ARTICLE VIII

NONCONFORMING SITUATIONS

Section 15-121 Definitions.

Unless otherwise specifically provided or unless clearly required by the context, the words and phrases defined in this section shall have the meaning indicated when used in this article.

(1) **DIMENSIONAL NONCONFORMITY.** A nonconforming situation that occurs when the height, size, or minimum floor space of a structure or the relationship between an existing building or buildings and other buildings or lot lines does not conform to the regulations applicable to the district in which the property is located.

(2) **EFFECTIVE DATE OF THIS CHAPTER.** Whenever this article refers to the effective date of this chapter, the reference shall be deemed to include the effective date of any amendments to this chapter if the amendment, rather than this chapter as originally adopted, creates a nonconforming situation.

(3) **EXPENDITURE.** A sum of money paid out in return for some benefit or to fulfill some obligation. The term also includes binding contractual commitments to make future expenditures, as well as any other substantial changes in position.

(4) **NONCONFORMING LOT.** A lot existing at the effective date of this chapter (and not created for the purposes of evading the restrictions of this chapter) that does not meet the minimum area requirement of the district in which the lot is located.

(5) **NONCONFORMING PROJECT.** Any structure, development, or undertaking that is incomplete at the effective date of this chapter and would be inconsistent with any regulation applicable to the district in which it is located if completed as proposed or planned.

(6) **NONCONFORMING SIGN.** A sign (see Section 15-270 for definition) that, on the effective date of this chapter does not conform to one or more of the regulations set forth in this chapter, particularly Article XVII, Signs.

(7) **NONCONFORMING SITUATION.** A situation that occurs when, on the effective date of this chapter, an existing lot or structure does not conform to one or more of the regulations applicable to the district in which the lot or structure is located. Among other possibilities, a nonconforming situation may arise because a lot does not meet minimum acreage requirements, because structures exceed maximum height limitations, because the relationship between existing buildings and the land (in such matters as density and setback requirements) is not in conformity with this chapter, because signs do not meet the requirements of Article XVII of this chapter, or because land or buildings are used for purposes made unlawful by this chapter.

(8) **NONCONFORMING USE.** A nonconforming use that occurs when property is used for a purpose or in a manner made unlawful by the use regulations applicable to the district in which the property is located. (For example, a commercial office building in a residential district may be a nonconforming use.) The term also refers to the activity that constitutes the use made of the property. (For example, all the activity associated with running a bakery in a residentially zoned area is a nonconforming use.)

Section 15-122 Continuation of Nonconforming Situations and Completion of Nonconforming Projects.

(a) Nonconforming situations that were otherwise lawful on the effective date of this chapter may be continued, subject to the restrictions and qualifications set forth in Section 15-123 through 15-129.

(b) Nonconforming projects may be completed only in accordance with the provisions of Section 15-128.

Section 15-123 Nonconforming Lots.

(a) When a nonconforming lot can be used in conformity with all of the regulations applicable to the intended use, except that the lot is smaller than the required minimums set forth in Section 15-181, then the lot may be used as proposed just as if it were conforming. However, no use (e.g., a duplex) that requires a greater lot size than the established minimum lot size for a particular zone is permissible on a nonconforming lot.

(b) When the use proposed for a nonconforming lot is one that is conforming in all other respects but the applicable setback requirements (Section 15-184) cannot reasonably be complied with, then the entity authorized by this chapter to issue a permit for the proposed use (the administrator, board of adjustment, or Town Council~~Board of Aldermen~~) may allow deviations from the applicable setback requirements if it finds that:

(1) The property cannot reasonably be developed for the use proposed without such deviations;

(2) These deviations are necessitated by the size or shape of the nonconforming lot; and

(3) The property can be developed as proposed without any significantly adverse impact on surrounding properties or the public health or safety.

(c) For purposes of subsection (b), compliance with applicable building setback requirements is not reasonably possible if a building that serves the minimal needs of the use proposed for the nonconforming lot cannot practicably be constructed and located on the lot in conformity with

such setback requirements. However, mere financial hardship does not constitute grounds for finding that compliance is not reasonably possible.

(d) This section applies only to undeveloped nonconforming lots. A lot is undeveloped if it has no substantial structures upon it. A change in use of a developed nonconforming lot may be accomplished in accordance with Section 15-126.

(e) Subject to the following sentence, if, on the date this section becomes effective, an undeveloped nonconforming lot adjoins and has continuous frontage with one or more other undeveloped lots under the same ownership, then neither the owner of the nonconforming lot nor his successors in interest may take advantage of the provisions of this section. This subsection shall not apply to a nonconforming lot if a majority of the developed lots located on either side of the street where such lot is located and within 500 feet of such lot are also nonconforming. The intent of this subsection is to require nonconforming lots to be combined with other undeveloped lots to create conforming lots under the circumstances specified herein, but not to require such combination when that would be out of character with the way the neighborhood has previously been developed.

Section 15-124 Extension or Enlargement of Nonconforming Situations.

(a) Except as specifically provided in this section, no person may engage in any activity that causes an increase in the extent of nonconformity of a nonconforming situation. In particular, physical alteration of structures or the placement of new structures on open land is unlawful if such activity results in:

(1) An increase in the total amount of space devoted to a nonconforming use; or

(2) Greater nonconformity with respect to dimensional restrictions such as setback requirements, height limitations or density requirements or other requirements such as parking requirements.

(b) Subject to subsection (d) a nonconforming use may be extended throughout any portion of a completed building that, when the use was made nonconforming by this chapter, was manifestly designed or arranged to accommodate such use. However, subject to Section 15-128 (authorizing the completion of nonconforming projects in certain circumstances), a nonconforming use may not be extended to additional buildings or to land outside the original building.

(c) Subject to Section 15-128 (authorizing the completion of nonconforming projects in certain circumstances), a nonconforming use of open land may not be extended to cover more land than was occupied by that use when it became nonconforming, except that a use that involves the removal of natural materials from the lot (e.g., a quarry) may be expanded to the boundaries of the lot where the use was established at the time it became nonconforming if ten percent or more of the earth products had already been removed at the effective date of this chapter.

(d) The volume, intensity, or frequency of use or property where a nonconforming situation exists may be increased and the equipment or processes used at a location where a nonconforming situation exists may be changed if these or similar changes amount only to changes

in the degree of activity rather than changes in kind and no violations of other paragraphs of this section occur.

(e) Notwithstanding subsection (a), when one single-family detached residence is located on a lot and that residence (i) constitutes a non-conforming use where it is located, or (ii) is located on a lot that is nonconforming in terms of size, or (iii) is non-conforming with respect to the dimensional or parking requirements of this chapter, then such single-family residence may be enlarged or replaced with another single-family residence of a larger size, so long as: **(Amended 5/21/02)**

(1) The enlargement or replacement does not create new non-conformities or increase the extent of existing non-conformities with respect to dimensional, parking or other requirements; and

(2) The enlarged or replacement house does not contain more than three bedrooms, or the number of bedrooms of the original house, whichever is greater; and

(3) The square footage of heated floor space within the enlarged or replacement house does not exceed that of the original house by more than 50% or 500 square feet, whichever is greater; and

(4) If the original house is replaced, the original house is removed from the lot.

(e1) Notwithstanding subsection (a), when more than one single-family residences are located on a single lot, and such structures (i) constitute non-conforming uses where they are located, or (ii) are located on a lot that is nonconforming in terms of size or density, or (iii) are non-conforming with respect to the dimensional or parking requirements of this chapter, any of such residential structures may be enlarged or replaced with another single-family residential structure of a larger size, so long as: **(Amended 5/21/02)**

(1) The enlargement or replacement does not create new non-conformities or increase the extent of existing non-conformities with respect to dimensional, parking or other requirements; and

(2) The enlarged or replacement house does not contain more than three bedrooms, or the number of bedrooms of the original house, whichever is greater; and

(3) The square footage of heated floor space within the enlarged or replacement house does not exceed that of the original house by more than 50% or 500 square feet, whichever is greater; and

(4) If the original house is replaced, the original house is removed from the lot.

(f) Notwithstanding subsection (a), whenever: (i) there exists a lot with one or more structures on it; and (ii) a change in use that does not involve any enlargement of a structure is proposed for such lot; and (iii) the parking requirements of Article XVIII that would be applicable as a result of the proposed change cannot be satisfied on such lot because there is not sufficient area available on the lot that can practicably be used for parking, then the proposed use shall not be regarded as resulting in an impermissible extension or enlargement of a nonconforming situation. However, the applicant shall be required to comply with all applicable parking requirements that can be satisfied without acquiring additional land, and shall also be required to obtain satellite parking in accordance with Section 15-297 if: (i) parking requirements cannot be satisfied on the lot with respect to which the permit is required; and (ii) such satellite parking is reasonably available. If such satellite parking is not reasonably available at the time the class A or class B special use permit or ~~zoning or special or conditional use permit~~ is granted, then the permit recipient shall be required to obtain it if and when it does become reasonably available. This requirement shall be a continuing condition of the permit.

(g) A nonconforming use that operates within an enclosed building may expand one time by enlarging the building within which the use is conducted or by expanding within a building where an extension is not otherwise allowed under subsection (b), so long as: **(AMENDED 6/15/86)**

(1) The area of the enlargement of the nonconforming use does not exceed the maximums established below:

a. If the gross floor area previously occupied by the nonconforming use does not exceed 1,000 square feet, then the maximum expansion shall be equal to 100% of the gross floor area previously occupied by the nonconforming use.

b. If the gross floor area previously occupied by the nonconforming use is between 1,001 and 5,000 square feet, then the maximum expansion shall be equal to 1,000 square feet plus 35% of the difference between the gross floor area previously occupied by the nonconforming use and 1,000 square feet.

c. If the gross floor area previously occupied by the nonconforming use exceeds 5,000 square feet, then the maximum expansion shall be equal to 2,400 square feet plus 25% of the difference between the gross floor area previously occupied by the nonconforming use and 5,000 square feet. However, in no case may the gross floor area of the expansion exceed 5,000 square feet.

(2) No additional outside storage is associated with the expansion; and

(3) The nonconforming use, when expanded, does not generate noise that tends to have an annoying or disruptive effect upon (i) uses located outside the immediate space occupied by the nonconforming use if that is one of several located on a lot; or (ii) uses located on adjacent lots; and

(4) At least "B" level screening is provided in conjunction with the expansion ("A" level screening shall be provided if required under Article XIX); and

(5) The expansion does not involve the addition of any new drive-in windows; and

(6) A permit authorizing the expansion is issued by the board of adjustment, unless the expansion is proposed in connection with a development that otherwise requires a class A special use permit~~conditional use permit~~, in which case the permit must be issued by the Town Council~~Board of Aldermen~~. Such a permit may be issued only if the board finds that the proposed expansion satisfies the foregoing requirements and that:

a. All of the applicable requirements of this chapter that can reasonably be complied with will be complied with. Compliance with a requirement of this chapter is not reasonably possible if compliance cannot be achieved without adding additional land to the lot where the nonconforming situation is maintained or moving a substantial structure that is on a permanent foundation. Mere financial hardship caused by the cost of meeting such requirements as paved parking does not constitute grounds for finding that compliance is not reasonably possible. And in no case may an applicant be given permission pursuant to this subsection to construct a building or add to an existing building if additional dimensional nonconformities (including parking nonconformities) would thereby be created; and

b. On balance, the benefits to the neighborhood that result from the improvements required under this subsection in conjunction with the expansion of a nonconforming use outweigh the disadvantages inherent in the expansion of a nonconforming use.

(h) Notwithstanding subsection (a), an expansion of a building intended to be used for the provision of emergency services (use classification 13.000) which is nonconforming with respect to setback requirements, whereby the expanded building will be no closer than the existing building to the lot line or the street right-of-way line or centerline with respect to which the existing building is nonconforming, shall not constitute an increase in the extent of nonconformity or a nonconforming situation, provided that to take advantage of this provision, the permit required for the expansion shall be a class A special use permit~~conditional use permit~~ notwithstanding anything to the contrary in the table of permissible uses. **(AMENDED 06/07/88)**

Section 15-125 Repair, Maintenance and Reconstruction.

(a) Minor repairs to and routine maintenance of property where nonconforming situations exist are permitted and encouraged. Major renovation, i.e., work estimated to cost more than

twenty-five percent of the appraised valuation of the structure to be renovated may be done only in accordance with a zoning permit issued pursuant to this section.

(b) If a structure located on a lot where a nonconforming situation exists is damaged to an extent that the costs of repair or replacement would exceed twenty-five percent of the appraised valuation of the damaged structure, then the damaged structure may be repaired or replaced only in accordance with a zoning permit issued pursuant to this section. This subsection does not apply to structures used for single-family residential purposes, which structures may be reconstructed pursuant to a zoning permit just as they may be enlarged or replaced as provided in subsection 15-124(e).

(c) For purposes of subsections (a) and (b):

(1) The "cost" of renovation or repair or replacement shall mean the fair market value of the materials and services necessary to accomplish such renovation, repair, or replacement.

(2) The "cost" of renovation or repair or replacement shall mean the total cost of all such intended work, and no person may seek to avoid the intent of subsection (a) or (b) by doing such work incrementally.

(3) The "appraised valuation" shall mean either the appraised valuation for property tax purposes, updated as necessary by the increase in the consumer price index since the date of the last valuation, or the valuation determined by a professionally recognized property appraiser.

(d) The administrator shall issue a permit authorized by this section if the administrator ~~he~~ finds that, in completing the renovation, repair or replacement work:

(1) No violation of Section 15-124 will occur; and

(2) The permittee will comply to the extent reasonably possible with all provisions of this chapter applicable to the existing use, (except that the permittee shall not lose his right to continue a nonconforming use or a nonconforming level of residential density). **(AMENDED 11/26/85)**

Compliance with a requirement of this chapter is not reasonably possible if compliance cannot be achieved without adding additional land to the lot where the nonconforming situation is maintained or moving a substantial structure that is on a permanent foundation. Mere financial hardship caused by the cost of meeting such requirements as paved parking does not constitute grounds for finding that compliance is not reasonably possible.

Section 15-126 Change In Use of Property Where a Nonconforming Situation Exists.

(a) A change in the use of property (where a nonconforming situation exists) that is sufficiently substantial to require a new class A or class B special use, or zoning~~, special use, or conditional use~~ permit in accordance with Section 15-46 may not be made except in accordance with

subsection (b) through (d). However, this requirement shall not apply if only a sign permit is needed. **(AMENDED 4/27/82)**

(b) If the intended change in use is to a principal use that is permissible in the district where the property is located, and all of the other requirements of this chapter applicable to that use can be complied with, permission to make the change must be obtained in the same manner as permission to make the initial use of a vacant lot. Once conformity with this chapter is achieved, the property may not revert to its nonconforming status.

(c) If the intended change in use is to a principal use that is permissible in the district where the property is located, but all of the requirements of this chapter applicable to that use cannot reasonably be complied with, then the change is permissible, if the entity authorized by this chapter to issue a permit for that particular use (the administrator, board of adjustment, or Town Council~~Board of Aldermen~~) issues a permit authorizing the change. This permit may be issued if the permit-issuing authority finds, in addition to any other findings that may be required by this chapter, that:

(1) The intended change will not result in a violation of Section 15-124; and

(2) All of the applicable requirements of this chapter that can reasonably be complied with will be complied with. Compliance with a requirement of this chapter is not reasonably possible if, among other reasons, compliance cannot be achieved without adding additional land to the lot where the nonconforming situation is maintained or moving a substantial structure that is on a permanent foundation. Mere financial hardship caused by the cost of meeting such requirements as paved parking does not constitute grounds for finding that compliance is not reasonably possible. However, the permit-issuing authority may conclude that compliance is not reasonably possible if the cost (financial and otherwise) of compliance is substantially disproportional to the benefits of eliminating a nonconformity**.** In no case may an applicant be given permission pursuant to this subsection to construct a building or add to an existing building if additional nonconformities would thereby be created. **(AMENDED 5/25/04)**

(d) If the intended change in use is to another principal use that is also nonconforming, then the change is permissible if the entity authorized by this chapter to issue a permit for that particular use (administrator, board of adjustment, or Town Council~~Board of Aldermen~~) issues a permit authorizing the change. The permit-issuing authority may issue the permit if it finds, in addition to other findings that may be required by this chapter, that:

(1) The use requested is one that is permissible in some zoning district with either a class A, class B, or zoning~~, special use, or conditional use~~ permit; and

(2) All of the conditions applicable to the permit authorized in subsection (c) of this section are satisfied; and

(3) The proposed development will have less of an adverse impact on those most affected by it and will be more compatible with the surrounding neighborhood than the use in operation at the time the permit is applied for.

Section 15-127 Abandonment and Discontinuance of Nonconforming Situations. (AMENDED 06/18/91)

(a) When a nonconforming use is discontinued for a period of at least twelve consecutive months, the property may thereafter be used only for conforming purposes, except as provided in subsection (b).

(b) When a nonconforming use has been discontinued for a consecutive period of at least twelve months, then the property may thereafter be re-used for a use within the same principal use classification as the most recently discontinued nonconforming use if the permit-issuing authority issues a permit authorizing the change. As used in this subsection, the term permit-issuing authority means the Town Council~~Board of Aldermen~~, if the use proposed would require a class A special use permit~~conditional use permi~~t in any zoning district where such use is permissible, and otherwise means the board of adjustment. The permit issuing authority may issue the permit if it finds, in addition to other findings that may be required by this chapter, that:

(1) All of the conditions applicable to the permit authorized in subsection 15-126(c) are satisfied; and

(2) The property where the nonconforming use is proposed to be reinstated is particularly well adapted (in terms of the nature and orientation of improvements on that property) to that nonconforming use, and it would be substantially difficult or impractical to use this property for conforming purposes; and

(3) Reinstatement of the nonconforming use will not have a substantially adverse effect on the public health or safety or the value, use, or enjoyment of properties in the immediate area of the nonconforming use; and

(4) Since the nonconforming use was discontinued, the property has not been used for conforming purposes for more than a continuous period of three months.

(c) If the principal activity on the property where a nonconforming situation other than a nonconforming use exists is discontinued for a consecutive period of at least twelve months, then that property may thereafter be used only in conformity with all of the regulations applicable to the pre-existing use unless the entity with authority to issue a permit for the intended use issues a permit to allow the property to be used for this purpose without correcting the nonconforming situations. This permit may be issued if the permit-issuing authority finds that eliminating a particular nonconformity is not reasonably possible (i.e., cannot be accomplished without adding additional land to the lot where the nonconforming situation is maintained or moving a substantial structure that is on a permanent foundation). The permit shall specify which nonconformity need not be corrected.

(d) For purposes of determining whether a right to continue a nonconforming situation is lost pursuant to this section, all of the buildings, activities, and operations maintained on a lot are generally to be considered as a whole. For example, the failure to rent one apartment in a nonconforming apartment building for twelve months shall not result in a loss of the right to rent that apartment or space thereafter so long as the apartment building as a whole is continuously maintained. But if a nonconforming use is maintained in conjunction with a conforming use, discontinuance of a nonconforming use for the required period shall terminate the right to maintain it thereafter [subject to subsection (b)].

(e) When a structure or operation made nonconforming by this chapter is vacant or discontinued at the effective date of this chapter, the twelve month period for purposes of this section begins to run at the effective date of this chapter.

Section 15-128 Completion of Nonconforming Projects.

(a) All nonconforming projects on which construction was begun at least 180 days before the effective date of this chapter as well as all nonconforming projects that are at least twenty-five percent completed in terms of the total expected cost of the project on the effective date of this chapter may be completed in accordance with the terms of their permits, so long as these permits were validly issued and remain unrevoked and unexpired. If a development is designed to be completed in stages, this subsection shall apply only to the particular phase under construction.

(b) Except as provided in subsection (a), and except to the extent that a developer has a vested right as set forth in Sections 15-128.2, ~~and~~ 15-128.3, all work on any nonconforming project shall cease on the effective date of this chapter, and all permits previously issued for work on nonconforming projects shall be revoked as of that date. The permit-issuing authority shall issue such a permit if it finds that the applicant has in good faith made substantial expenditures or incurred substantial binding obligations or otherwise changes his position in some substantial way in reasonable reliance on the land use law as it existed before the effective date of this chapter and thereby would be unreasonably prejudiced if not allowed to complete his project as proposed. In considering whether these findings may be made, the permit-issuing authority shall be guided by the following, as well as other relevant considerations: **(AMENDED 11/10/81; 10/01/91)**

(1) All expenditures made to obtain or pursuant to a building, class A or class B special use, or zoning~~, sign, or special or conditional use~~ permit that was validly issued and that remains unrevoked shall be considered as evidence of reasonable reliance on the land use law that existed before this chapter became effective. **(AMENDED 4/27/82)**

(2) Except as provided in subdivision (b)(1), no expenditures made more than 180 days before the effective date of this chapter may be considered as evidence of reasonable reliance on the land use law that existed before this chapter became effective. An expenditure is made at the time a party incurs a binding obligation to make that expenditure.

(3) To the extent that expenditures are recoverable with a reasonable effort, a party shall not be considered prejudiced by having made those expenditures. For example, a party shall not be considered prejudiced by having made some expenditures to acquire a potential development site if the property obtained is approximately as valuable under the new classification as it was under the old, for the expenditure can be recovered by a resale of the property.

(4) To the extent that a nonconforming project can be made conforming and that expenditures made or obligations incurred can be effectively utilized in the completion of a conforming project, a party shall not be considered prejudiced by having made such expenditures.

(5) An expenditure shall be considered substantial if it is significant both in dollar amount and in terms of (i) the total estimated costs of the proposed project, and (ii) the ordinary business practices of the developer.

(6) A person shall be considered to have acted in good faith if actual knowledge of a proposed change in the land use law affecting the proposed development site could not be attributed to him.

(7) Even though a person had actual knowledge of a proposed change in the land use law affecting a development site, the permit-issuing authority may still find that he acted in good faith if he did not proceed with his plans in a deliberate attempt to circumvent the effects of the proposed ordinance. The permit-issuing authority may find that the developer did not proceed in an attempt to undermine the proposed ordinance if it determines that (i) at the time the expenditures were made, either there was considerable doubt about whether any ordinance would ultimately be passed, or it was not clear that the proposed ordinance would prohibit the intended development, and (ii) the developer had legitimate business reasons for making expenditures.

(8) In deciding whether a permit should be issued under this section, the permit issuing authority shall not be limited to either denying a permit altogether or issuing a permit to complete the project (or phases, sections, or stages thereof) as originally proposed or approved. Upon proper submission of plans by the applicant, the permit issuing authority may also issue a permit authorizing a development that is less nonconforming than the project as originally proposed or approved but that still does not comply with all the provisions of the ordinance making the project nonconforming. **(AMENDED 10/01/91)**

(c) When it appears from the developer's plans or otherwise that a project was intended to be or reasonably could be completed in phases, stages, segments, or other discrete units, the developer shall be allowed to complete only those phases or segments with respect to which the developer can make the showing required under subsection (b). In addition to the matters and subject to the guidelines set forth in subdivisions (1) through (8) of subsection (b), the permit issuing authority shall, in determining whether a developer would be unreasonably prejudiced if not allowed to

complete phases or segments of a nonconforming project, consider the following in addition to other relevant factors:

(1) Whether any plans prepared or approved regarding incompleted phases constitute conceptual plans only or construction drawings based upon detailed surveying, architectural, or engineering work.

(2) Whether any improvements, such as streets or utilities, have been installed in phases not yet completed.

(3) Whether utilities and other facilities installed in completed phases have been constructed in such a manner or location or on such a scale, in anticipation of connection to or interrelationship with approved but incompleted phases, that the investment in such utilities or other facilities cannot be recouped if such approved but incompleted phases are constructed in conformity with existing regulations.

(AMENDED 10/01/91)

(d) The permit-issuing authority shall not consider any application for the permit authorized by subsection (b) that is submitted more than sixty days after the effective date of this chapter. The permit-issuing authority may waive this requirement for good cause shown, but in no case may it extend the application deadline beyond one year.

(e) The administrator shall send copies of this section to the persons listed as owners for tax purposes (and developers, if different from the owners) of all properties in regard to which permits have been issued for nonconforming projects or in regard to which a nonconforming project is otherwise known to be in some stage of development. This notice shall be sent by certified mail not less than fifteen days before the effective date of this chapter.

(f) The permit-issuing authority shall establish expedited procedures for hearing applications for permits under this section. These applications shall be heard, whenever possible, before the effective date of this chapter, so that construction work is not needlessly interrupted.

(g) When it appears from the developer's plans or otherwise that the nonconforming project was intended to be or reasonably could be completed in stages, segments, or other discrete units, the permit-issuing authority shall not allow the nonconforming project to be constructed or completed in a fashion that is larger or more extensive than is necessary to allow the developer to recoup and obtain a reasonable rate of return on the expenditures he has made in connection with that nonconforming project. **(REPEALED 10/01/91; AMENDED 10/01/91)**

Section 15-128.1 Authorization of Nonconforming Projects (AMENDED 10/01/91)

Whenever an amendment to this chapter becomes effective after an application for a development permit is submitted but before the permit is issued, and the effect of the amendment is to render the proposed development nonconforming in some respect, then the permit issuing authority may nevertheless issue the permit even though the project is nonconforming if it finds that the

applicant has in good faith made substantial expenditures or incurred substantial binding obligations or otherwise changed his position in some substantial way in reasonable reliance on this chapter as it existed prior to the amendment and thereby would be unreasonably prejudiced if required to comply with this chapter as so amended.

Vested Rights and Permit Choice ~~Section 15-128.2 Vested Rights: Site Specific Development Plan (AMENDED 10/01/91)~~

(a) Findings. Pursuant to G.S. sections 160D-108 and 160D-108.1, the Town Council recognizes that development typically follows significant investment in site evaluation, planning, development costs, consultant fees, and related expenses, and finds that it is necessary and desirable to provide for the establishment of certain vested rights in order to ensure reasonable certainty, stability, and fairness in the development regulation process, to secure the reasonable expectations of landowners, and to foster cooperation between the public and private sectors in land-use planning and development regulation.

(b) Permit Choice. If a land development regulation is amended between the time a development permit application was submitted and a development permit decision is made or if a land development regulation is amended after a development permit decision has been challenged and found to be wrongfully denied or illegal, G.S. 143-755 applies.

(c) Vested Rights. Amendments in land development regulations are not applicable or enforceable without the written consent of the owner with regard to any of the following:

(1) Buildings or uses of buildings or land for which a development permit application has been submitted and subsequently issued in accordance with G.S. 143-755.

(2) Subdivisions of land for which a development permit application authorizing the subdivision has been submitted and subsequently issued in accordance with G.S. 143-755.

(3) A site-specific vesting plan pursuant to G.S. 160D-108.1.

(4) A multi-phased development pursuant to subsection (f) of this section.

(5) A vested right established by the terms of a development agreement authorized by Article 10 of this Chapter.

The establishment of a vested right under any subdivision of this subsection does not preclude vesting under one or more other subdivisions of this subsection or vesting by application of 8 common law principles. A vested right, once established as provided for in this section or by common law, precludes any action by the town that would change, alter, impair, prevent, diminish, or otherwise delay the development or use of the property allowed by the applicable land development regulation or regulations, except where a change in State or federal law mandating town enforcement occurs after the development application is submitted that has a fundamental and retroactive effect on the development or use.

(d) Duration of Vesting. Upon issuance of a development permit, the statutory vesting granted by subsection (c) of this section for a development project is effective upon filing of the application in accordance with G.S. 143-755, for so long as the permit remains valid pursuant to law. A zoning right that has been vested as provided in this chapter shall remain vested for a period of two years after issuance of a development permit unless work authorized by the permit has substantially commenced. For the purposes of this section, a permit is issued either in the ordinary course of business of the applicable governmental agency or by the applicable governmental agency as a court directive.

The statutory vesting granted by this section, once established, expires for an uncompleted development project if development work is intentionally and voluntarily discontinued for a period of not less than 24 consecutive months, and the statutory vesting period granted by this section for a nonconforming use of property expires if the use is intentionally and voluntarily discontinued for a period of not less than 24 consecutive months. The 24-month discontinuance period is automatically tolled during the pendency of any board of adjustment proceeding or civil action in a State or federal trial or appellate court regarding the validity of a development permit, the use of the property, or the existence of the statutory vesting period granted by this section. The 24-month discontinuance period is also tolled during the pendency of any litigation involving the development project or property that is the subject of the vesting

(e) Multiple Permits for Development Project. Subject to subsection (d) of this section, where multiple town development permits are required to complete a development project, the development permit applicant may choose the version of each of the town development regulations applicable to the project upon submittal of the application for the initial development permit. This provision is applicable only for those subsequent development permit applications filed within 18 months of the date following the approval of an initial permit. For purposes of the vesting protections of this subsection, an erosion and sedimentation control permit or a sign permit is not an initial development permit.

(f) Multi-Phased Development. A multi-phased development is vested for the entire development with the land development regulations then in place at the time a site plan approval is granted for the initial phase of the multi-phased development. A right which has been vested as provided for in this subsection remains vested for a period of seven years from the time a site plan approval is granted for the initial phase of the multi-phased development.

(g) Continuing Review. Following issuance of a development permit, a local government may make subsequent inspections and reviews to ensure compliance with the applicable land development regulations in effect at the time of the original approval.

(h) Process to Claim Vested Right. A person claiming a statutory or common law vested right may submit information to substantiate that claim to the administrator, who shall make an initial determination as to the existence of the vested right. The decision of the administrator may be appealed under G.S. 160D-405. On appeal, the existence of a vested right shall be reviewed de novo. In lieu of seeking such a determination or pursuing an appeal under G.S. 160D-405, a person claiming a vested right may bring an original civil action as provided by G.S. 160D-1403.1.

(i) Miscellaneous Provisions. The vested rights granted by this section run with the land except for the use of land for outdoor advertising governed by G.S. 136-136.1 and G.S. 136-131.2 in which case the rights granted by this section run with the owner of the permit issued by the North Carolina Department of Transportation. Nothing in this section precludes judicial determination, based on common law principles or other statutory provisions, that a vested right exists in a particular case or that a compensable taking has occurred. Except as expressly provided in this section, nothing in this section shall be construed to alter the existing common law.

(j) As used in this section, the following definitions apply:

(1) Development. As defined in G.S. 143-755(e) (1).

(2) Development permit. As defined in G.S. 143-755(e)(2).

(3) Land development regulation. As defined in G.S. 143-755(e)(3).

(4) Multi-phased development. A development containing 25 acres or more that is both of the following:

a. Submitted for development permit approval to occur in more than one phase.

b. Subject to a master development plan with committed elements showing the type and intensity of use of each phase

~~(a) The Board determines that a special use permit or a conditional use permit shall be regarded as a "site specific development plan" under the provisions of G.S. 160A-385.1. Therefore, once a special use permit or conditional use permit has been issued, the permit recipient shall have a "vested right" to complete the development authorized by such permit in accordance with its terms, irrespective of subsequent amendments to this chapter, to the extent provided in G.S. 160A-385.1.~~

~~(b) The Board further determines that recipients of zoning permits should be entitled to the same protections as recipients of special or conditional use permits. Therefore, subject to Subsection 15-148(b), once a zoning permit has been issued, the permit recipient shall have a "vested right" to complete the development authorized by such permit in accordance with its terms, irrespective of subsequent amendments to this chapter, to the same extent provided in G.S. 160A-385.1 for developments authorized by the approval of "site specific development plans."~~

~~(c) A vested right under this section commences upon the issuance of the permit in question, and the date of issuance is to be determined in accordance with the provisions of Subsection 15-62(d).~~

~~(1) A zoning right that has been vested as provided in this chapter shall remain vested for a period of two years. This vesting shall not be extended by any amendments or modifications to a site specific development plan (that are not~~

~~processed as new applications - - see Section 15-64), unless expressly provided by the approval authority at the time the amendment or modification is approved.~~

~~(2) As provided in G.S. 160A-385.1(d)(6), a right which has been vested in accordance with this section shall terminate at the end of the applicable vesting period with respect to buildings and uses for which no valid building permit applications have been filed.~~

~~(d) Nothing in this section shall prohibit the revocation of a permit pursuant to Section 15-115, and the vesting of rights provided for under this section shall be terminated upon such revocation.~~

~~(e) The effect of this section is to ensure that, during the period of vesting, the developer is protected from subsequent changes in this ordinance to a greater extent than is authorized under Section 15-128.3 (which provides for a vesting of rights only after a building permit has been obtained), or Section 15-128 (which generally provides for a vesting of rights only after the developer has made substantial expenditures in good faith reliance upon this chapter).~~

Section 15-128.3 Vested Rights Upon Issuance of Building Permits (Repealed and replaced) (AMENDED 10/01/91)

~~As provided in G.S. 160A-385, amendments, modifications, supplements, repeal or other changes in the zoning regulations set forth in this chapter or zoning district boundaries shall not be applicable or enforceable without consent of the owner with respect to buildings and uses for which a building permit has been issued pursuant to G.S. 160A-417 prior to the enactment of the ordinance making the change or changes, so long as the permit remains valid and unexpired pursuant to G.S. 160A-418 and unrevoked pursuant to G.S. 160A-422.~~

Section 15-128.3 Vested Rights – Site Specific Vesting Plans.

(a) Site-Specific Vesting Plan. A site-specific vesting plan consists of a plan submitted to the town in which the applicant requests vesting pursuant to this section, describing with reasonable certainty on the plan the type and intensity of use for a specific parcel or parcels of property. The plan may be in the form of, but not be limited to, any of the following plans or approvals: a planned unit development plan, a subdivision plat, a preliminary or general development plan, a special use permit, a conditional district zoning plan, or any other land-use approval designation. Unless otherwise expressly provided by the town, the plan shall include the approximate boundaries of the site; significant topographical and other natural features affecting development of the site; the approximate location on the site of the proposed buildings, structures, and other improvements; the approximate dimensions, including height, of the proposed buildings and other structures; and the approximate location of all existing and proposed infrastructure on the site, including water, sewer, roads, and pedestrian walkways. What constitutes a site-specific vesting plan under this section that would trigger a vested right shall be finally determined by the Town Council pursuant to a development regulation, and the document that triggers the vesting shall be so identified at the time of its approval. A variance does not constitute a site-specific vesting plan, and approval of a site-specific vesting plan with the condition that a variance be

obtained does not confer a vested right unless and until the necessary variance is obtained. If a sketch plan or other document fails to describe with reasonable certainty the type and intensity of use for a specified parcel or parcels of property, it may not constitute a site-specific vesting plan.

(b) Establishment of Vested Right. A vested right is established with respect to any property upon the valid approval, or conditional approval, of a site-specific vesting plan as provided in this section. Such a vested right confers upon the landowner the right to undertake and complete the development and use of the property under the terms and conditions of the site specific vesting plan, including any amendments thereto.

(c) Approval and Amendment of Plans. If a site-specific vesting plan is based on an approval required by a town development regulation, the town shall provide whatever notice and hearing is required for that underlying approval. A duration of the underlying approval that is less than two years does not affect the duration of the site-specific vesting plan established under this section. If the site-specific vesting plan is not based on such an approval, a legislative hearing with notice as required by G.S. 160D-602 shall be held.

The town may approve a site-specific vesting plan upon any terms and conditions that may reasonably be necessary to protect the public health, safety, and welfare. Conditional approval results in a vested right, although failure to abide by the terms and conditions of the approval will result in a forfeiture of vested rights. The town shall not require a landowner to waive the landowner's vested rights as a condition of developmental approval. A site specific vesting plan is deemed approved upon the effective date of the town's decision approving the plan or another date determined by the council upon approval. An approved site-specific vesting plan and its conditions may be amended with the approval of the owner and the town as follows: any substantial modification must be reviewed and approved in the same manner as the original approval; minor modifications may be approved by staff, if such are defined and authorized by local regulation.

(d) Continuing Review. Following approval or conditional approval of a site-specific vesting plan, the town may make subsequent reviews and require subsequent approvals to ensure compliance with the terms and conditions of the original approval, provided that these reviews and approvals are not inconsistent with the original approval. The town may, pursuant to G.S. 160D-403(f), revoke the original approval for failure to comply with applicable terms and conditions of the original approval or the applicable local development regulations.

(e) Duration and Termination of Vested Right.

(1) A vested right for a site-specific vesting plan remains vested for a period of two years. This vesting shall not be extended by any amendments or modifications to a site-specific vesting plan unless expressly provided by the local government.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, the town may provide for rights to be vested for a period exceeding two years but not exceeding five years where warranted in light of all relevant circumstances, including, but not limited to, the size and phasing of

development, the level of investment, the need for the development, economic cycles, and market conditions or other considerations. These determinations are in the sound discretion of the town and shall be made following the process specified for the particular form of a site-specific vesting plan involved in accordance with subsection (a) of this section.

(3) Upon issuance of a building permit, the provisions of G.S. 160D-1111 and G.S. 160D-1115 apply, except that a permit does not expire and shall not be revoked because of the running of time while a vested right under this section is outstanding.

(4) A right vested as provided in this section terminates at the end of the applicable vesting period with respect to buildings and uses for which no valid building permit applications have been filed.

(f) Subsequent Changes Prohibited; Exceptions.

(1) A vested right, once established as provided for in this section, precludes any zoning action by the town which would change, alter, impair, prevent, diminish, or otherwise delay the development or use of the property as set forth in an approved site-specific vesting plan, except under one or more of the following conditions:

a. With the written consent of the affected landowner.

b. Upon findings, by ordinance after notice and an evidentiary hearing, that natural or man-made hazards on or in the immediate vicinity of the property, if uncorrected, would pose a serious threat to the public health, safety, and welfare if the project were to proceed as contemplated in the site-specific vesting plan.

c. To the extent that the affected landowner receives compensation for all costs, expenses, and other losses incurred by the landowner, including, but not limited to, all fees paid in consideration of financing, and all architectural, planning, marketing, legal, and other consulting fees incurred after approval by the town, together with interest as provided under G.S. 160D-106. Compensation shall not include any diminution in the value of the property which is caused by the action.

d. Upon findings, by ordinance after notice and an evidentiary hearing, that the landowner or the landowner's representative intentionally supplied inaccurate information or made material misrepresentations that made a difference in the approval by the town of the site-specific vesting plan or the phased development plan.

e. Upon the enactment or promulgation of a State or federal law or regulation that precludes development as contemplated in the site-

specific vesting plan or the phased development plan, in which case the town may modify the affected provisions, upon a finding that the change in State or federal law has a fundamental effect on the plan, by ordinance after notice and an evidentiary hearing.

(2) The establishment of a vested right under this section does not preclude the application of overlay zoning or other development regulations which impose additional requirements but do not affect the allowable type or intensity of use, or ordinances or regulations which are general in nature and are applicable to all property subject to development regulation by the town, including, but not limited to, building, fire, plumbing, electrical, and mechanical codes. Otherwise applicable new regulations become effective with respect to property which is subject to a site-specific vesting plan upon the expiration or termination of the vesting rights period provided for in this section.

(3) Notwithstanding any provision of this section, the establishment of a vested right does not preclude, change, or impair the authority of the town to adopt and enforce development regulations governing nonconforming situations or uses.

(g) Miscellaneous Provisions.

(1) A vested right obtained under this section is not a personal right, but attaches to and runs with the applicable property. After approval of a site-specific vesting plan, all successors to the original landowner are entitled to exercise these rights.

(2) Nothing in this section precludes judicial determination, based on common law principles or other statutory provisions, that a vested right exists in a particular case or that a compensable taking has occurred. Except as expressly provided in this section, nothing in this section shall be construed to alter the existing common law.

(3) In the event the town fails to adopt a development regulation setting forth what constitutes a site-specific vesting plan triggering a vested right, a landowner may establish a vested right with respect to property upon the approval of a zoning permit, or otherwise may seek appropriate relief from the Superior Court Division of the General Court of Justice.

Section 15-129 Nonconforming Signs.

(a) Notwithstanding any other provision of this article, a nonconforming sign that exceeds the height or size limitations of Article XVII by more than ten percent or that is nonconforming in some other way shall, within three years following the effective date of this chapter, or two years after notification, whichever is sooner, be altered to comply with the provisions of this chapter (particularly

Article XVII) or be removed. If the nonconformity consists of too many freestanding signs or an excess of total sign area, the person responsible for the violation may determine which sign or signs need to be altered or removed by bringing the development into conformity with the provisions of Article XVII.

(b) Within nine months after the effective date of this chapter, the administrator shall make every reasonable effort to identify all the nonconforming signs within the town's planning jurisdiction. He shall then contact the person responsible for each such sign (as well as the owner of the property where the nonconforming sign is located, if different from the former) and inform such person (i) that the sign is nonconforming, (ii) how it is nonconforming, (iii) what must be done to correct it and by what date, and (iv) the consequences of failure to make the necessary corrections. The administrator shall keep complete records of all correspondence, communications, and other actions taken with respect to such nonconforming signs.

(c) This section applies to all signs, including off-premises signs.

Section 15-130 Nonconforming Mobile Home Communities. (**AMENDED 10/20/87**)

(a) Existing mobile home communities (use classifications 1.122 or 1.123) that do not meet all of the standards for such a use that are set forth elsewhere in this ordinance at the time of adoption of this section shall be considered nonconforming. Such uses shall not expand in any way beyond the existing developed areas, but shall be allowed to remove and replace the units on spaces existing within the existing community at the time of adoption of this section.

(b) Only the replacement and location of units on an existing mobile home space shall be permitted, provided that the total number of units does not exceed the number existing at the time of adoption of this section; and provided that the existing waste treatment system is functioning properly. Removal and replacement of such units shall not be considered expansion of the nonconforming use.

(c) Any mobile home unit replacing an existing mobile home unit on an existing home space, pursuant to subsections (a) and (b) above, and not previously located within the mobile home community, must be a Class A or Class B mobile home as defined in Article II of this ordinance.

Section 15-131 through Section 15-134 Reserved.