

## **ARTICLE 6: NONCONFORMITIES**

### **SECTION 6.01 INTENT**

The intent of this Code is to promote land-use conformities; it is recognized, however, that certain nonconforming conditions are allowed to continue, subject to the provisions of this article. Except as otherwise provided in this Code, a nonconforming condition may not be permitted to become more nonconforming. [amended October 28, 2009]

### **SECTION 6.02 GENERAL PROVISIONS**

#### **A. Lawful Nonconforming Status**

Lawful nonconforming status can be applied only to a condition that, at a prior time, was legal and in conformity and meets one of the following criteria:

1. was in existence as of December 7, 1983
2. was made nonconforming by a Code change
3. is a result of a pending application that was complete and ready for review, which applied to a condition in conformity with the Code, but was made nonconforming by the enactment of a new Code or change in the Code

#### **B. Subdivision, Site Development, and/or Performance Standards**

Any condition that is nonconforming as to subdivision, site development, and/or performance standards, which meets the conditions of Item A, may continue. Any additional development, however, that involves an alteration or expansion of the condition must meet existing subdivision, site development, and/or performance standards.

#### **C. Transfer of Ownership**

Uses, lots, and structures allowed to be maintained as lawful nonconforming conditions under this article are deemed to run with the land; upon any transfer of the property, the new owner may continue the lawful nonconforming condition subject to the terms and provisions of this Code.

## **SECTION 6.03 NONCONFORMING USES** [amended October 28, 2009]

### **A. Defined**

The use of any building, structure, premises, lot, land, or parts thereof, which is not allowed in the zoning district in which it is situated, but which is allowed to remain solely because it was in lawful existence at the time this Code or subsequent amendments took effect. A legally nonconforming lot is one that has achieved nonconforming status in accordance with the conditions described in Section 6.02 A.

### **B. Continuation**

Any lawful nonconforming use established as defined in Section 6.02 A may be continued and used for the same nonconforming purpose regardless of its noncompliance with the use regulations of this Code.

### **C. Repair, Maintenance, Renovation, and Replacement**

Any structure, building, or site containing a lawful nonconforming use may be physically repaired, maintained, and/or renovated as long as the total area within the structure, building, or site dedicated to the nonconforming use is not changed or expanded, and as long as there is no change in the specific nature of the nonconforming use. Any building or structure containing a lawful nonconforming use that is destroyed or damaged by fire, lightning, wind, flood, or other casualty may be rebuilt within 1 year of the date of loss and the nonconforming use continued with no increase in the total area dedicated to the nonconforming use and no change in the specific nature of the use. If the building or structure itself is nonconforming with regard to bulk and space requirements, then the repair, maintenance, renovation, and/or replacement is subject to the provisions applying to such nonconforming structures.

### **D. Abandonment**

Where a lawful nonconforming use has been abandoned, it thereafter may not be resumed, and any further use or development of the property must be in compliance with the requirements of this Code. A lawful nonconforming use is deemed abandoned upon the occurrence of any of the following events:

1. the use has been discontinued for a period of 12 consecutive months
2. the use is terminated and a conforming use has been established
3. the use has been terminated and another lawful nonconforming use of a less objectionable and detrimental nature has been established

### **E. Expansion**

## **1. Normal Business Expansion**

An increase in the intensity or volume of business, where there is no increase in the amount of space dedicated to the use nor any change in the specific nature of the use, is not considered an enlargement of a lawful nonconforming use.

## **2. Expansion**

Any lawful nonconforming use may be physically enlarged with the prior approval of the ZBA. Such enlargement may not change the specific nonconforming use of the property. The total enlargement, whether occurring at one time or over a period of time, may not exceed 50 percent of the total area used as of December 7, 1983, or at such time as a use becomes nonconforming by change in the use provisions of this Code.

## **3. Code-mandated Expansion**

A limited physical expansion of the area utilized by the nonconforming use is permitted solely for the purpose of bringing the use into compliance with health, safety, or access codes, or to correct a condition that, while technically not considered a violation of Code, is determined by the ZBA to constitute a health, safety, or access problem. The expansion under such circumstances is limited to the minimum necessary to accomplish the purpose of bringing the property into compliance.

## **4. Expansion Standards**

An application for an enlargement of a lawful nonconforming use will be processed in accordance with the provisions of Item E following, and must meet those requirements.

## **F. Changes in Use**

### **1. Change to a Permitted Use**

A lawful nonconforming use may be changed at any time to a use permitted in the zone in which the activity is located.

### **2. Other Changes**

Subject to approval by the ZBA, a lawful nonconforming use may be changed to another nonconforming use that is deemed less objectionable and detrimental than the existing lawful nonconforming use. A change in use is one that results in an activity that is different in nature and purpose from the original use; results in a difference in the quality, character, degree, and kind of activity; and is different in kind in its effect on the neighborhood. *Less objectionable and detrimental* means

that the new proposed nonconforming use will have a lesser effect on the neighborhood and on the property on which the use occurs, is less noticeable than the current use, is closer in nature to the uses allowed in the zoning district, or represents a decline in the volume and intensity of the use. The ZBA will review any application for change in nonconforming use in accordance with the following standards:

- (a) The hours of operation are decreased or not increased.
- (b) Undesirable effects such as noise, glare, vibration, smoke, dust, odor, or fire hazard are decreased or not increased.
- (c) Hazardous traffic conditions are minimized or not increased and the amount of traffic is decreased or not increased.
- (d) The appearance of the property from public ways and abutting properties is improved and the value of adjacent properties will not be adversely affected.
- (e) Unsanitary conditions as a result of sewage disposal, air emissions, or other aspects of its design or operation will not be created.

## **SECTION 6.04 NONCONFORMING LOTS**

### **A. Defined**

A nonconforming lot is a lot that, in one or more respects, fails to meet applicable space and bulk regulations of this Code. A legally nonconforming lot is one that has achieved nonconforming status in accordance with the conditions described in Section 6.02 A.

### **B. Single Legally Nonconforming Lots**

A single legally nonconforming lot of record existing as of December 7, 1983, or subsequently made nonconforming by Code changes may be built upon and/or used in conformance with the provisions of the district in which it is located, even though the lot does not meet the minimum requirements for lot area, lot net area, lot area per dwelling unit (in the case of single-family dwellings), or lot-width requirements. Development of such lots, however, must comply with all other space and bulk regulations including but not limited to setback, yard area, height, lot coverage, and lot area per dwelling unit (in the case of multi-family dwellings). Failure to meet any of these other space and bulk regulations requires a variance for that nonconforming element. This section applies to any lot that remains nonconforming after having had additional land area added. [amended May 16, 2001 and August 6, 2003]

### **C. Reduction in Lot Size**

Except as expressly provided in this article or in the case of a condemnation or a conveyance in lieu thereof, a lot may not be reduced in size by conveyance of a portion thereof unless both of the following conditions are met:

1. the remaining land meets the minimum lot size, lot net area, area per dwelling unit, and lot width requirements for the district in which the lot is located
2. the land to be conveyed either meets the minimum lot size requirement or will be conveyed to the owner of an abutting lot, the City, or a conservation organization in conjunction with covenants or similar restrictions that prohibit its development

#### **D. Merger of Lots**

##### **1. Undeveloped Lots**

Notwithstanding Item B, above, contiguous undeveloped lots in the same ownership must be merged to the extent necessary to eliminate or reduce any nonconformity or to meet all applicable space and bulk regulations. [amended October 28, 2009]

##### **2. Developed Lot/Undeveloped Lot**

Notwithstanding Item B, above, where there are 2 contiguous lots of record under the same ownership, one or more of which is nonconforming and where one is developed and the other is vacant, then merger is required to the extent necessary to eliminate or reduce any nonconformity or to meet applicable space and bulk regulations. [amended October 28, 2009]

##### **3. Developed Lots**

Notwithstanding Item B, above, where there exists developed contiguous lots in in the same ownership where one or more lots is nonconforming and each is occupied by a primary structure, then merger may not occur and the lots are not considered merged. [amended May 16, 2001]

##### **4. Exception**

The following conditions do not require a merger:

- (a) Lots in a subdivision that have received Planning Board approval need not be merged and may be developed in accordance with space and bulk regulations in existence at the time of the approval, with the exception of space and bulk regulations mandated by other authorities.

- (b) Subdivision lots created on subdivision plans not having received approval of the Bath Planning Board may be developed only as individual lots on the granting of appropriate variances by the ZBA.

#### **E. Multiple Structures on a Legally Nonconforming Lot**

Where principal structures existed on a single lot, both of which have been established prior to December 7, 1983, and where the use in each of the primary structures is a permitted use consistent with this Code, then the property may be divided into no more than 2 lots, provided that all of the following criteria are met:

1. The original lot, prior to its division, is nonconforming in some respect relative to applicable space and bulk regulations.
2. The uses on the lot are conforming uses in accordance with applicable district regulations.
3. Only 1 division into 2 lots is permitted. If the proposal is for a division into more than 2 lots, then that division is subject to review and approval by the Planning Board, and all applicable provisions of this Code and Bath subdivision regulations must be met. Normal exemptions to proposed subdivisions, such as principal residence by the owner, do not apply to the division of a nonconforming lot and do not exempt the applicant from the review process.
4. There is no increase in the degree of nonconformity to space and bulk regulations, except that which was created by the division line.
5. There is no increase in density.
6. There are no common or shared utilities or easements, except for the access drive.
7. All parking requirements for principal uses are met on each new lot created by the division.
8. Each lot created must have a structure containing the original principal use(s).

If any of the conditions cited previously are not fully met, then the division of a nonconforming lot with multiple preexisting structures may occur only with review and approval by the Planning Board in accordance with criteria set forth in this Code and Bath subdivision regulations.

A permit for division is acquired from the CEO or, if applicable, from the Planning Board, prior to any deed transfer. The CEO has the authority to require any and all information necessary to demonstrate compliance with the criteria set forth herein, including the

right to require appropriate plans that locate property lines, structures, setbacks, and any other information necessary to demonstrate compliance with criteria in this section.

## **SECTION 6.05 NONCONFORMING STRUCTURES**

### **A. Defined**

A nonconforming structure is one that fails to meet applicable Space and Bulk Regulations, including setback, yard area, height, lot coverage, or height requirements of this Code. A legally nonconforming structure is one that fails to meet such standards but falls under the conditions of Section 6.02 A. [amended October 28, 2009]

### **B. Continuation**

A legally nonconforming structure may continue to exist and may be physically repaired, maintained, and renovated to maintain and improve the structure. In addition, other changes in a legally nonconforming structure that may be required by federal, state, or local building and/or safety codes, or are allowed by D, 1, (c), (i) through (iv), below, are permitted. [amended December 24, 2008 and October 28, 2009]

### **C. Reconstruction or Replacement** [amended October 28, 2009]

#### **1. Reconstruction or Replacement, Not in the Shoreland Zone**

A legally nonconforming structure that is damaged or destroyed by any cause or is demolished may be reconstructed or replaced, provided that a building permit is obtained within 1 year of the date of damage, destruction, or demolition. The replacement or reconstruction of any nonconforming portion of the structure must be located within the original building footprint. The replacement or reconstruction may increase or decrease the number of square feet of floor area, but may not create any additional, or expand any existing, nonconformity, except as allowed by D, 1, (c), (i) through (iv), below. [amended May 16, 2001 and December 24, 2008]

#### **2. Reconstruction or Replacement, In the Shoreland Zone**

Any nonconforming structure, which is located less than the required setback from a water body, tributary stream, or wetland and which, over less than a 2-year period, is removed, or damaged or destroyed, regardless of the cause, by more than 50 percent of the market value of the structure before such damage, destruction or removal, may be reconstructed or replaced provided that a permit is obtained within 12 months of the date of said damage, destruction, or removal, and provided that such reconstruction or replacement is in compliance with the water body, tributary stream, or wetland setback requirement to the greatest practical extent as determined by the Planning Board in accordance with the purposes of this Code. In no case may a structure be reconstructed or replaced so as to increase its

nonconformity. If the reconstructed or replacement structure is less than the required setback it may not be any larger than the original structure, except as allowed pursuant to Section 6.05, D, 2. If the total amount of floor area and volume of the original structure can practically be relocated or reconstructed beyond the required setback area, as determined by the Planning Board, no portion of the relocated or reconstructed structure may be replaced or constructed at less than the setback requirement for a new structure.

When it is necessary to remove vegetation in order to replace or reconstruct a structure, vegetation must be replanted in accordance with E, 2, (a) through (b).

Any non-conforming structure which is located less than the required setback from a water body, tributary stream, or wetland and which is removed by 50 percent or less of the market value, or damaged or destroyed by 50 percent or less of the market value of the structure, excluding normal maintenance and repair, may be reconstructed in place if a permit is obtained from the CEO within one year of such damage, destruction, or removal.

In determining whether the building reconstruction or replacement meets the setback to the greatest practical extent the Planning Board must consider, in addition to the criteria in E, 2, (a) through (b) the physical condition and type of foundation present, if any.

#### **D. Expansion** [amended October 28, 2009]

##### **1. Expansion, Not in the Shoreland Zone**

- (a) Any expansion or physical enlargement of a legally nonconforming structure is permitted to the extent that it meets all Space and Bulk Regulations in existence at the time of the proposed expansion or physical enlargement. Enlargement is not permitted on a lot that is nonconforming where it exceeds the lot coverage requirement of the Space and Bulk Regulations. Any expansion is considered an increase in nonconformity if it expands an existing nonconformity horizontally or vertically, however, the expansion of a building may take place vertically if the expansion is not above the highest existing roofline of such nonconforming building and meets the requirements in paragraph 3, below. Any dimension that is in conformity can be expanded to the extent that it does not create a new nonconformity. [amended May 16, 2001 and December 24, 2008]
- (b) The provisions of Section 6.05, D, 1, (a), above do not prevent the expansion or physical enlargement of a legally nonconforming building if that expansion or physical enlargement is proposed to occur on the side of the building away from the property line where the district Minimum Setback requirement is violated, and is outside the minimum setback distance from the property line. [added May 16, 2001 and December 24, 2008]
- (c) The provisions of Section 6.05, D, 1, above, do not prevent the expansion or physical enlargement in the following situations:



- (i) The construction of a foundation under a building provided the increase in elevation does not exceed 3 feet and the height of the building does not exceed the maximum height allowed in the zone in which the building is located.
- (ii) The change of a flat roof to a pitched roof provided there is no additional living or storage space created by the enlargement and no features, such as dormers and skylights other than flush mounted skylights, constructed on or in the new roof, and the height of the building does not exceed the maximum height allowed in the zone in which the building is located.
- (iii) Where there is a survey, done by a professional land surveyor, of the lot line to which the building is nonconforming that shows the distance between the legally nonconforming structure and the lot line. This lot line must also be marked by monuments placed in the ground by the professional land surveyor who had performed the survey unless the CEO finds that adequate permanent monumentation exists.
- (iv) Where the proposed expansion or physical enlargement is closer than 6 feet to the property line, a permanent easement from the owner of the abutting property allowing the safe, unobstructed use of such abutting property for staging, ladders, or other maintenance purposes, is required. Such easement must be for a width of 8 feet from the nonconforming building, must contain a surveyed legal description, and must be recorded at the Sagadahoc County Registry of Deeds before a permit for such work is granted by the CEO.

## **2. Expansion, In the Shoreland Zone**

A non-conforming structure may be added to or expanded after obtaining a permit from the same permitting authority as that for a new structure, if such addition or expansion does not increase the non-conformity of the structure, and is in accordance with Section 6.05, D, 2, (a), and (b), below.

- (a) Legally existing non-conforming principal and accessory structures that do not meet the water body, tributary stream, or wetland setback requirements may be expanded or altered as follows, as long as all other applicable standards contained in this Code are met.
  - (i) Expansion of any portion of a structure within 25 feet, horizontal distance, of the normal high-water line of a water body, tributary stream, or upland edge of a wetland is prohibited, even if the expansion will not increase nonconformity with the water body, tributary stream, or wetland setback requirement.

- (ii) Expansion of an accessory structure that is located closer to the normal high-water line of a water body, tributary stream, or upland edge of a wetland than the principal structure is prohibited, even if the expansion will not increase nonconformity with the water body or wetland setback requirement.
- (iii) For structures located less than 75 feet, horizontal distance, from the normal high-water line of a water body, tributary stream, or upland edge of a wetland, the maximum combined total floor area for all portions of those structures within that 75-foot distance is 1,000 square feet, and the maximum height of any portion of a structure that is within 75 feet, horizontal distance, of a water body, tributary stream or upland edge of a wetland is 20 feet or the height of the existing structure, whichever is greater.

For the purposes of Section 6.05, D, 2, (a), (i) through (iii), a basement is not counted toward floor area.

- (b) Whenever a new, enlarged, or replacement foundation is constructed under a non-conforming structure, the structure and new foundation must be placed such that the setback requirement is met to the greatest practical extent as determined by the Planning Board or its designee, basing its decision on the criteria specified in Section 6.05, E, 2, (a) through (b), Relocation in the Shoreland Zone, *below*. If the completed foundation does not extend beyond the exterior dimensions of the structure and the foundation does not cause the structure to be elevated by more than 3 additional feet, as measured from the uphill side of the structure, it is not considered to be an expansion of the structure.

- (c) Special Expansion Allowance.

Existing principal and accessory structures that exceed the floor area or height limits set in Section 6.05 D, 2, (a), (iii), above, may not be expanded, except that the limits may be exceeded by not more than 500 square feet provided that all of the following requirements are met:

- (i) The principal structure is set back at least 50 feet, horizontal distance, from the normal high-water line of a water body, tributary stream, or upland edge of a wetland.
- (ii) A well-distributed stand of trees and other natural vegetation as defined in Section 11.05 extends at least 50 feet, horizontal distance, in depth as measured from the normal high-water line or upland edge for the entire width of the property.

If a well-distributed stand of trees and other vegetation meeting the criteria in Section 11.05 is not present, the 500 square-foot Special Expansion Allowance may be permitted only upon approval by the Planning Board of a plan to reestablish a buffer of trees, shrubs, and other ground cover within 50 feet, horizontal distance, of the shoreline, or tributary stream. The plan must be drawn to a scale of not less than 1 inch = 50 feet and prepared by a landscape architect registered in the State of Maine.

- (iii) Approval is granted by the Planning Board of a plan drawn to a scale of not less than 1 inch = 50 feet, prepared by a landscape architect registered in the State of Maine, that meets the following mitigation criteria for the property within the shoreland zone. The plan must be implemented and maintained.
  - Un-stabilized areas resulting in soil erosion must be mulched, seeded, or otherwise stabilized and maintained to prevent erosion and sedimentation to water bodies, tributary streams, and wetlands.
  - Roofs and associated drainage systems, driveways, parking areas, and other non-vegetated surfaces must be designed or modified, as necessary, to prevent concentrated flow of stormwater runoff from reaching a water body, tributary stream, or wetland. Where possible, runoff must be directed through a vegetated area or infiltrated into the soil through the use of a dry well, stone apron, or similar device.
- (iv) Any planting or re-vegetation required as a condition to the Special Expansion Allowance must be in accordance with a written plan prepared by a landscape architect registered in the State of Maine, be implemented at the time of construction, and be designed to meet the rating scores contained in Section 6.05, D, 2, (c), (ii), when the vegetation matures within the 50-foot strip. At a minimum, the plan must provide for the establishment of a well-distributed planting of saplings spaced so that there is at least one sapling per 80 square feet of newly established buffer. Planted saplings may be no less than 3 feet tall for coniferous species and no less than 6 feet tall for deciduous species. The planting plan must include a mix of at least 3 native tree species found growing in adjacent areas, with no one species making up more than 50 percent of the number of saplings planted unless otherwise approved by the Planning Board, based on adjacent stand comparison. All aspects of the implemented plan must be maintained by the applicant and future owners.
- (v) Plans required pursuant to Section 6.05, D, 2, (c), (iii), must be filed with the Sagadahoc County Registry of Deeds. A copy of all permits issued pursuant to this paragraph must be forwarded by the CEO to the DEP within 14 days of the issuance of the permit.

**E. Relocation** [amended October 28, 2009]

## **1. Relocation, Not in the Shoreland Zone**

- (a) A nonconforming structure may be relocated within the boundaries of the parcel on which the structure is located provided that the site of relocation conforms to all setback requirements to the greatest practical extent as determined by the Planning Board, and provided that if the use is not connected to the public sewerage system the applicant demonstrated that the present subsurface sewage disposal system meets the requirements of State Law and the Subsurface Wastewater Disposal Rules, or that a new system can be installed in compliance with the State Law and Subsurface Wastewater Disposal Rules. A structure may not be relocated so as to increase its nonconformity.
- (b) In determining whether the building relocation meets the setback to the greatest practical extent, the Planning Board must consider the size of the lot, the slope of the land, the potential for soil erosion, the location of other structures on the property and on adjacent properties, the location of the septic system (if any) and other on-site soils suitable for septic systems, the impact on views, and the type and amount of vegetation to be removed to accomplish the relocation.

## **2. Relocation, In the Shoreland Zone**

- (a) A non-conforming structure may be relocated within the boundaries of the parcel on which the structure is located provided that the site of relocation conforms to all setback requirements to the greatest practical extent as determined by the Planning Board, and provided that the applicant demonstrates that the present subsurface sewage disposal system, if applicable, meets the requirements of State law and the State of Maine Subsurface Wastewater Disposal Rules (Rules), or that a new system can be installed in compliance with the law and said Rules. In no case may a structure be relocated in a manner that causes the structure to be more non-conforming.
- (b) In determining whether the building relocation meets the setback to the greatest practical extent, the Planning Board must consider the size of the lot, the slope of the land, the potential for soil erosion, the location of other structures on the property and on adjacent properties, the location of the septic system and other on-site soils suitable for septic systems (if applicable), and the type and amount of vegetation to be removed to accomplish the relocation. When it is necessary to remove vegetation within the water or wetland setback area in order to relocate a structure, the Planning Board must require replanting of native vegetation to compensate for the destroyed vegetation. In addition, the area from which the relocated structure was removed must be replanted with vegetation. Replanting must be required as follows:
  - (i) Trees removed in order to relocate a structure must be replanted with at least one native tree, 3 feet in height, for every tree removed. If more than

5 trees are planted, no one species of tree may make up more than 50 percent of the number of trees planted. Replaced trees must be planted no further from the water or wetland than the trees that were removed. Other woody and herbaceous vegetation, and ground cover, that are removed or destroyed in order to relocate a structure must be re-established. An area at least the same size as the area where vegetation and/or ground cover was disturbed, damaged, or removed must be reestablished within the setback area. The vegetation and/or ground cover must consist of similar native vegetation and/or ground cover that was disturbed, destroyed or removed.

- (ii) Where feasible, when a structure is relocated on a parcel the original location of the structure must be replanted with vegetation which may consist of grasses, shrubs, trees, or a combination thereof.

## **F. Change of Use** [amended October 28, 2009]

### **1. Change of Use, Not in the Shoreland Zone**

The use of a nonconforming structure may be changed to any permitted principal use or permitted accessory use in accordance with the provisions of Section 3.03 and Article 9, and from a nonconforming principal use or nonconforming accessory use to a different nonconforming principal use or nonconforming accessory use in accordance with the provisions of Section 6.03, E, 2. [added August 6, 2003]

### **2. Change of Use, In the Shoreland Zone**

The use of a non-conforming structure may not be changed to another use unless the ZBA, after receiving a written application, determines that the provisions of Section 3.03; Section 6.03, E, 2.; and Article 9 have been met and that the new use will have no greater adverse impact on the water body, tributary stream, or wetland, or on the subject or adjacent properties and resources than the existing use. In determining that no greater adverse impact will occur, the ZBA must require written documentation from the applicant, regarding the probable effects on public health and safety, erosion and sedimentation, water quality, fish and wildlife habitat, vegetative cover, visual and actual points of public access to waters, natural beauty, floodplain management, archaeological and historic resources, and commercial fishing and maritime activities, and other water-dependent uses.

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