tailored solutions to nonconformities often come about because of input from the

neighbors most impacted. Stakeholder outreach can be especially important in determining the best approach to this complex, often controversial issue.

- **Zoning map updates.** A new zoning code is sometimes accompanied by a new map, and the mapping process provides an opportunity to ensure that conditions

on the ground match the new zoning tools (especially the district boundaries and the uses allowed). A new zoning map should not be so different from existing conditions that many new nonconformities are created.

ABOUT THE AUTHOR

Matthew Goebel, AICP, is a director in the Denver office of Clarion Associates. He works principally in the areas of zoning, planning, and historic preservation. His projects have included development codes and growth management plans for a variety of large and small jurisdictions around the country. Goebel is coauthor of the PAS Reports *The Rules that Shape Urban Form and Aesthetics, Community Character, and the Law* and principal author of award-winning studies of the economic benefits of historic preservation and regulatory barriers to affordable housing.

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VOL. 37, NO. 8

The American Planning Association provides leadership in the development of vital communities for all by advocating excellence in planning, promoting education and resident empowerment, and providing our members with the tools and support necessary to ethically meet the challenges of growth and change.

Zoning Practice (ISSN 1548-0135) is a monthly publication of the American Planning Association. Joel Albizo, FASAE, CAE, Chief Executive Officer; Petra Hurtado, PhD, Research Director; Joseph DeAngelis, AICP, and David Morley, AICP, Editors.

Subscriptions are available for \$95 (U.S.) and \$120 (foreign). Missing and damaged print issues: Contact APA Customer Service (312-431-9100 or subscriptions@planning.org) within 90 days of the publication date.

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Suite 1200
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DOES YOUR ZONING CODE
TREAT ALL NONCONFORMITIES
THE SAME?

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