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## <sup>1</sup>Article 15: Nonconforming Use and Development

### 15.010 Purpose.

This Article concerns nonconforming uses, development, and lots. It is the purpose of this Article to:

- (1) Encourage uses and development to conform over time with the use and development standards of the zone and any applicable overlay district;
- (2) Allow for limited expansion and alteration of nonconforming use;
- (3) Allow reasonable continuance and maintenance of nonconforming use and development, and replacement of nonconforming development damaged or destroyed by calamity;
- (4) Mitigate the impact of nonconforming use and development upon adjoining property.

For nonconforming development, this Article provides for retention of existing nonconformity, but provides that new expansion shall comply with this Code. Any relief for new construction associated with expansion of a nonconforming development shall be addressed through the provisions of Article 6, Variances, or Article 18, Planned Unit Development.

Alteration or expansion in a manner that brings the property into full compliance with current requirements of this Code is not subject to the requirements of this Article.

Nothing in this Article is intended to modify any provision of the Building Code or Fire Code.

### 15.020 Definitions.

- (1) Nonconforming Development. Means a “Nonconforming Building” as defined in Article 30, or any other aspect of a property developed in such a way that it lawfully existed prior to the effective date of this Code, its subsequent amendment, or its applicability to the property, but which due to requirements adopted herein, no longer complies with the standards of this Code.
- (2) Nonconforming Lot. See Article 30.
- (3) Nonconforming Use. See Article 30.

15.030 Procedures, Criteria, and Fees.

The procedures, fees, and criteria for applications involving nonconforming use or development shall be according to the following schedule. If there is a conflict between the review procedure in this Section and the procedure for site plan review, the higher procedure shall be utilized.

<b><sup>2</sup>Schedule 15-1: Review Procedures, Fees, and Criteria for Nonconforming Use and Development</b>				
<b>Action</b>	<b>Procedure</b>	<b>Fees (1)</b>	<b>Criteria (2)</b>	<b>Applicable Standards (3)</b>
<b><i>Nonconforming Use</i></b>				
One-Time Expansion of Nonconforming Use <=50%	-Type 3	SPR fee, plus nonconforming use supplemental fee	SPR, plus 15.044	SPR only
Modification or Change of Nonconforming Use	-Type 2	SPR fee, plus nonconforming use supplemental fee	SPR, plus 15.048	SPR only
<b><i>Nonconforming Development</i></b>				
Expansion or Alteration of Nonconforming Development <=50%:  -Single Family Dwelling or Duplex, and Items in 2.035, Type I-A Building Permit as Dev. Permit  -Other:	-Type 1, Building Permit as Development Permit  -Type 2	Applicable SPR fee only	SPR only	SPR, plus 15.051 & 15.053
Expansion or Alteration of Nonconforming Development >50%:  -Single Family Dwelling or Duplex:  -Other:	-Type 2  -Type 3	Applicable SPR fee only	SPR only	SPR, plus 15.051 & 15.053
<b><i>Nonconforming Use or Development</i></b>				
Replacement of Structure Destroyed by Calamity. -or- Major Repair of Structure Damaged by Calamity.	-Type 3	-SPR fee, plus nonconforming use supplemental fee	SPR , plus 15.060	SPR only

Routine Maintenance (15.080)	-Type 1, Building Permit as Development Permit	Applicable SPR fee only	SPR only	SPR only
Required Strengthening of Unsafe Building (15.090) -or- Minor Repair of Structure Damaged by Calamity:	-Type 1, Building Permit as Development Permit	Applicable SPR fee only	SPR only	SPR only

- (1) Where “SPR” is noted in the Fee column, it means the applicable fee for minor site plan review, major site plan review, or the planning review fee where building permit serves as development permit.
- (2) Where “SPR” is noted in the Criteria column, it means the applicable minor site plan review criteria of Section 19.042 or major site plan review criteria of Section 19.052. If other criteria are listed, the proposal shall also comply with those criteria.
- (3) When Development includes nonconforming use or development, these standards include special provisions specifying how the nonconformity is to be addressed without full adherence to other provisions of this Code.

15.040 Nonconforming Uses.

Except as provided in this Section, no nonconforming use shall be expanded, modified, or changed; no additional structure, building, or sign shall be constructed on the lot in connection with the nonconforming use of land; and the operating characteristics of a nonconforming use shall not be substantially modified. In no case shall a nonconforming use be moved to another property where it is not a permitted use.

15.041 Continuation of Nonconforming Use.

Where at the time of adoption, amendment, or applicability of this Code, a use of land exists which would not be permitted by the regulations imposed by this Code and was lawful at the time it was established, the use may be continued as long as it remains otherwise lawful, subject to the provisions of this Article.

15.042 Expansion of Nonconforming Use.

- (1) Any of the following shall be considered expansion of a nonconforming use:
  - (a) Expansion of a nonconforming use to occupy a greater area within a building, either horizontal or vertical;

- (b) Expansion of a building or structure housing a nonconforming use, either horizontal or vertical;
  - (c) Expansion of a nonconforming use to occupy a greater area of land.
- (2) A one-time expansion of a nonconforming use up to 50% may be permitted for some situations, as provided below, subject to the provisions of this Article.
- (a) For any use that became nonconforming with this Code upon its adoption, a one-time expansion or alteration shall be permitted if no expansion has occurred since September 14, 1983, or the effective date of subsequent amendment that made the use nonconforming.
  - (b) For any use that was subject to, and nonconforming with, the Josephine County Urban Growth Area Zoning Ordinance and became nonconforming with this Code on August 5, 1998 through adoption of the 1998 Intergovernmental Agreement, a one-time expansion shall be permitted if no expansion has occurred since September 14, 1983.
  - (c) For any use that was subject to, and conforming with, the Josephine County Urban Growth Area Zoning Ordinance and became nonconforming subject to this Code on August 5, 1998 through adoption of the 1998 Intergovernmental Agreement, a one-time expansion shall be permitted if no expansion has occurred since August 5, 1998.
  - (d) For any use that was subject to the Josephine County Rural Land Development Code, whether conforming or nonconforming, and became nonconforming subject to this Code by inclusion in the Urban Growth Boundary after August 5, 1998, no expansion of a nonconforming use shall be permitted.
  - (e) For any use that was conforming with this Code and became nonconforming by an amendment to this Code after August 5, 1998, no expansion of a nonconforming use shall be permitted.

15.043      Application for One-Time Expansion of Nonconforming Use.

In addition to the submittal requirements for Site Plan Review, the applicant shall provide the following items:

- (1) Supplemental Fee
- (2) Detailed site plan and floor plan drawn to scale showing the extent and location of the nonconforming use before and after the expansion.

- (3) Calculation of area of land occupied by nonconforming use and square footage of building occupied by nonconforming use.
- (4) Narrative explaining proposal, and including the following:
  - (a) nature of nonconforming use
  - (b) operating characteristics of nonconforming use before and after the change, including noise, dust, odor, light and glare, traffic, deliveries, hours of operation, appearance, and any restriction on minors
  - (c) any proposed measures to mitigate impacts resulting from the expansion

15.044 Supplemental Criteria for One-Time Expansion of Nonconforming Use.

In addition to the site plan review criteria, the Review Body shall grant a one-time expansion of a nonconforming use up to 50% only when it finds the proposal satisfies the following additional criteria. The review body may require special development standards or conditions to ensure impacts resulting from the expansion are adequately mitigated.

- (1) The property qualifies for expansion in accordance with Section 15.042, and has not already utilized the one-time expansion.
- (2) Impacts upon adjoining properties can be adequately mitigated. Impacts include changes to the character or operation of the use including, but not limited to, noise, dust, odor, light and glare, traffic, hours of operation, appearance, or any other characteristic that affects the use, enjoyment, or livability of conforming uses in the vicinity or zoning district.
- (3) If the property is nonconforming in respect to site development standards, the site shall be brought into greater conformance with current development standards, consistent with the provisions of this Article regulating Nonconforming Development.
- (4) The review body may deny expansion of the nonconforming use if the property is within a special district specifically designed to actively redevelop the area and eliminate nonconforming uses, including non-regulatory districts such as urban renewal districts, where expansion would be in direct conflict with the purpose of the special district.

15.045 Change or Modification of Nonconforming Use.

- (1) Less Restrictive Use or Greater Impact. A change of a nonconforming use to a less restrictive nonconforming use or to a nonconforming use with greater impact upon adjoining properties is not permitted. Modification to the

character or operation of the existing nonconforming use in a manner that has greater impacts upon adjoining properties is not permitted.

- (2) More Restrictive Use or Less Impact. A change of a nonconforming use to a more restrictive nonconforming use, or to a nonconforming use with less impact upon adjoining properties may be approved. Modification to the character or operation of the existing nonconforming use in a manner that has less impacts upon adjoining properties may be approved.
- (3) Nature of Impacts. Items to be considered by the review body to determine if there is greater or less impact include changes to the character or operation of the land use including, but not limited to, noise, dust, odor, light and glare, traffic, hours of operation, appearance, or any other characteristic that adversely affects the use, enjoyment, or livability of conforming uses in the vicinity or zoning district.
- (4) Restrictiveness of Use. If the proposal is a change of a nonconforming use to a different nonconforming use, the proposed use shall only be authorized if it is closer to the purpose, intended character, and nature of permitted uses in the zoning district and conforming uses in the vicinity of the nonconforming use.

15.046 Application for Modification or Change of Nonconforming Use.

In addition to the submittal requirements for the Site Plan Review, the applicant shall provide the following items.

- (1) Supplemental Fee
- (2) Detailed site plan and floor plan drawn to scale showing the extent and location of the nonconforming use before and after the modification or change of nonconforming use.
- (3) Calculation of area of land occupied by nonconforming use and square footage of building occupied by nonconforming use.
- (4) Narrative explaining proposal, and including the following:
  - (a) nature of nonconforming use, before and after change,
  - (b) operating characteristics of nonconforming use before and after the change, including noise, dust, odor, light and glare, traffic, deliveries, hours of operation, appearance, and any restriction on minors.
  - (c) any proposed measures to mitigate impacts resulting from the change

In conjunction with the review for completeness, the Director shall make a preliminary determination whether the modification or change is less restrictive or more restrictive and whether the use has greater or less impact. If the Director

determines it is a less restrictive use or has greater impact, the applicant shall be informed of the decision and may withdraw or proceed with the application. The review body shall make the final determination regarding the restrictiveness and impacts of the use

15.047

Supplemental Criteria for Modification or Change of Nonconforming Use.

A modification or change of nonconforming use that does not include expansion may be permitted subject to the criteria of this Section, and is not subject to the “one-time” limitation that applies to expansion of a nonconforming use.

In addition to the site plan review criteria, the Review Body shall approve an alteration, relocation, or change of a nonconforming use, only if it finds the proposal satisfies the following additional criteria. The review body may require special development standards or conditions to ensure there are less impacts as a result of the modification or change of use.

- (1) If the proposal is a change of use, the change of a nonconforming use shall be to a more restrictive nonconforming use, or to a nonconforming use with less impact upon adjoining properties. If the proposal is a modification of use, the modification to the character or operation of the existing nonconforming use shall have less impact upon adjoining properties.
- (2) The modification or change of use shall not expand the nonconforming use. An expansion shall only be reviewed in accordance with the provisions of Section 15.043 for “One-Time Expansion of Nonconforming Use Up to 50 Percent”.
- (3) Addition of one or more accessory uses or buildings shall not substantially change the character of the primary use unless it reduces impacts.
- (4) A building housing a nonconforming use shall not be moved to, nor rebuilt at, a different location on the property.
- (5) Where a nonconforming use occupies a portion of a building, the review body may allow such nonconforming use to occupy a different part of the same building, or a different building already existing on the same property, only if it reduces the impacts of the nonconformity. The use shall not occupy more area than was lawfully occupied on the effective date the use became nonconforming. The area previously occupied by the nonconforming use shall only thereafter be occupied only with a conforming use, in accordance with the development standards of this Code.
- (6) Where the nonconforming use includes outdoor elements such as outdoor storage or outdoor retail, the review body may allow such nonconforming elements to be moved to a different location on the same property, only if it reduces impacts of the nonconformity. The use shall not occupy more area than was lawfully occupied on the effective date the use became



nonconforming. The location from which the use is moved shall be improved to current standards for permitted uses. The area previously occupied by the nonconforming use shall only thereafter be occupied only with a conforming use, in accordance with the development standards of this Code.

- (7) If the property is nonconforming in respect to site development standards, any alteration to the site shall bring the property into greater conformance with current development standards, consistent with the provisions of this Article regulating Nonconforming Development.

15.048

Discontinuation or Abandonment of Nonconforming Use.

- (1) If the nonconforming use is discontinued or abandoned for any reason for a period of more than 12 months, any subsequent use of land shall conform to the schedule of permitted uses for the zoning district. For purposes of calculating the 12-month period, a use is discontinued or abandoned upon the occurrence of the first of any of the following events:
  - (a) On the date when the use of land is physically vacated;
  - (b) On the date the use ceases to be actively involved in the sale of merchandise or the provision of services;
  - (c) On the date of termination of any lease or contract under which the nonconforming use has occupied the land; or
  - (d) On the date a request for final reading of water and power meters is made to the applicable utility.
- (2) The following items are not sufficient to demonstrate that the nonconforming use has continued:
  - (a) Payment of a utility bill, such as a sewer or water bill, after the nonconforming use has been discontinued.
  - (b) Demonstrating that the property was for sale, after the nonconforming use has been discontinued.
- (3) If the property is subsequently occupied by a permitted use, the subsequent use of land shall conform to applicable development standards and criteria specified by this Code for the use and zoning district in which such land is located, unless retention of existing nonconforming elements is authorized by Section 15.050.

15.050 Nonconforming Development

15.051 General Provisions.

- (1) Right-of-Way Encroachment. If an existing structure encroaches into existing public right-of-way, the City shall not be limited to the provisions of this Article and may require removal of the encroachment at any time, or may require the owner to sign a right-of-way use agreement specifying terms under which continued encroachment is authorized, whether or not in conjunction with any alteration or expansion of the nonconforming development.
- (2) Encroachment onto Adjoining Property. Encroachment of a structure onto an adjoining property is not considered nonconforming development. The City cannot authorize expansion or modification any portion of a structure that encroaches onto adjoining property.
- (3) Relocation. Should any nonconforming structure be moved for any reason and by any distance, it shall thereafter conform to the regulations of the Development Code.

15.052 Continuation of Nonconforming Development.

Where a development exists on the effective date of adoption, amendment, or applicability of this Code that could not be built under the terms of this Code by reason of restrictions on lot area, lot coverage, height, yard, equipment, its location on the lot, or other requirements concerning the development; and the development was lawful when constructed, the development may remain on the site so long as it remains otherwise lawful, except as otherwise provided in this Article.

15.053 Alteration or Enlargement.

No nonconforming development may be altered or enlarged in a way that increases its nonconformity, but any portion thereof may be altered or enlarged in a way that satisfies the current requirements of this Code or will decrease its nonconformity, as follows. The following shall apply at the time of application for expansion or alteration.

- (1) Exempt Alterations. Alteration of a nonconforming building that does not include expansion, and that does not alter the footprint or exterior elevation, is subject only to the applicable site plan review or building permit procedures, and not this Section. Alteration of a site that involves only routine maintenance, or brings existing nonconforming landscaping, paving, or driveway approaches into compliance without changing drainage, parking, traffic or circulation patterns, is subject only to the applicable site plan review or building permit procedures, and not this Section.
- (2) Existing Nonconformity Affecting Right-of-Way, Public Utility Easements, or Creating Hazard; Requirements at Time of Alteration or Enlargement. If,

at the time of alteration or enlargement of nonconforming development, an existing nonconforming structure encroaches into an existing or planned public right-of-way or public utility easement, or creates a hazard such as a visual obstruction, the review body may require the existing structure to be partially or fully brought into compliance with setback requirements to the extent needed to eliminate the conflict. If the review body authorizes all or part of such nonconformity to remain, it may require the owner to sign an agreement specifying the terms under which the continuation of the nonconformity is authorized.

- (3) Percentage Expansion Cumulative. When expansion occurs sequentially, determination of the percentage of expansion shall be cumulative from the effective date of adoption, amendment, or applicability of the standards in this Code that made the property nonconforming.
- (4) Change of Use of Residential Accessory Structure. An accessory structure in a residential zone, nonconforming in relation to height or setback, shall only be converted to a primary use if related impacts on adjoining properties can be adequately mitigated. A primary use includes residential living space, bed and breakfast, day care, residential home, residential care facility, professional or limited office, etc.
- (5) Change of Use of Residential Structure. A residential structure in a residential zone, nonconforming in relation to height or setback, shall only be converted to a more intensive use if related impacts on adjoining properties can be adequately mitigated. A more intensive use includes a bed and breakfast, day care, residential care facility, professional or limited office, etc.
- (6) Standards for Expansion of Single-Family Dwelling or Duplex.
  - (a) Existing Nonconforming Structure. Except as provided in Subsection (2), the Review Body shall allow for an existing structure that is nonconforming in relation to height or setback to:
    - (i) remain; or
    - (ii) be altered in a manner that decreases its nonconformity;
  - (b) New Enlargement. Any new construction that enlarges the existing development shall satisfy current requirements.
  - (c) Other Nonconformity. The Review Body shall approve the amount and type of improvements to be made in order to bring existing nonconforming aspects of the site into greater conformance. The type of improvements may include, but are not limited to:
    - (i) Expansion of 50 Percent or Less:

- (1) Paving of all new driving and parking surfaces.
  - (2) Partial paving of existing driving and parking surfaces, up to a maximum of 50 feet starting at the street, at a rate of ten lineal feet per 100 square feet of expansion, except an expansion of 100 square feet or less is exempt.
  - (3) Architectural Standards of Article 22 if the expansion increases the width of the front façade.
- (ii) Expansion of More than 50 Percent:
- (1) Frontage improvements or deferral for street, sidewalk and driveway approach, sewer, water, and storm drain.
  - (2) Paving of all existing driving and parking surfaces, up to a maximum of 50 feet starting at the street.
  - (3) Paving of all new driving and parking surfaces.
  - (4) Provision of all required landscaping.
  - (5) Eliminating or modifying nonconforming driveway approaches.
  - (6) Architectural standards of Article 22.
- (7) Standards for Expansion of 50 Percent or Less, Except Single-Family Dwelling or Duplex. When cumulative expansion exceeds 50 percent, the development shall be reviewed under Subsection (8) below.
- (a) Existing Nonconforming Structure. Except as provided in Subsection (2), the Review Body shall allow for an existing structure that is nonconforming in relation to height or setback to
    - (i) remain; or
    - (ii) be altered in a manner that decreases its nonconformity;
  - (b) New Enlargement. Any new construction that enlarges the existing development shall satisfy current requirements.
  - (c) Other Nonconformity. The Review Body shall approve the amount and type of improvements to be made in order to bring existing nonconforming aspects of the site into greater conformance. The type of improvements may include, but are not limited to:

- (i) Eliminating or modifying non-conforming driveway approaches;
  - (ii) Pedestrian circulation between a building's main entrance and the public right-of-way;
  - (iii) Pedestrian circulation between buildings on a site;
  - (iv) Bicycle parking;
  - (v) Paving of surface parking and exterior storage and display area;
  - (vi) Interior parking lot landscaping;
  - (vii) Landscaped yards or buffers for surface parking and exterior development.
  - (viii) Modify setbacks to preserve intersection sight distance to ensure safe ingress and egress, if different requirements are necessary as a result of existing nonconformity.
- (8) Standards for Expansion of Greater than 50 Percent, Except Single-Family Dwelling or Duplex. The following shall apply to a nonconforming development that is enlarged, increased, or extended to occupy a greater area of land or space, greater than 50 percent of what was occupied at the effective date of adoption or amendment of this Code when the development became nonconforming.
- (a) Existing Nonconforming Structure. Except as provided in Subsection (2), the Review Body shall allow for an existing structure that is nonconforming in relation to height or setback to
    - (i) remain; or
    - (ii) be altered in a manner that decreases its nonconformity;
  - (b) New Enlargement. Any new construction that enlarges the existing development shall satisfy current requirements.
  - (c) Other Nonconformity. Except for a structure that is nonconforming in relation to height or setback as provided in Subsection (a), all other nonconforming aspects of the structure and property shall be brought into compliance, or a variance obtained.

15.060 Replacement of Structure Destroyed by Calamity

- (1) A nonconforming building or structure, or a building or structure housing a nonconforming use which has been destroyed or damaged by fire, flood, wind, or other calamity may be restored to its original condition, provided such restoration is begun within 12 months of the calamity and is completed within 24 months of the calamity.
- (2) Restoration shall meet current building and fire codes, and right-of-way shall not be encroached upon, unless use of right-of-way is authorized by City Council, and the owner signs an agreement acknowledging the terms under which the right-of-way may be used.
- (3) Restoration that results in alteration or expansion shall only occur if in accordance with the other provisions of this Article.
- (4) Restoration shall make every reasonable effort to conform to current development standards, where physically possible without creating undue financial hardships.

15.070 Repair of Structure Damaged by Calamity.

When a structure is partially damaged by calamity, the Director shall determine whether repair of the damaged structure is minor or major. "Major Repair" shall be processed subject to the provisions of Section 15.060, "Structure Destroyed by Calamity". "Minor Repair" shall be subject to the provisions of Section 15.090, "Required Strengthening of Unsafe Building".

The director shall consider the following in determining whether the repair is major or minor:

- (1) Whether the nature of the repair would reasonably include measures to bring nonconforming aspects of the development into greater conformity.
- (2) Extent of area damaged and in need of repair, whether structural or nonstructural elements.
- (3) Nature of items needing repair, and whether the repair is limited to nonstructural elements, such as electrical, plumbing, or mechanical systems, nonstructural interior walls, drywall, or nonstructural roofing components.

If the Director determines the repair constitutes "Major Repair", he may, prior to review by the Review Body, immediately authorize a building permit for temporary measures to prevent damage to other parts of the building, or to allow safe occupancy of a portion of the building. At the time of review, the Review Body may require modifications to any temporary measures authorized by the Director.

15.080      Routine Maintenance

Routine maintenance and repairs may be performed on nonconforming development and upon structures or sites containing nonconforming uses, without being subject to the requirements of this Article.

15.090      Required Strengthening of Unsafe Building

- (1) A nonconforming building, or a building housing a nonconforming use, which is declared unsafe by the City Building Official may be strengthened or restored to a safe condition.
- (2) Strengthening or restoration shall not involve alteration that increases nonconformity.

15.100      Nonconforming Lots

- (1) Lots of Record. Any lot of record that was created in accordance with City requirements in effect at the time of creation, and is now nonconforming due to area, width and depth of the lot, may be used for development as originally intended.
- (2) Development of Nonconforming Lots. Setbacks, landscaping and buffering, building height, off-street parking, utilities, and other development standards of this Code shall be met. Relief from any Code requirement other than lot area, width and depth shall be processed according to the requirements of Article 6, Variance Procedures.

15.110      Variance Development is Not Nonconforming

A development lawful by reason of a Variance shall not be considered a nonconforming use or development. Such development shall be subject to all provisions of Article 6, Variance Procedures.

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<sup>1</sup>Revised 12-17-03 by Ordinance 5205

<sup>2</sup>Revised 4-20-05 by Ordinance 5285