

CITY OF WINCHESTER, VIRGINIA

PROPOSED CITY COUNCIL AGENDA ITEM

CITY COUNCIL MEETING OF: 11/25/14, CUT OFF DATE: 11/19/14
12/9/2014 - 1st Reading, 1/13/2015 - 2nd Reading/Public Hearing

RESOLUTION ___ ORDINANCE X PUBLIC HEARING X

ITEM TITLE:

TA-14-476 AN ORDINANCE TO AMEND AND REENACT ARTICLE 17 OF THE WINCHESTER ZONING ORDINANCE PERTAINING TO NONCONFORMING USES AND VESTED RIGHTS. (This amendment is a complete revision and update to Article 17, Nonconformities, bringing the article into compliance with State Code and updating standards for nonconforming uses, structures and lots of record.)

STAFF RECOMMENDATION:

Adopt the text amendment.

PUBLIC NOTICE AND HEARING:

Public hearing required at 2nd reading on 1/13/2015.

ADVISORY BOARD RECOMMENDATION:

Planning Commission unanimously forwarded with favorable recommendation.

FUNDING DATA: N/A

INSURANCE: N/A

The initiating Department Director will place below, in sequence of transmittal, the names of each department that must initial their review in order for this item to be placed on the City Council agenda.

Table with 4 columns: DEPARTMENT, INITIALS FOR APPROVAL, INITIALS FOR DISAPPROVAL, DATE. Rows include Planning Director, City Attorney, City Manager, and Clerk of Council.

Initiating Department Director's Signature: (Zoning and Inspections)

Handwritten signature and date 11/19/14



APPROVED AS TO FORM:

Handwritten signature and date 11/19/2014 CITY ATTORNEY

CITY COUNCIL ACTION MEMO

To: Honorable Mayor and Members of City Council
From: Aaron Grisdale, Director of Zoning and Inspections *AMG*
Date: November 25, 2014
Re: **TA-14-476** AN ORDINANCE TO AMEND AND REENACT ARTICLE 17 OF THE WINCHESTER ZONING ORDINANCE PERTAINING TO NONCONFORMING USES AND VESTED RIGHTS. *(This amendment is a complete revision and update to Article 17, Nonconformities, bringing the article into compliance with State Code and updating standards for nonconforming uses, structures and lots of record.)*

THE ISSUE:

This is a publicly sponsored amendment serving as a complete revision to Article 17, Nonconformities, of the Zoning Ordinance.

RELATIONSHIP TO STRATEGIC PLAN:

Goal 4 – Create a More Livable City for All, Objective 3 – Manage future growth, development and redevelopment consistent with City’s vision, comprehensive plan and development standards and policies

BACKGROUND:

Zoning and Planning staff worked for several months to draft this update to the Zoning Ordinance to bring Article 17, Nonconformities, into compliance with State Code, as well as reorganize and update provisions that have not been modified since the adoption of the 1976 Zoning Ordinance. The resulting text amendment brings greater clarity and organization to the ordinance provisions making them easier to understand for citizens, as well as incorporating new planning tools and techniques into the ordinance provisions.

(Full staff report attached).

BUDGET IMPACT:

No funding is required.

OPTIONS:

- Approve the text amendment
- Approve the text amendment with modifications
- Decline to adopt the text amendment

RECOMMENDATIONS:

The Planning Commission unanimously recommended approval.

TA-14-476 AN ORDINANCE TO AMEND AND REENACT ARTICLE 17 OF THE WINCHESTER ZONING ORDINANCE PERTAINING TO NONCONFORMING USES AND VESTED RIGHTS

REQUEST DESCRIPTION

This amendment is a staff drafted and a Planning Commission initiated amendment. As part of an internal zoning ordinance review team, numerous areas were identified within Article 17 that needed to be updated to conform to the Code of Virginia, as well as modern planning practices. As a result of a several month long editing process, staff completed a rewrite of Article 17.

STAFF COMMENTS

The Code of Virginia §15.2-2307 enables localities to adopt provisions pertaining to nonconformities, as well as providing for certain provisions that must be included within local Zoning Ordinances. This ordinance amendment incorporates the requirements of 15.2-2307 as well as applying more specific uniform standards for nonconforming uses, structures, and lots of record.

The revised Article has been restructured as to allow for better readability and organization among topics. The previous ordinance was not well organized and as a result the provisions were difficult for citizens, businesses and developers to read and understand. Furthermore, most of the provisions of the ordinance had not be revisited or revised since the adoption of the 1976 Zoning Ordinance.

The new Article is categorized into four parts: General Provisions, Nonconforming Structures, Nonconforming Uses, and Nonconforming Lots:

1. **General Provisions** –
 - a. Definitions of common terms used in the Article
 - b. Standards that apply in each nonconformity situation
 - c. Vested rights
 - d. Determination of a nonconforming status by the Zoning Administrator
2. **Nonconforming Structures** –
 - a. General requirements that apply to all nonconforming structures
 - b. Enlargement of nonconforming structures
 - c. Modification/restoration/replacement of such structures
 - d. Destruction of nonconforming structures
 - e. Common repairs and maintenance
 - f. Expiration of nonconforming status
3. **Nonconforming Uses** –
 - a. General provisions that apply to all nonconforming uses
 - b. Expiration of a Nonconforming Use
 - c. Change of a Nonconforming Use
 - d. Expansion of a Nonconforming Use
4. **Nonconforming Lots** –
 - a. Development on a Nonconforming Lot
 - b. Highway Realignment or Condemnation

Some of the important specific changes within the rewrite of Article 17 include:

1. Establishing clearer provisions as to how a determination of a nonconforming status occurs by the Zoning Administrator. (Section 17-1-4)
2. Codifying the existing practice of allowing for the modification of a nonconforming structure provided that the modification reduces the extent of the nonconformity. (Section 17-2-3)
3. Modifying the amount of repair/maintenance that can be conducted on a nonconforming structure. Previously, owners were limited to 10% of the replacement value of the structure per calendar year; now owners can complete repairs up to 35% of the replacement value of the structure per year. (Section 17-2-5)
4. Allows for the owner of a nonconforming use to pursue a conditional use permit (CUP) to change an existing nonconforming use to a more restricted and less intensive nonconforming use. This will allow for greater flexibility for owners to use their property, while also measuring and mitigating potential impacts from the change in use. The ordinance includes specific evaluation factors to be considered by the Planning Commission and Council for each proposal. If Council believes that the proposal is consistent with the Comprehensive Plan, the neighborhood, and will not have unmitigated impacts they can approve the new use. (Section 17-3-3)

Staff believes that this is a more readable ordinance that makes the City's standards clearer for the public to understand. The standards are also consistent with the enabling provisions of the Code of Virginia and are consistent with good planning practice.

RECOMMENDATION

At their November 18, 2014 meeting, the Planning commission unanimously forwarded **TA-14-476** with a favorable recommendation because the amendment as proposed is consistent with good planning practice by establishing clear provisions for nonconforming uses, structures and lots, as well as ensuring current provisions are consistent with the Code of Virginia.

AN ORDINANCE TO AMEND AND REENACT ARTICLE 17 OF THE WINCHESTER ZONING
ORDINANCE PERTAINING TO NONCONFORMING USES AND VESTED RIGHTS

TA-14-476

Draft 1 – 10/03/14

Ed. Note: The following text represents a complete rewrite of Article 17 of the Zoning Ordinance. The proposed amendment would completely repeal the existing provisions of Article 17 and replace with the below language.

ARTICLE 17

NONCONFORMITIES

The purpose of this Article is to establish regulations for uses which do not presently conform to the district and general provisions established within this Ordinance in a manner consistent with sound planning and zoning principles. The general intent is that, over time, nonconforming uses will be discontinued in favor of uses conforming to this Zoning Ordinance and the zoning map. However, it is also recognized that nonconforming uses and structures need not be entirely static and that under certain circumstances nonconforming uses and structures may change according to law and the provisions of this Article. The provisions of this Article are intended to complement the requirements of §15.2-2307 of the Code of Virginia and its subsequent amendments which are hereby adopted and incorporated mutatis mutandis as if set forth fully herein. To the extent that any provision of this article is inconsistent with or more restrictive than §15.2-2307 of the Code of Virginia or other controlling legal authority, the provisions of §15.2-2307 of the Code of Virginia or other controlling legal authority shall supersede as to that provision and the remaining provisions of this article shall continue in full force and effect.

SECTION 17-1 GENERAL PROVISIONS

17-1-1 Definitions

- A. This section applies to any nonconformity. There are three categories of nonconformities established within this Article, defined as the following:
- 1) Nonconforming use – A use that was lawfully established but no longer complies with the use regulations applicable to the use or the zoning district.
 - 2) Nonconforming structure – A structure that was lawfully erected but no longer complies with development standards established in this Ordinance.

- 3) Nonconforming lot – A lot, parcel, or development site that was lawfully created but no longer complies with the dimensional standards established in this Ordinance.

17-1-2 Change in District Boundaries

- A. Whenever the boundaries of a district are changed, any uses of land or buildings which become nonconforming as a result of such change shall become subject to the provisions of this Article.

17-1-3 Vested Rights

- A. Without limiting the time when rights might otherwise vest, a landowner's rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner:
 - (i) Obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project,
 - (ii) Relies in good faith on the significant affirmative governmental act, and
 - (iii) Incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.
- B. For the purpose of this section and without limitation, the following are deemed to be significant affirmative governmental acts allowing development of a specific project:
 - (i) The City Council has accepted proffers or proffered conditions which specify use related to a zoning amendment;
 - (ii) The City Council has approved an application for a rezoning for a specific use or density;
 - (iii) The City Council or Board of Zoning Appeals has granted a special exception or conditional use permit;
 - (iv) The Board of Zoning Appeals has approved a variance;
 - (v) The City Council or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner's property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances;
 - (vi) The City Council or its designated agent has approved a final subdivision plat, site plan of development for the landowner's property; or
 - (vii) The Administrator or other administrative officer has issued a written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner's property that is no longer subject to appeal

and no longer subject to change, modification or reversal under subsection C of §15.2-2311 of the Code of Virginia, as amended.

17-1-4 Determination of Nonconforming Status

- A. The burden of establishing a nonconforming status of a use or structure shall be upon the owner of the claimed nonconformity.
- B. Upon request, the Administrator shall make a written determination pertaining to the existence of a lawful nonconforming use and/or structure. In verifying the lawful status of a nonconforming use and/or structure, the Administrator shall determine whether the use and/or structure is, in fact, a lawful nonconformity as defined by this Article; and if so then:
 - 1) The location and gross floor area (in square feet) of all buildings, if any, associated with the nonconforming use;
 - 2) Any site improvements currently existing on the property which are also nonconforming (including accessory buildings, parking, outside storage, travel ways, green area, landscaping, etc.); and,
 - 3) A description of the principal use(s) and all accessory uses that make up the lawful nonconforming use as a whole.
- C. The decision of the Administrator shall be based upon information provided by the owner of the property on which the nonconforming use is located, on information provided by other persons with knowledge of the property and on any other non-confidential information legally available to the Administrator. Such information may include, but shall not be limited to, permits, licenses, tax records, receipts, business records, photographs, plats, plans, bills, utility information, assessment information, and sworn affidavits from individuals with personal knowledge of the use and/or the property on which the use is located.

SECTION 17-2 NONCONFORMING STRUCTURES

17-2-1 General Requirements

- A. Any lawfully constructed structure which existed at the time of this Ordinance or any amendments thereto may continue in its legally nonconforming status so long as the structure does not violate other legal provisions and otherwise complies with the provisions of this Article.
- B. No additional structure not conforming to the requirements of this Ordinance shall be erected in connection with such nonconforming use of land.

- C. A nonconforming structure may be used for any use allowed in the underlying zoning district, subject to all applicable use standards.
- D. If a variance is approved from otherwise applicable zoning district dimensional standards, the subject structure still shall be deemed nonconforming.

17-2-2 Enlargement

- A. Notwithstanding Section 17-2-2B, no such nonconforming structure shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of this Ordinance unless said enlargement does not result in an increase in nonconformity.
- B. In any district, existing nonconforming residential structures that do not meet setback, side, and/or rear yard requirements may be enlarged in line with the existing building, provided that the existing nonconforming setback, side, and rear yards are not reduced.

17-2-3 Modification, Restoration, or Replacement

- A. The Administrator may allow for a modification or alteration of a nonconforming structure, provided that the modification does not increase the nonconformity. Modifications which cause a structure to become more conforming to the requirements of this Ordinance shall be encouraged, including, but not limited to, required setbacks, height, density, bulk/area standards, or landscaping.
- B. Nonconforming structures other than buildings and signs (such as, but not limited to, underground storage tanks, private sewage disposal systems and parking lots) may be restored or replaced when such structures become unsafe or unsound. Relocation on the same lot may be approved by the Zoning Administrator, provided the new location is less nonconforming than the original location, and further provided that the new location shall not cause a greater detrimental impact on conforming uses in the neighborhood.

17-2-4 Destruction of Nonconforming Structure

- A. Any residential or commercial building damaged or destroyed by a natural disaster or other act of God may repair, rebuild, or replace such building to eliminate or reduce the nonconforming features to the extent possible. If such building is damaged greater than 50 percent and cannot be repaired, rebuilt or replaced except to restore it to its original nonconforming condition, the owner shall have the right to do so. The owner shall apply for a building permit and any work done to repair, rebuild or replace such building shall be in compliance with the provisions of the Uniform Statewide Building Code and any work done to repair, rebuild or replace such building shall be in compliance with the provisions of the local flood

plain regulations adopted as a condition of participation in the National Flood Insurance Program.

- B. Unless such building is repaired, rebuilt or replaced within two years of the date of the natural disaster or other act of God, such building shall only be repaired, rebuilt or replaced in accordance with the provisions of this Ordinance. However, if the nonconforming building is in an area under a federal disaster declaration and the building has been damaged or destroyed as a direct result of conditions that gave rise to the declaration, then the property owner shall have an additional two years for the building to be repaired, rebuilt or replaced as otherwise provided.
- C. For purposes of this section, "act of God" shall include any natural disaster or phenomena including a hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake or fire caused by lightning or wildfire. For purposes of this section, owners of property damaged by an accidental fire have the same rights to rebuild such property as if it were damaged by an act of God. Nothing herein shall be construed to enable the property owner to commit an arson under § 18.2-77 or 18.2-80 of the Code of Virginia, and obtain vested rights under this section.

17-2-5 Repairs and Maintenance

- A. Nothing in this Section shall be deemed to prevent minor repair and keeping in good repair a nonconforming building or a building in which a nonconforming use is conducted, provided that such repair constitutes only routine maintenance necessary to keep the structure in the same general condition as it was when it originally became nonconforming. In no case shall any building that is declared by any authorized City official to be unsafe or unlawful by reason of physical condition be restored, repaired or rebuilt.
- B. Any repair, maintenance, or renovation during a one year period that exceeds 35% of the replacement value of the structure being repaired is deemed to be a major repair and shall require approval of a conditional use permit by City Council prior to the repair.
- C. For the purposes of this Section, the cost of land or any factors other than the cost of the structure are excluded in the determination of the cost of repair.

17-2-6 Expiration of Nonconforming Status

- A. If any nonconforming structure shall cease to be used for a period of at least two (2) years, the nonconforming status of the structure shall no longer be valid. Prior to any subsequent use, the structure must be modified to conform to the regulations specified in this Ordinance for the district for which such land is located.
- B. If any change in title of possession, or renewal of a lease of any such structure occurs, the existing nonconforming structure may continue.

SECTION 17-3 NONCONFORMING USES

17-3-1 General Provisions

- A. No nonconforming use shall be moved in whole or in part to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment of this Ordinance unless said move results in decreasing the degree of nonconformity or results in conformity with the requirements for the district.
- B. Any nonconforming use may be extended throughout any parts of a building which were manifestly arranged or designed for such use at the time of adoption or amendment of this Ordinance, but no such use shall be extended to occupy any land, outside such building.
- C. A nonconforming use that was recognized prior to the adoption of this Article shall continue to operate under the provision of law under which the nonconforming use was recognized so long as the nonconforming use is not in violation of such provision of law, the adoption of this Article notwithstanding.

17-3-2 Expiration of Nonconforming Use

- A. If any nonconforming use shall cease to be operated for a period of at least two (2) years, the nonconforming use shall no longer be valid. Any subsequent use of land shall conform to the regulations specified in this Ordinance for the district for which such land is located.
- B. Operation of only an accessory or incidental use to the principal nonconforming use during the two (2) year period shall not operate to continue the principal nonconforming use.
- C. No use accessory to a principal nonconforming use shall be continued after nonconforming status is lost for the principal use.
- D. If any change in title of possession, or renewal of a lease of any such lot or structure occurs, the existing nonconforming use may continue.
- E. When any nonconforming use is superseded by a permitted use, the use shall thereafter conform to the regulations for the district, and no nonconforming use shall thereafter be resumed.

17-3-3 Change of Nonconforming Use

- A. In any district in which a lawful nonconforming use exists, upon formal application submitted by the owner, the use may be changed to a less intensive and more restricted use upon approval from City Council of a conditional use permit per Section 18-2. Prior to the application of a conditional use permit to change a lawful

nonconforming use, the current nonconforming use shall be verified by the Zoning Administrator per Section 17-4.

- B. In determining whether a proposed use is a “less intensive and more restricted use” the following factors, among others, shall be considered:
- 1) The number and size of parking spaces serving the new use;
 - 2) The design, mass and/or scale of the building(s) and site on which the new use is located;
 - 3) The use, type, area, and appearance of new signs;
 - 4) The intensity of the new nonconforming use, including the days and hours of operation, traffic, noise, odor, and similar impacts;
 - 5) The lighting provisions on the site for the new use;
 - 6) The landscaping provisions on the site for the new use;
 - 7) The amount of vehicular traffic in the neighborhood;
 - 8) The potential effect on the fair market value of neighboring properties from the new use; and,
 - 9) The considerations of the City’s Comprehensive Plan.
- C. Once a nonconforming use has been changed to a less intensive and more restricted use, the legal nonconforming status shall not be subsequently reinstated.
- D. Upon evaluation of a less intensive and more restricted use request, City Council may include reasonable requirements as a condition of the approval in order to mitigate potential impacts on the surrounding properties and the neighborhood, including but not limited to: parking requirements, landscaping, lighting, hours of operation, density, and signage.

17-3-4 Expansion of Nonconforming Use

- A. No nonconforming use may be expanded on a lot which is not properly zoned to permit such nonconforming use, unless the zoning is amended to permit such use or a conditional use permit is approved by City Council, as may be applicable.
- B. For the purposes of this section an expansion of use shall consist of one or more of the following:
- 1) The square footage of the use is increased, regardless of whether inside or outside of a structure.
 - 2) The intensity or operation of a use is changed in a manner which causes a higher parking requirement, in accordance with Section 18-6.

- 3) The number of dwelling units is increased.

SECTION 17-4 NONCONFORMING LOTS

17-4-1 Development on a Nonconforming Lot

- A. Where a lot of record at the time of the effective date of this Ordinance has less area or width than herein required in the district in which it is located, said lot may nevertheless be used for a single-family detached dwelling if that use is permitted in the district in which it is located provided that side yards of not less than ten percent (10%) of the required lot width, with a minimum width of five (5) feet, are provided; and that the setback and rear yard requirements shall be as required by the zoning district in which the lot is located. If the lot is a corner lot, a side yard facing on the side street of not less than twenty percent (20%) of the required lot width, with a minimum of ten (10) feet shall be provided.
- B. In any district, existing single-family detached dwellings may be enlarged on any nonconforming lot of record, provided, however, that side yards of not less than ten percent (10%) of the lot width, with a minimum width of five (5) feet, are provided, and that the setback and rear yard requirements shall be as required by the zoning district in which the lot is located. If the lot is a corner lot, a side yard facing on the side street of not less than twenty percent (20 %) of the required lot width, with a minimum of ten (10) feet shall be provided.
- C. Additions to residences permitted under Section 17-4-1A and 17-4-1B, such as decks, porches, and terraces, must fully meet the requirements of Section 18-10 of this Ordinance.
- D. In any district, permitted structures, other than single-family detached dwellings, may be erected or enlarged on a nonconforming lot of record, provided that a variance of lot width, setback, and/or yard requirements is obtained through action of the Board of Zoning Appeals and that parking, green area and landscaping requirements are met.
- E. Where a lot of record at the time of the effective date of this Ordinance has less area or width than herein required in the district in which it is located, said lot may nevertheless be used for a community garden, if that use is permitted in the district in which said lot is located.

17-4-2 Highway Realignment or Condemnation

- A. Any lot, which by reason of realignment of a federal or state highway or by reason of condemnation proceedings, has been reduced in size to an area less than that required by law, shall be considered a lawful nonconforming lot of record subject to the provisions set forth in this section; and any lawful use or structure existing at the time of such highway realignment or condemnation proceedings which would thereafter no longer be permitted under the terms of this Ordinance shall be