

CHAPTER 20.440 NONCONFORMING USES AND STRUCTURES

Section 20.440.XX Purpose and Intent

Within the zones established by this Zoning Ordinance, land uses and structures that were lawful before the adoption or amendment of this Zoning Ordinance, but which would be prohibited, regulated, or restricted differently under the current terms of this Zoning Ordinance or under future amendments. The foregoing provisions of this chapter shall apply to buildings, structures, land and uses which hereafter become nonconforming due to any reclassification of zones or land under this ordinance.

- A. This chapter is intended to promote the public health, safety and general welfare of the City and its citizens by prohibiting or limiting nonconforming uses and structures considered harmful or detrimental to the orderly and creative development of surrounding land uses.
- B. While permitting the use and maintenance of existing nonconforming uses and structures, this chapter is intended to establish the criteria under which they may be continued, or possibly expanded, and to provide for the correction or removal of the land use nonconformities determined incompatible in an equitable, reasonable and timely manner.

Section 20.440.XX Applicability

The provisions of this chapter shall apply to all nonconforming uses and structures located within any zone in the City. This Chapter does not apply to land uses and structures that were illegally established, constructed, or divided. These are instead subject to **Chapter XX** (Enforcement).

Section 20.440.XX Definitions

A. Nonconforming structure defined

“Nonconforming structure” means a building, or portion thereof, which was legally constructed or altered and maintained, but which, because of the application of this title, no longer conforms to the physical development standards of the zone in which it is located.

B. Nonconforming use defined

“Nonconforming use” means a use that was legally established and that has been continuously conducted at the same location, but which because of the application of this title, is no longer authorized at that location, or requires approval of a discretionary permit and has not obtained such discretionary permit approval.

Section 20.440.XX Restriction on Nonconforming Uses and Structures

The provisions of this section shall apply to nonconforming uses and structures that have been legally established.

- A. **Legal Establishment.** Nonconforming uses and structures must have been legally established to be recognized as a legal nonconforming use. In order to legally continue a use, structure, or improvement that is not consistent with the regulations of this title, the person claiming the legal nonconforming use or structure has the burden of proof to establish that the use, structure, or improvement qualifies as legal.
- B. **Health, Safety, Welfare.** The City determines that the continuation of the previously conforming use and/or structure does not endanger the health, safety, or general welfare of the public.
- C. **Continuation of Nonconforming Residential Uses.** Nonconforming residential uses may continue to be used for residential purposes in any zone where they were legally established
- D. **Continuation of Nonconforming Residential Structures.**
1. Nonconforming residential structures may continue to be maintained and used for residential purposes in any zone where they were legally established, provided that no additions or enlargements are made thereto and no structural alterations are made therein except those required by law or expressly permitted by this ordinance.
 2. A nonconforming building, structure or part thereof for which construction has begun prior to a change in regulations, which change would make the structure once completed a nonconforming structure, may be completed in accordance with the approved building permit and plans, provided the work is implemented continuously and without delay. Such structure shall be deemed to be a previously conforming structure and shall thereafter be subject to the regulations set forth herein.
- E. **Continuation of Nonconforming Nonresidential Uses.**
1. Nonconforming nonresidential uses may continue to operate in the location where they were legally established.
- F. **Continuation of Nonconforming Nonresidential Structures**
1. Nonconforming nonresidential structures may continue to be maintained in the location where they were legally established provided no additions or enlargements

are made therein except those required by law or expressly permitted by this ordinance.

2. A nonconforming building, structure or part thereof for which construction has begun prior to a change in regulations, which change would make the structure once completed a nonconforming structure, may be completed in accordance with the approved building permit and plans, provided the work is implemented continuously and without delay. Such structure shall be deemed to be a previously conforming structure and shall thereafter be subject to the regulations set forth herein.
- G. **Nonconforming Use of Land May Be Maintained.** A nonconforming use of land which does not involve buildings may be continued. Any discontinuance of such nonconforming use for a continuous period of twelve (12) calendar months shall be deemed to constitute an abandonment of any right to continue or maintain such nonconforming use and any future use of such land shall conform to provisions of this ordinance. The Planning Division Director may extend, for no longer than twelve months, the period of discontinuance due to findings contained in Section 20.440.xxx
- H. **Nonconforming Use of Conforming Building - Generally.** Where a nonconforming use of a conforming building exists at the time of the provisions of this ordinance become applicable to such building so as to make the use thereof a nonconforming use, such nonconforming use may be continued and such nonconforming use may be expanded or extended throughout such building, provided no structural alterations are made therein except those permitted by law or as expressly permitted by this ordinance. Any discontinuance of such nonconforming use for a continuous period of twelve (12) calendar months shall be deemed to constitute an abandonment of any right to continue or maintain such nonconforming use and any future use of such land shall conform to provisions of this ordinance. The Planning Division Director may extend, for no longer than twelve months, the period of discontinuance due to findings contained in Section 20.440.xxx
- I. **Nonconforming Use of a Nonconforming Structure or Building - Generally.** The nonconforming use of a nonconforming structure or building may be continued and expanded or extended throughout such building provided no structural alterations are made therein except those required by law or expressly permitted by this ordinance. Any discontinuance of such nonconforming use for a continuous period of twelve (12) calendar months shall be deemed to constitute an abandonment of any right to continue or maintain such nonconforming use and any future use of such land shall conform to provisions of this ordinance. The Planning Division Director may extend, for no longer than twelve months, the period of discontinuance due to findings contained in Section 20.440.xxx
- J. **Abandonment.**

1. Nonconforming use and/or structure:
 - a. If any residential or nonresidential nonconforming use or structure is wholly discontinued or abandoned for a continuous period of twelve calendar months, any subsequent use of such land or structure shall conform to the provisions of the Zoning Ordinance. The determination of discontinuance (aka abandonment) shall be supported by evidence, satisfactory to the Planning Division Director, and shall include the following:
 - ai. The intent of the owner to discontinue use of the nonconforming structure is apparent, as determined by the Planning Division Director;
 - aii: Where characteristic furnishings and equipment associated with the use have been removed and not replaced with equivalent furnishings and equipment during this time, and where normal occupancy and/or use has been discontinued for a period of twelve consecutive calendar months (this includes, but is not limited to lapse of a City business license, lapse of State Board of Equalization permit, no evidence of other business related receipts and/or records (telephone, utility bills, etc.);
 - aiii. If the previously conforming use has been discontinued for the purpose of repair, remodeling, or aesthetic improvements, the maintenance of an active building permit and continuance of a business license shall constitute conclusive evidence that such use has not been abandoned during the period or repair, remodeling, or aesthetic improvements, provided that the work is conducted diligently to completion.
- K. Extension of a Legal Nonconforming Use: Wherein special circumstances exist, the Planning Division Director may extend the legal nonconforming status of a use, for up to an additional twelve (12) month period. The total time period for discontinuance of a nonconforming use shall not exceed twenty four (24) continuous months.
- L. Application Process for Extension of a Legal Nonconforming Use:
 1. An application for extension of legal nonconforming status shall be filed with the Planning Division on a City application form, together with all required fees, plans, maps, statement of justification, and any other information deemed necessary by

the Planning Division to process the application. The application shall be filed prior to the expiration of the twelve month period.

2. The Planning Division shall notify the applicant, in writing, as to whether the application is complete. If the application is not complete, the Planning Division shall specify those parts of the application that are not complete and shall identify the manner by which it can be made complete. If written notification is not provided to the applicant within fifteen (15) working days following application filing, the application shall be deemed complete.
3. Notice to affected property owners. Within ten (10) working days after the application has been filed, the Planning Director shall notify all property owners as shown on the last equalized county assessment roll(s) as owning property located within a radius of five hundred (500) feet of the proposed project that the application has been filed. Each such person may request, in writing, the opportunity to be heard on the application. Such written request must be filed with the Planning Division Director within fifteen (15) days after the mailing of the notice. Failure to do so shall be deemed a waiver of the rights under this Section. If written request to be heard is filed by any property owner receiving such notice, the property owner shall receive all notices required by 20.440(L) (5) and may request or shall be permitted to be heard at a review pursuant thereto. The notice required by this Section shall include a brief description of the project as proposed on the application, and shall inform each property owner of their rights pursuant to this Section. The failure of any person to receive the notice specified herein shall not invalidate any action taken pursuant to this Title
4. The Planning Division shall investigate the facts bearing on the application and provide the information necessary for action on the application, consistent with this Zoning Ordinance and the General Plan, and shall report all findings to the Planning Division Director.
5. Consideration of the request for an extension – Notice of Decision.
 - a. Within fifty (50) calendar days after an application is deemed complete by the City, the Planning Division Director shall approve, conditionally approve, or disapprove the request for extension of the legal nonconforming use. The time limit specified in this paragraph may be extended by mutual consent of the applicant and the Planning Division Director. If the request for extension of legal nonconforming use is disapproved, the reasons therefore shall be stated in the notice of disapproval.

- b. The Planning Division Director shall notify the applicant of his preliminary decision to conditionally approve or disapprove the application for extension of the legal nonconforming use, along with any conditions of conditional approval or the reasons for the disapproval, within forty (40) days after the application is deemed complete by the City. If the applicant is dissatisfied with such preliminary decision or with any condition pertaining thereto, he may request in writing that such preliminary decision be reviewed. Such request must be received by the Planning Division Director within ten calendar days after the date of the preliminary decision, but in no case later than forty-one (41) calendar days after the application is deemed complete by the City. Upon receipt within the time prescribed of the written request for review of a preliminary decision, the Planning Division Director shall arrange a time and place for such review, and shall notify the applicant and appropriate City departments thereof. In the event that a review cannot be arranged or completed prior to fifty (50) calendar days after the application is deemed complete, the request for review shall be deemed to constitute consent of the applicant to extend for a reasonable period not to exceed ten (10) working days the time limit in which the Planning Director must approve, conditionally approve, or disapprove the application for the extension of a legal nonconforming use. After completion of the review, the Planning Division Director shall render his final approval, conditional approval, or disapproval of the application as provided in this Section.

In the event no written request for the review is received within the time prescribed, the preliminary decision shall become final and the applicant shall be so notified as prescribed in this Section.

- c. The applicant shall be informed of the preliminary decision and of the final decision of the Planning Division Director by written notice. Notice shall be deemed to have been given upon deposit of the notice in the United States mail addressed to the applicant
6. In granting an extension of the legal nonconforming status, the Planning Division Director may attach reasonable conditions and restrictions to the request, in addition to those required by this Zoning Ordinance, which will ensure that the use:
- a. Will comply with California Building Code, California Fire Code and local Ordinance and National Standards;
 - b. Will not injure the value of adjoining or abutting property;
 - c. Will not result in any significant environmental impacts; and

- d. Will be in harmony with the area in which it is located
7. The Planning Division Director shall consider the following factors in determining whether an extension of time shall be approved under the provisions of this section:
- a. The applicant's investment in the property or structure on or in which the nonconforming use is conducted;
 - b. The applicant's lease obligations in the property or structure on or in which the nonconforming use is conducted;
 - c. Whether the applicant's investment in the property or structure on or in which the nonconforming use is conducted was made prior to the effective date of the ordinance codified in this article;
 - d. Whether the applicant will be able to recoup the applicant's investment in the property or structure on or in which the nonconforming use is conducted as of the date established for termination of the nonconforming use
8. Approval of Extension; Findings.
- a. An extension under the provisions of this section shall be for a period of time not exceeding twelve (12) months, and shall be approved only if the Planning Division Director makes the following findings, based on supporting documentation and evidence submitted by the applicant:
 - ai. The applicant has made a good faith effort to keep the nonconforming status;
 - aii. If applicable, in the case of vacation of the property by the City due to unsafe and dangerous conditions, the applicant has made a good faith effort to rectify the unsafe and dangerous conditions through the submittal of plans, and/or the issuance of permits, and had diligently pursued it to completion (shown through the request for inspections); and
 - b. Based on the determination made in 20.440.xxx.7, the twelve (12) month extension shall be granted by the Planning Division Director only if three of the following findings are made, based on supporting documentation and evidence submitted by the applicant:

- bi. A physical and/or economic hardship has prevented the nonconforming use from being reestablished prior to the expiration of the twelve (12) month period;
 - bii. Approving the extension will not adversely affect the character, integrity, or value of surrounding properties;
 - biii. Approving the extension will not adversely affect the character, integrity, or general welfare of the neighborhood;
 - biv. The extension will not adversely impact the public health, safety or general welfare of the City's residents;
 - bv. The applicant has made a substantial investment (including but not limited to lease obligations) in the property or structure on or in which the nonconforming use is conducted; such property or structure cannot be readily converted to another use; and such investment was made prior to the effective date of the ordinance codified in this article;
 - bvi. The applicant will be unable to recoup said investment as of the date established for termination of the use.
- M. **Conversion to a Conforming Use.** If any residential or nonresidential nonconforming use or any portion thereof is converted to a conforming use, the nonconforming use shall not resume nor shall any portion that has been made conforming be allowed to resume as a nonconforming use.
- N. **Transfer to New Owner or Tenant.** A residential or nonresidential nonconforming use is transferable to a new owner or tenant; provided that the use is not discontinued, and may continue and does not need to be brought into conformance with the provisions of the Zoning Ordinance.
- O. **Moving Nonconforming Uses and Structures.** A nonconforming residential or nonresidential use within a structure, or a nonconforming residential or nonresidential structure shall lose its legal nonconforming status if the structure is moved any distance on the site for any reason, or is removed from the site. If any such nonconforming structure is moved or removed from the site, every future use of the land on which the building is located shall conform to the provisions of this ordinance.

Section 20.440.XX Maintenance and repair of Nonconforming Structures

Routine maintenance, repairs, and aesthetic improvements may be performed on nonconforming structures provided that no additions, enlargements, or structural alterations are made that intensify the nonconformity, except in accordance with the procedures of Section 20. 440XX. Routine maintenance, repair, and aesthetic improvements typically include improvements made to comply with law or ordinance; landscaping, paving, roof repairs/replacement, painting, replacement of doors, and windows.

Section 20.440.XX Alteration and/or Expansion of Nonconforming Uses and Structures

If a nonconforming residential or nonresidential use or a residential or nonresidential nonconforming structure is enlarged, extended, expanded or in any other manner changed to increase its nonconformity, except in accordance with the alteration/expansion procedures in this section, any entitlement to maintain the nonconformity is terminated.

- A. **Residential Structures.** Alterations, enlargements, extensions or additions may be made to a single family residential structure which occupies a lot containing a nonconforming residential use, or to a nonconforming residential structure, which is used for residential purposes in a residential zone in accordance with the following:
1. The proposed expansion consists of no more than ten percent (10%) of gross habitable square footage of structure; and may be expanded to the maximum setback of the previous residential zoning district, or if the previous zoning was not residential, to the setback and height standards of the R-1-10 zone, provided that:
 - a. All required permits for the expansion or extension are obtained and all fees paid prior to start of construction; and
 - b. The expansion or extension does not reduce the number of existing or required on site parking spaces or access to the building.
 2. The expansion does not increase the number of stories in a dwelling unit
- B. **Nonresidential Structures.** Within residential and nonresidential zones, a nonconforming structure shall not be enlarged or extended; except as follows:
1. The Planning Division Director may permit up to a 10% enlargement of the floor area of a nonconforming structure subject to the findings of Section 20.440.C
 2. Through the Minor Conditional Use Permit process, the Administrative Hearing Officer may permit up to 20% enlargement of the floor area of a nonconforming structure, subject to the findings of Section 20.44.xx.
 3. In considering whether or not to allow the proposed expansion of non-conforming structures, the Planning Division Director and/or Administrative Hearing Officer shall weigh the potential for eliminating and/or reducing the nonconformities through the proposed expansion. The proposed expansion and/or alteration of the structure shall comply with all other provisions of the code.
- C. **Findings for Alteration/Expansion of Nonconforming Nonresidential Structures.** Prior to the approval of a Minor Conditional Use Permit to allow for the expansion and/or

alteration of a nonconforming nonresidential structure, all of the following findings shall be made, along with the general findings for a Minor Conditional Use Permit:

- a. Enlargement of a nonconforming nonresidential structure is of an incidental character and does not constitute a complete remodeling or relocation of complete remodeling or relocation of machinery, equipment or apparatus operating the establishment in question, and can be carried out without injury to the residents of adjacent property and of the neighborhood;
- b. The alteration and/or expansion of the non-conforming structure improves the structure's compatibility with neighboring conforming structures;
- c. The alteration and/or expansion enhances the quality of the architecture and/or site;
- d. The alteration and/or expansion improve the structure's ability to better achieve the purpose and intent of the zone in which it is located;
- e. The existing structure and proposed alteration or expansions are conforming as to use;
- f. The proposed alteration and/or expansion of the structure is in full compliance with development requirements of the Zoning Ordinance and all applicable City building and housing codes.
- g. When the proposed project is viewed as a whole, the decision-making authority finds that the benefits from allowing the expansion and/or alteration, in terms of the elimination of specific nonconformities, outweighs the detriments associated with the nonconformities remaining after the expansion and/or alteration.

Section 20.440.XX Damage and/or Destruction of Nonconforming Structures

- A. **Damage and/or Destruction of Nonconforming Structure.** If a nonconforming residential or nonresidential structure is damaged or destroyed by fire, flood, wind, explosion, earthquake, other casualty or act of God, the public enemy, or other cause which is beyond the control of the property owner, and which could not otherwise been prevented by reasonable care and maintenance of the structure the structure may be restored, and occupancy and use at the time of destruction may be restored to its pre-existing building envelope, original number of dwelling units or intensity, size, height, design, configuration or condition and the use or occupancy of which existed at the time of such destruction and may be continued if nonconformities are not increased in density or intensity, and no reduction in the amount of off-street parking. Under these circumstances, the structure may be rebuilt if:

1. The nonconformity of the structure is certified, which means that proof of a legal building permit is required; and
2. Building permit(s) to rebuild must be obtained within one year of such fire or other casualty; and
3. Building permits must be diligently pursued to completion and accomplished within eighteen (18) months from the issuance of the required permit.
3. Construction is commenced and completed in conformance with the provisions of the building code then in effect. This provision shall not reduce any requirements of the building or fire codes in effect when such structure is rebuilt.
4. The proposed restoration or reconstruction shall comply with the City's Zoning, development, design, and architectural regulations and standards applicable to the type of use or structure damaged or destroyed that were in existence at the time the structure was legally created.

Section 20.440.XX Abatement of Illegal Uses and Structures

Any use or structure which did not comply with the zoning code requirements at the time it was established (date of adoption of rezoning and General Plan and original legal approval) and does not comply with the current zoning code is illegal and shall be brought into compliance with the provisions of the zoning code in accordance with the San Marcos Municipal Code.

- A. **Facts Required for Abatement.** Whenever any of the following facts are found to exist with reference to a nonconforming use or structure, the nonconforming protection/benefits shall cease, and the use shall be abated:
1. A change has been made from a nonconforming use to another nonconforming use; or
 2. An illegal increase or enlargement of the area, space, or volume of the structure or land occupied by or devoted to the nonconforming use has been made except if the structure is nonconforming with respect to setbacks, height, distance between structures, architectural projections, staircase and landing area encroachments, and the requirements of the City's adopted Building Code are met. No new additions or alterations shall increase existing nonconformities; or
 3. A structural alteration has been made, except as required or allowed by law.