

Chapter 134. Zoning

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134-7.1 General¹

7.1.1 INTENT

Nonconformities are created when the zoning regulations that apply to a particular property are changed to no longer allow uses, structures or other development features that have already been lawfully established. The nonconformity regulations of this article are intended to explain the effect of this nonconforming status and help differentiate nonconformities, which have legal status under this zoning ordinance, from zoning violations, which are illegal and subject to penalties and enforcement action. The regulations of this article are also intended to:

- A. Recognize the interests of landowners in continuing to use their property for uses that were lawfully established;
- B. Promote maintenance, reuse and rehabilitation of existing buildings; and
- C. Place reasonable limits on nonconformities that have the potential to adversely affect surrounding properties.

7.1.2 AUTHORITY TO CONTINUE

Any nonconformity that existed on the effective date specified in section [134-1.3](#) or any lot, structure use or situation that becomes nonconforming upon adoption of any amendment to this zoning ordinance or any amendment of the zoning map after the effective date specified in section [134-1.3](#) may be continued, subject to the regulations of this article.

7.1.3 DETERMINATION OF NONCONFORMING STATUS

- A. The burden of proving that a nonconformity exists (as opposed to a zoning ordinance violation) rests entirely with the subject property owner.
- B. The development administrator is authorized to determine whether reliable evidence of nonconforming status has been provided by the subject property owner.
- C. Building permits, lawfully recorded plats, lawfully recorded instruments of conveyance, aerial photography owned by a governmental agency and other official government records that indicate lawful establishment of the use, lot or structure constitute conclusive evidence of nonconforming status. If such forms of conclusive evidence are not available, the development administrator is authorized to consider whether other forms of evidence provided

by the subject owner are reliable and adequate to document nonconforming status. Common examples of evidence that may be determined to be reliable and adequate include:

1. Professional registrations or business licenses;
 2. Utility billing records;
 3. Rent records;
 4. Advertisements in dated publications;
 5. Listings in telephone or business directories; and
 6. Notarized affidavits affirming the date of lawful establishment of the use or structure.
- D. The development administrator's determination of nonconforming status may be appealed in accordance with section [134-6.9](#).

7.1.4 REPAIRS AND MAINTENANCE

- A. Repairs and normal maintenance necessary to keep a nonconformity in sound condition are permitted unless the work increases the extent of the nonconformity or is otherwise expressly prohibited by this zoning ordinance.
- B. If a nonconforming structure or a structure occupied by a nonconforming use becomes unsafe or dangerous, or when a structure is found unfit for human occupancy or otherwise deemed to be a public nuisance, it may not thereafter be used, restored, or repaired, or rebuilt except in conformity with the provisions of the district in which it is located.
- C. Nothing in this article is intended to prevent nonconformities from being structurally strengthened or restored to a safe condition in accordance with an order from a duly authorized public official.

7.1.5 CHANGE OF TENANCY OR OWNERSHIP

Nonconforming status runs with the land and is not affected by changes of tenancy, ownership or management.

¹ This section is mostly new..

134-7.2 Nonconforming Lots²**7.2.1 DESCRIPTION**

A nonconforming lot is a lawfully created lot, shown on a plat recorded in the office of the county recorder, that does not comply with applicable lot area, lot width, or street frontage requirements of the subject district.

7.2.2 LOTS IN AGRICULTURAL OR NEIGHBORHOOD DISTRICTS

In A and N districts, a single detached house containing no more than one dwelling unit may be erected on a nonconforming lot without complying with the applicable lot area, lot width, or street frontage requirements of the subject district. All other lot and building regulations apply.

7.2.3 LOTS IN OTHER DISTRICTS

In districts other than A or N districts, a nonconforming lot may be used as a building site and developed with a use allowed in the subject district. If the zoning district allows a variety of uses or a variety of intensities of uses and one or more uses or intensities would comply with applicable lot area, lot width, or street frontage requirements, while others would not, then only the uses or intensities that comply with applicable regulations are permitted. All other lot and building regulations apply.

134-7.3 Nonconforming Uses**7.3.1 DESCRIPTION**

A nonconforming use is a use that was lawfully established in accordance with all zoning regulations in effect at the time of its establishment but that is no longer allowed by the use regulations of the district in which the use is located. Lawfully established uses that do not comply with separation distance requirements (i.e., those requiring that uses be separated from the same use or protected uses by a specified minimum distance) are also deemed to be nonconforming uses.

7.3.2 CHANGE OF USE

A. A nonconforming use in an N district may be changed only to a use that is allowed in the subject district. Once changed to a conforming use, a nonconforming use may not be re-established.

A nonconforming use located in a district other than an N district, may be changed to a use that is allowed in the subject district, in which case the nonconforming use may not be re-established.

² This is an entirely new section. The existing zoning ordinance does not appear to expressly address nonconforming lots.

A nonconforming use located in a district other than an N district, may also be changed to another nonconforming use if approved in accordance with the type zoning exception procedures of section [134-6.5](#). In order to approve an administrative exception for a nonconforming use substitution, the community development director must determine that the proposed use substitution will not result in any increase in adverse impacts on the surrounding area when compared to the previous nonconforming use of the property. In making such a determination, the community development director must consider all of the following factors, as applicable:

1. Traffic to and from the site;
2. The amount of parking required;
3. Hours of operation,
4. Outdoor display, storage and work activities; and
5. Other factors likely to have an effect on the surrounding area.³

7.3.3 EXPANSION

Unless otherwise expressly stated, nonconforming uses may not be expanded or extended to occupy a greater area than was occupied at the time the use became nonconforming unless the expansion reduces or eliminates the nonconformity. A nonconforming use of a portion of a building may be expanded or extended into the remaining portions of the building if the development administrator determines that the area of the building in which the expansion is proposed was manifestly arranged and designed for the use.

7.3.4 MOVEMENT

A nonconforming use may be moved in whole or in part to another location only if the movement or relocation eliminates the nonconformity.

7.3.5 DAMAGE OR DESTRUCTION

If a structure containing a nonconforming use is damaged or destroyed to the extent of 50% or more of its replacement cost at time of damage or destruction, exclusive of the foundation, the nonconforming use may not be re-established. If the structure is damaged or destroyed to the extent of less than 50% of its replacement cost at time of damage or destruction, exclusive of the foundation, the nonconforming use may be re-established to the extent it existed before the damage, provided that a permit application to allow

³ The existing ordinance allows change "to another nonconforming use of a similar nature." This proposed change will require review of such use substitution requests.

Nonconforming Buildings

the re-establishment is filed within 6 months of the damage.

7.3.6 LOSS OF NONCONFORMING STATUS

- A. If a nonconforming use is changed to a conforming use, no matter how short the period of time, the nonconforming use is deemed abandoned, all nonconforming use rights are lost and re-establishment of the nonconforming use is prohibited.
- B. If a nonconforming use of a structure is abandoned, the use may not be re-established. A nonconforming use is deemed to have been abandoned if during the time that the use is not in place the subject property owner makes any change to the property inconsistent with the resumption of the use. Examples of changes that are inconsistent with the resumption of a use expressly include: combining 2 or more dwelling units under one water, gas or electric meter or creating an opening between 2 dwelling units.
- C. If a nonconforming use in an N district is discontinued for more than one year for any reason whatsoever, the nonconforming use is deemed abandoned and may not be re-established. If a nonconforming use in any district other than an N district is discontinued for more than 6 months for any reason whatsoever, the nonconforming use is deemed abandoned and may not be re-established.

7.3.7 USE OF OPEN LAND

- A. Nonconforming uses of open land are land uses and activities that meet the definition of a nonconforming use but that include structures that are merely accessory or incidental to the principal use and in the aggregate do not cover more than 10% of the lot. Common examples include storage yards, construction debris sites, vehicle sales lots, vehicle impound yards, auto wrecking, junkyards, and similar open-air uses. Nonconforming uses of open land are subject to the nonconforming use regulations of this section [134-7.3](#), except as modified by the specific regulations of this subsection [134-7.3.7](#).
- B. A nonconforming use of open land may not be enlarged, increased or extended to occupy a greater area of land than was occupied at the time the use became nonconforming. For purposes of this section, the addition of gravel or similar material on or after February 1, 2015, in an amount deemed substantial by the zoning enforcement officer, for purposes of surfacing or maintaining an unpaved

parking area, parking lot, off-street parking or loading area, or access drive, constitute enlargement of a nonconforming use whether or not such surfaced or maintained area occupies a greater area of land than was occupied as of February 1, 2015.

- C. If a nonconforming use of open land ceases for any reason for a period of more than 6 months, all nonconforming use rights are lost and re-establishment of the nonconforming use is prohibited.

7.3.8 LIQUOR, WINE OR BEER SALES

Structures that are nonconforming with respect to the regulations that apply to controlled uses (see [134-3.8.2](#)) may not be modified in any way that would alter the occupant-capacity of the business premises, and if damaged or destroyed by any means to the extent of 50% or more of its value at the time of damage or destruction, exclusive of land, may not be reconstructed for use by a business holding a liquor license or beer or wine permit, except in compliance with the controlled use regulations of [134-3.8.2](#).

7.3.9 USES IN FLOODPLAIN AND FLOODWAY

Existing structures in F districts that are occupied in whole or in part by a nonconforming use, may not be enlarged, extended, reconstructed or structurally altered, unless the use is changed to a use permitted in the F district. Such structures may not be moved or relocated unless the movement or relocation eliminates the nonconformity.

134-7.4 Nonconforming Buildings

7.4.1 DESCRIPTION

A nonconforming building is a building that was lawfully established but that no longer complies with the applicable building type or design regulations of Chapter 135 because of the adoption or amendment of zoning, building type or design regulations after the structure was established.

7.4.2 INTENT

Adoption of the building type and design regulations of Chapter 135 will result render some buildings that were lawfully established being rendered nonconforming. The nonconforming building regulations of this section are intended to allow these buildings to be changed and upgraded without requiring their elimination if the change would not substantially adversely affect the surrounding area and would not increase the degree of nonconformity.

134-7. NONCONFORMITIES

Nonconforming Structures

7.4.3 USE

A nonconforming building may be used for any use allowed in the district in which the structure is located, including a lawfully established nonconforming use.

7.4.4 MOVEMENT

A nonconforming building may be moved in whole or in part to another location on the same lot only if the movement or relocation eliminates the nonconformity.

7.4.5 ALTERATION, ENLARGEMENT OR CHANGE

- A.** Any modification to a lawfully building that does not meet the building type or design regulations of Chapter 135 that adds more than 50% to the floor area existing on the effective date specified in section [134-1.3](#) must comply with all applicable building type or design regulations of Chapter 135. For the purposes of calculating the amount of floor area being added, all floor area added since the effective date specified in section [134-1.3](#) must be included.
- B.** Any facade being added or replaced must comply with the building type regulations of Chapter 135 if any of the following criteria apply:
1. New exterior facades are being added as a result of the addition of floor area;
 2. More than 30% of the exterior facade material is being replaced;
 3. More than 30% of the windows on any exterior facade are being replaced;
 4. Doors or balconies located on any exterior facade are being replaced.
- C.** If the facade exists or will be constructed within the build-to zone, compliance with the facade requirements of the applicable building type, not including the cap types, is required if any one of the following criteria apply to the building modification or expansion:
1. New exterior facades are being added as a result of the addition of floor area;
 2. More than 2 additional exterior doors are being added or installed;;
 3. The area of exterior windows is being expanded by more than 30%;
 4. More than 30% of the exterior facade material is being replaced;
 5. Doors or balconies located on any exterior facade are being replaced.

- D.** The cap type regulations of the applicable building type must be met when the shape or style of more than 60% of the roof is changed and 30% or more of the façade is within the required build-to zone.

7.4.6 DAMAGE OR DESTRUCTION

- A.** If a nonconforming building is damaged or destroyed by any means beyond the control of the property owner, the nonconforming building may be re-established to the extent it existed before the damage or destruction, provided that a permit application to allow the re-establishment is filed within 6 months of the damage or destruction.
- B.** If a nonconforming building is demolished, modified, damaged or destroyed by intentional act of the property owner to the extent of 60% or more of its replacement cost at time of demolition, modification, damage or destruction, the nonconforming building may not be re-established.

7.4.7 MANUFACTURED HOUSING UNITS⁴

Nonconforming manufactured housing units may be occupied and maintained and if damaged or destroyed may be reconstructed, provided that if the dwelling is damaged or destroyed by any means to the extent of 50% or more of its replacement cost at the time of damage or destruction, it may not be reconstructed unless a permit application to allow the re-establishment is filed within 6 months and the reconstructed dwelling::

- A.** Remains within the original building footprint without an increase in the gross floor area; and
- B.** Complies the building type regulations of the subject zoning district.

134-7.5 Nonconforming Structures

7.5.1 DESCRIPTION

A nonconforming structure is a structure, other than a building or a sign, that was lawfully established but that no longer complies with the applicable provisions of this zoning ordinance or with the building type or design regulations of Chapter 135 because of the adoption or amendment of zoning, building type or design regulations after the structure was established.

7.5.2 MOVEMENT

A nonconforming structure may be moved in whole or in part to another location on the same lot only if the

- ⁴ These provisions were originally in the zoning upon annexation section and did not specifically call-out “manufactured housing” as the issue. Need to confirm that the provisions works, as edited.

Nonconforming Signs

movement or relocation eliminates the nonconformity.

7.5.3 ALTERATION, ENLARGEMENT OR EXPANSION

Nonconforming structures may not be enlarged or altered in a way which increases their nonconformity. Alterations, including enlargements and expansions, are permitted if the proposed alteration or expansion complies with all applicable lot and building regulations and does not increase the extent of the nonconformity. A building with a nonconforming street setback, for example, may be expanded to the rear as long as the rear expansion complies with applicable rear setback regulations and all other applicable lot and building regulations.

7.5.4 DAMAGE OR DESTRUCTION

If a nonconforming structure is damaged or destroyed to the extent of 50% or more of its replacement cost at time of damage or destruction, the nonconforming structure may not be re-established. If the structure is damaged or destroyed to the extent of less than 50% of its replacement cost at the time of damage or destruction, the nonconforming structure may be re-established to the extent it existed before the damage or destruction, provided that a permit application to allow the re-establishment is filed within 6 months of the damage.

134-7.6 Nonconforming Signs

A nonconforming sign is a sign that was lawfully established but that no longer complies with applicable zoning ordinance regulations because of the adoption or amendment of regulations after the sign was established.

7.6.1 USE

Nonconforming signs may continue subject to the regulation of this section.

7.6.2 MOVEMENT

A nonconforming sign may be moved in whole or in part to another location only if the movement or relocation eliminates the nonconformity.

7.6.3 ALTERATION, ENLARGEMENT OR EXPANSION

Nonconforming signs may not be enlarged or altered in a way which increases their nonconformity.

7.6.4 CONVERSION TO ELECTRONIC DISPLAY⁵

Nonconforming signs may not be converted to use an electronic or multi-vision display.

⁵ New billboards would be prohibited under this draft, as would conversion of existing static displays.

7.6.5 DAMAGE OR DESTRUCTION

- A. If a nonconforming sign is damaged or destroyed by any means, including repair, alteration, replacement or upgrade, to the extent of 50% or more of its replacement cost at time of damage or destruction, exclusive of the foundation and supporting elements below the bottom of the sign, the nonconforming sign must be removed.
- B. If a nonconforming sign is damaged or destroyed by any means, including repair, alteration, replacement or upgrade, to an extent of less than 50% of its replacement cost at the time of the damage or destruction, exclusive of the foundation and supporting elements below the bottom of the sign, the nonconforming sign may remain to the extent it existed before the damage, provided that a building permit application to re-establish the sign is filed within 6 months of the date of damage or destruction.
- C. For purposes of this subsection (134-7.6.5), the phrase “damages or destroyed” includes removal of the sign face for repair, alteration, replacement or upgrade.

7.6.6 LOSS OF NONCONFORMING STATUS

- A. If the use of the property containing a nonconforming pole sign is discontinued for a period of more than 6 months, or if a new or amended site plan is required by a change in the use or building expansion on the premises, the pole sign loses its nonconforming status. Any pole sign that loses its nonconforming status must be removed no later than 6 months after its change of status.
- B. If a pole sign or other on-premise sign is not used to display a commercial or noncommercial message for a period of 6 months or more, the sign is deemed abandoned and must be removed.
- C. If a nonconforming off-premise outdoor advertising sign is not used to display a commercial or noncommercial message for a period of 6 months or more, the nonconforming off-premise outdoor advertising sign is deemed to have been abandoned and must be removed.
- D. When removal of a sign is required, the entire sign structure, including the base and supports, must be removed to a depth of at least 6 inches below grade.

134-7.7 Effect of Condemnation⁶

7.7.1 If a portion of a lot is conveyed to the state, the city, or any other political subdivision of the state through condemnation or under threat of condemnation, and the conveyance results in lot or structure becoming nonconforming or more nonconforming, then notwithstanding any provisions to the contrary in this article, if the nonconforming structure or structure on the nonconforming lot is thereafter damaged to any extent or is totally destroyed by any means, the structure may be repaired, restored, or rebuilt to its prior condition, if all of the following conditions are satisfied:

- A.** The nonconformity was created by the conveyance through condemnation or under threat of condemnation;
- B.** Appropriate relief was obtained from the board of adjustment for any nonconformity with the applicable zoning requirements, to the extent that such nonconformity predated the condemnation or conveyance;
- C.** The repair, restoration or rebuilding of the structure does not create any additional nonconformity of the structure beyond that originally created by such conveyance or allowed by any relief granted by the board of adjustment;
- D.** A permit application to allow the repair, restoration, or rebuilding is filed within 6 months of such damage and is diligently pursued to completion; and,
- E.** One of the following conditions are satisfied:
 1. The acquisition document for such conveyance contains language stating substantially as follows: "The provisions of section [134-7.7](#) of the Des Moines Zoning Ordinance apply to this acquisition"; or
 2. The community development director determines after consultation with the real estate division of the engineering department, that the circumstances of such conveyance affirmatively support a finding that any resulting nonconformities were not considered in determining the compensation paid for such conveyance.

7.7.2 If a portion of a lot is conveyed to the state, the city, or any other political subdivision of the state through condemnation or under threat of condemnation, and the conveyance results in a single-

family dwelling upon the remaining lot becoming nonconforming or more nonconforming with setback or lot size requirements, then the remaining lot will be treated as a nonconforming lot.

7.7.3 Any adjustment to the minimum lot area made under authority of this section automatically lapses and is of no further effect if the lot is combined with other abutting land under common ownership and such combination results in a lot that meets applicable minimum lot area requirements.

7.7.4 Any adjustment to a required setback made under authority of this section lapses and is of no further effect if the lot is combined with other abutting land under common ownership and such combination results in a lot that meets applicable minimum setback requirements.

⁶ Flagged for discussion.

