

Presented:
Land Use Planning Fundamentals

March 20, 2012
Austin, TX

OPTIONS FOR HANDLING NONCONFORMITIES: THEY MAY NOT BE INCOMPATIBLE

Kimberley Mickelson, AICP
Olson & Olson, LLP
Wortham Tower, Suite 600
2727 Allen Parkway
Houston, TX 77019
kmickelson@olsonllp.com
713-533-3956

Dorothy Palumbo
City Attorney
City of Galveston
823 25th Street
Galveston, TX 77550
palumbodot@cityofgalveston.org
409-797-3550

OPTIONS FOR HANDLING NONCONFORMITIES THEY MAY NOT BE INCOMPATIBLE

Nonconformity defined¹: Who knew there were so many ways to define nonconformity, and that the original meaning was religious, signifying a break with the Church of England? To those who think the zoning ordinance is the bible, the reference is appropriate.²

Dictionary.reference.com

non·con·form·i·ty [non-kuhn-fawr-mi-tee] **noun**

1. failure or refusal to conform, as with established customs, attitudes, or ideas.
2. lack of conformity or agreement.
3. (*often initial capital letter*) refusal to conform to the Church of England.
4. *Geology.* an unconformity that separates crystalline rocks, either igneous or metamorphic, from sedimentary rocks.

Origin: 1610–20; non- + conformity/break with the Church of England

¹ My websearch for definitions and examples of the term “nonconformity” turned up hundreds of thousands of hits. By far the most fun website using the term defined nonconformity as a personal goal: “I define non-conformity as ‘a lack of orthodoxy in thoughts or beliefs’ or ‘the refusal to accept established customs, attitudes, or ideas.’” See www.chrisguillebeau.com.

² “The text [of the zoning ordinance] is the bible of the use and area requirements.” p.72, *The Citizen’s Guide to Zoning*, Herbert H. Smith, Planners Press, American Planning Association, 1983. However, a city plan commissioner explained it to me as: “There are many different versions of the bible.”

This paper will use the term “nonconformity” to include nonconforming elements of development—uses, buildings and structures, lots and signs.³ It will start with how nonconformities are created by the adoption or amendment of zoning ordinances and the doctrinal basis of wishing nonconformities would self-correct, then survey statutory and case law on challenges to nonconformities and the impact of vested rights provisions in Texas law. It will conclude with an overview of current trends in regulatory drafting that recognize at least some nonconformities as an element of the fabric of the community, and options for their retention.

HOW NONCONFORMITIES START

Once upon a time, there was no zoning, and development occurred anyway. When citizens and the city fathers thereafter decided to implement zoning, often because they felt some uses or structures didn’t belong together, they were left with uses or structures that didn’t fit in the new categories they had developed—the junkyard that was next to the residences hadn’t gone away with the adoption of zoning—it was still there. Nonconformities fit into the following categories: uses,

³ Other definitions of nonconforming uses include “the lawful use of a building or structure or the lawful use of any land, as existing and lawful at the time of the adoption of a zoning resolution, or, in the case of an amendment of a resolution, at the time of such amendment.” Colo. Rev. Stat. § 30-28-120. This definition is common in statutes with slight variations.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Options for Handling Nonconformities: They May Not be Incompatible

Also available as part of the eCourse

[Land Use Planning: Nonconformities Overview; plus Grandfathering and Dealing with Nonconformities](#)

First appeared as part of the conference materials for the
2013 Land Use Planning Fundamentals session
"Options for Handling Nonconformities"