

CHAPTER 33.258
NONCONFORMING SITUATIONS

(Amended by: Ord. No. 163697, effective 1/1/91; Ord. No. 166313, effective 4/9/93; Ord. No. 169324, effective 10/12/95; Ord. No. 170704, effective 1/1/97; Ord. No. 171081, effective 5/16/97; Ord. No. 171219, effective 7/1/97; Ord. No. 172882, effective 11/18/98; Ord. No. 174263, effective 4/15/00; Ord. No. 174980, effective 11/20/00; Ord. No. 175204, effective 3/1/01; Ord. Nos. 175341 and 175358, effective 3/16/01; Ord. No. 175837, effective 9/7/01; Ord. No. 176469, effective 7/1/02; Ord. No. 177028, effective 12/14/02; Ord. No. 177368, effective 5/17/03; Ord. No. 177422, effective 6/7/03; Ord. No. 177701, effective 8/30/03; Ord. No. 178172, effective 3/5/04; Ord. No. 178509, effective 7/16/04; Ord. No. 179316, effective 7/8/05; Ord. No. 179980, effective 4/22/06; Ord. No. 181357, effective 11/9/07.)

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33.258.010 Purpose

Nonconforming situations are created when the application of a specific zone to a site changes, or a zoning regulation changes. As part of the change, existing uses, density, or development might no longer be allowed. The intent of the change is not to force all noncomplying situations to be immediately brought into conformance. Instead, the intent is to guide future uses and development in a new direction consistent with City policy, and, eventually, bring them into conformance.

This chapter provides methods to determine whether situations have legal nonconforming status. This is based on whether they were allowed when established, and if they have been maintained over time. This chapter also provides a method to review and limit nonconforming situations when changes to those situations are proposed. The intent is to protect the character of the area by reducing the negative impacts from nonconforming situations. At the same time, the regulations assure that the uses and development may continue and that the zoning regulations will not cause unnecessary burdens.

Nonconforming situations that have a lesser impact on the immediate area have fewer restrictions than those with greater impacts. Nonconforming uses in residential zones are treated more strictly than those in commercial, employment or industrial zones to protect the livability and character of residential neighborhoods. In contrast, nonconforming residential developments in residential zones are treated more liberally because they do not represent a major disruption to the neighborhood and they provide needed housing opportunities in the City.

33.258.030 Types of Nonconforming Situations

A specific site may be nonconforming because it contains either a nonconforming use, an allowed residential use that exceeds the allowed density, a nonconforming development, or

a combination of these. Nonconforming uses, nonconforming residential densities, and nonconforming development are defined in Chapter 33.910, Definitions.

33.258.035 Where These Regulations Apply

The nonconforming situation regulations apply only to those nonconforming situations which were allowed when established or which were approved through a land use review. Additionally, they must have been maintained over time. These situations have legal nonconforming status. Nonconforming situations which were not allowed when established or have not been maintained over time have no legal right to continue (often referred to as "grandfather rights") and must be removed.

33.258.037 Documenting Conforming Development

Sites with nonconforming development must come into compliance with certain development standards in some situations, as required by Paragraph 33.258.070.D.2. To streamline the permitting process, applicants may request that sites that are in compliance be certified by BDS as in compliance with the development standards listed in Paragraph 33.258.070.D.2.

33.258.038 Documenting A Nonconforming Situation

The applicant must provide evidence to show that the situation was allowed when established and was maintained over time. If the applicant provides standard evidence from the list below, the Director of BDS will determine if the evidence is satisfactory. The Director of BDS will also determine, based on the evidence, what the current legal use is, using the definitions in Chapter 33.910 and the use categories in Chapter 33.920. If the applicant provides evidence other than the standard evidence listed below, a Determination of Legal Nonconforming Status is required. (See 33.258.075.)

- A. Situation allowed when established.** Standard evidence that the situation was allowed when established is:
 - 1. Building, land use, or development permits; or
 - 2. Zoning codes or maps;

- B. Situation maintained over time.** Standard evidence that the use has been maintained over time is:
 - 1. Utility bills;
 - 2. Income tax records;
 - 3. Business licenses;
 - 4. Listings in telephone, business, or Polk directories;
 - 5. Advertisements in dated publications;
 - 6. Building, land use, or development permits;
 - 7. Insurance policies;
 - 8. Leases;
 - 9. Dated aerial photos;

10. Insurance maps that identify use or development, such as the Sanborn Maps;
or
11. Land use and development inventories prepared by a government agency.

33.258.040 Regulations that Apply to All Nonconforming Situations

- A. Ownership.** The status of a nonconforming situation is not affected by changes in ownership.
- B. Change to a conforming situation.** A nonconforming situation may be changed to a conforming situation by right. Once a conforming situation occupies the site, the nonconforming rights are lost and a nonconforming situation may not be re-established.
- C. Change to conditional use.** A nonconforming use may change to a conditional use if approved through a conditional use review. Some previously nonconforming uses receive automatic conditional use status, as described in 33.815.030. Once a conditional use occupies the site, the nonconforming rights are lost and a nonconforming use may not be re-established.
- D. Maintenance.** Normal maintenance and repair of nonconforming situations is allowed.

33.258.050 Nonconforming Uses

- A. Continued operation.** Nonconforming uses may continue to operate. Changes in operations are allowed. However, nonconforming uses in residential zones may not extend their hours of operation into the period of 11 pm to 6 am.
- B. Change of use.** A change to another use in the same use category is allowed by right, provided that the off-site impact standards of Chapter 33.262, Off-Site Impacts, are met. The applicant must document in advance that the nonconforming use will meet the off-site impact standards. For changes of use within the same use category which do not meet the off-site impact standards, the change may be allowed through a nonconforming situation review.

A change to a use in a different use category which is prohibited by the base zone may be allowed through a nonconforming situation review. In R zones, a change from a nonconforming nonresidential use to an allowed residential use that exceeds the allowed density may be allowed through a nonconforming situation review. An example of this is conversion of a storefront in an R7 zone (nonconforming use) to a triplex (allowed use, nonconforming residential density).

- C. Expansions.** Nonconforming uses may expand under certain circumstances. Exterior improvements may expand by increasing the amount of land used. Changing the exterior use, for example from parking to storage, is an expansion of exterior storage. Adding parking spaces to an existing lot is also an expansion. However, increasing the amount of goods stored on an existing exterior storage area is a change in operations, not an expansion. Examples of expansion of floor area include expanding a nonconforming use into a newly constructed building or addition on the site, and expanding the amount of floor area occupied by a nonconforming use within an existing building.

Expansion of nonconforming uses and development is generally limited to the area bounded by the property lines of the use as they existed two years before the use became nonconforming. The property lines are the lines nearest to the land area occupied by the nonconforming use and development and its accessory uses and development, moving in an outward direction. Property lines bound individual lots, parcels, and tax lots; a site or ownership may have property lines within it. See Figures 258-1 and 258-2. The applicant must provide evidence to show the location of property lines as they existed two years before the use became nonconforming.

1. OS and R zones. The standards stated below apply to all nonconforming uses in OS and R zones.
 - a. Expansions of floor area or exterior improvements, when proposed within the property lines as they existed two years before the use became nonconforming, may be approved through a nonconforming situation review. The development standards of the base zone, overlay zone, and plan district must be met.
 - b. Expansion of floor area or exterior improvements beyond the property lines as they existed two years before the use became nonconforming, is prohibited.

Figure 258-1
Area of Possible Expansion - OS and R Zones

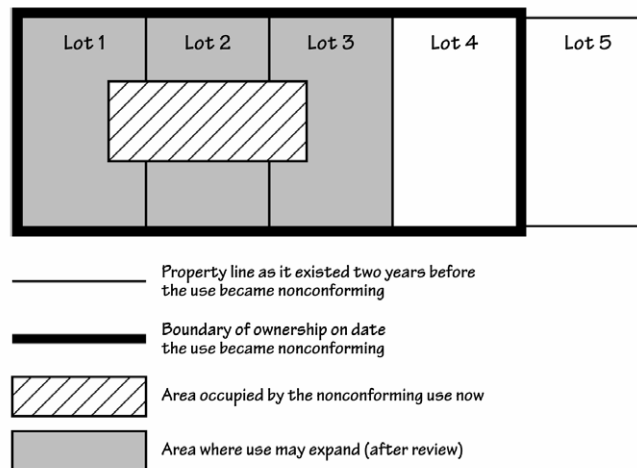
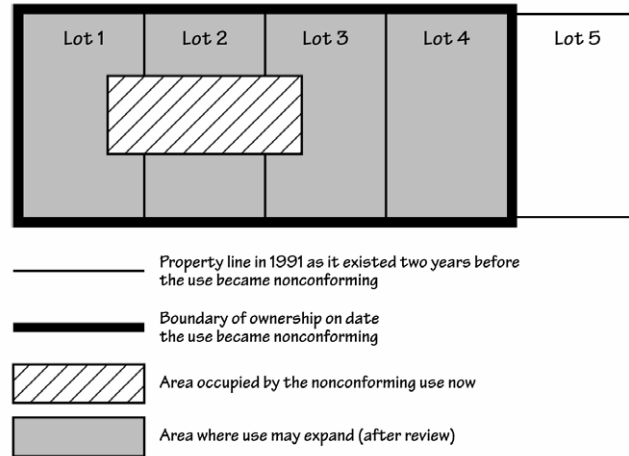


Figure 258-2
Area of Possible Expansion - C, E, and I Zones



2. C, E, and I zones. The standards stated below apply to all nonconforming uses in C, E, and I zones.
 - a. Except as allowed by Subparagraph C.2.b, below, expansions of floor area or exterior improvements, when proposed within the property lines as they existed two years before the use became nonconforming, may be approved through a nonconforming situation review. The development standards of the base zone, overlay zone, and plan district must be met for the expansion.
 - b. In I zones, expansions of floor area for nonconforming Household Living uses, when proposed within the property lines as they existed two years before the use became nonconforming, are allowed if all of the following are met:
 - (1) The expansion will not increase the floor area by more than 500 square feet over the floor area that existed when the use became nonconforming. Expansions that increase the floor area by more than 500 square feet over the floor area that existed when the use became nonconforming may be requested through a nonconforming situation review;
 - (2) The expansion must comply with development standards of the base zone, overlay zone, and plan district; and
 - (3) The addition of new dwelling units is prohibited.
 - c. In I zones, expansions of exterior improvements for nonconforming Household Living uses are allowed if they comply with the development standards of the base zone, overlay zone, and plan district.
 - d. Expansion of floor area or exterior improvements, when proposed beyond the property lines as they existed two years before the use became nonconforming, is prohibited, except in the following situation:

- (1) The property proposed for expansion is abutting at least one of the property lines of the nonconforming use as they existed two years before the use became nonconforming; and
- (2) The property proposed for expansion was in the same ownership as the property holding the nonconforming use when it became nonconforming; and
- (3) The zoning regulations on the property proposed for expansion would have allowed the use at the time the existing situation became nonconforming; and
- (4) The expansion is approved through a nonconforming situation review.

D. Loss of nonconforming use status.

1. Discontinuance. If a nonconforming use is discontinued for 3 continuous years, the nonconforming use rights are lost. If a nonconforming use ceases operations, even if the structure or materials related to the use remain, the use has been discontinued. If a nonconforming use changes to another use without obtaining all building, land use, and development permits that would have been required at the time of the change, the legal nonconforming use has been discontinued. A nonconforming use that has been discontinued for more than 3 continuous years may request re-establishment through a nonconforming situation review. Re-establishment of a nonconforming use that has been discontinued for 5 or more continuous years is prohibited.
2. Accidental destruction. When a structure containing a nonconforming use is damaged by fire or other causes beyond the control of the owner, the re-establishment of the nonconforming use is prohibited if the repair cost of the structure is more than 75 percent of its assessed value.
3. Intentional destruction. When a structure containing a nonconforming use is intentionally damaged by fire or other causes within the control of the owner, the re-establishment of the nonconforming use is prohibited.

33.258.060 Nonconforming Residential Densities

A. Changes to dwellings.

1. Generally. Existing dwelling units may continue, may be removed or enlarged, and amenities may be added to site.
 - a. Sites that exceed maximum residential density standard. On sites that exceed the maximum residential density standards, there may not be a net increase in the number of dwelling units and the building may not move further out of compliance with the base zone development standards, except as allowed in Paragraph A.2, below.
 - b. Sites where the minimum residential density standard is not met. On sites where the minimum residential density standard is not met, changes may be made that bring the site closer into conformance with the minimum residential density standard. There may not be a net decrease in the number of dwelling units, and the building may not move further out of compliance with the base zone development standards.

2. In multi-dwelling zones. In multi-dwelling zones, sites with residential structures may move out of compliance or further out of compliance with the maximum density standards of Table 120-3 if all of the following are met:
 - a. The residential structure was constructed before December 31, 1980; and
 - b. The site is moving out of compliance or further out of compliance with the maximum density standards due to a separation of ownership as allowed by Subsection 33.120.210.C.

B. Discontinuance and damage.

1. Building unoccupied but standing. Nonconforming residential density rights continue even when a building has been unoccupied for any length of time.
2. Damage or destruction.
 - a. More than one dwelling unit. When there is more than one dwelling unit on a site, and when the site is nonconforming for residential density, the following applies if a structure containing dwelling units is damaged or destroyed by fire or other causes beyond the control of the owner:
 - (1) If the structure is rebuilt within 5 years, nonconforming residential density rights are maintained;
 - (2) If the structure is not rebuilt within 5 years, the nonconforming residential density rights are lost, and the site is considered vacant;
 - (3) If the repair cost is more than 75 percent of the assessed value of the structure, the new structure must comply with one of the following, whichever is less restrictive:
 - The development standards (except for density) that would apply to new development on the site; or
 - The development standards (except for density) that would apply to new development in the R2 zone.
 - b. One dwelling unit. When there is only one dwelling unit on a site, and when the site is nonconforming for residential density, the following applies if the structure containing the dwelling unit is damaged or destroyed by fire or other causes beyond the control of the owner:
 - (1) If the repair cost is 75 percent or less of the assessed value of the structure, nonconforming residential density rights are maintained and the structure may be rebuilt;
 - (2) If the repair cost is more than 75 percent of the assessed value of the structure, the structure may be rebuilt within 5 years if it complies with the development standards (except for density) that would apply to new development on the site;
 - (3) If the repair cost is more than 75 percent of the assessed value of the structure, and the structure is not rebuilt within 5 years, the nonconforming residential density rights are lost, and the site is considered vacant.

33.258.070 Nonconforming Development

- A. Purpose.** This section is primarily aimed at upgrading nonconforming development elements that affect the appearance and impacts of a site. It is not intended to require extensive changes that would be extremely impractical such as moving or lowering buildings.
- B. Continued operation.** Nonconforming developments may continue unless specifically limited by Subsection D. below or other regulations in this Title.
- C. Changes.** Changes may be made to the site that are in conformance with the development standards of the base zone, overlay zone, plan district or other development standards that apply to the site. Changes that bring the site closer to conformance are allowed. Proposed changes that are not in conformance or do not move closer to conformance, are subject to the adjustment process unless prohibited.
- D. Development that must be brought into conformance.** The regulations of this subsection are divided into two types of situations, depending upon whether the use is also nonconforming or not. These regulations apply except where superseded by more specific regulations in the code.
1. Nonconforming development with a new nonconforming use or new nonconforming residential density. When there is a change to a different nonconforming use, or a change from a nonconforming nonresidential use to a nonconforming residential density, the following nonconforming development must be brought into compliance with the development standards that apply to the site (base, overlay, plan district, special use):
 - a. Exterior display, storage, and work activity areas, including landscaping;
 - b. Landscaped setbacks for surface parking and exterior development areas;
 - c. Pedestrian circulation systems, as set out in the pedestrian standards that apply to the site;
 - d. Bicycle parking by upgrading existing bicycle parking and providing additional spaces in order to comply with 33.266.220;
 - e. Interior parking lot landscaping. See Subsection 33.730.130.D, Expiration of adjustments approved prior to March 16, 2001;
 - f. Landscaping in **existing** building setbacks;
 - g. Minimum landscaped area (where land is not used for structures, parking, or exterior improvements);
 - h. Screening; and
 - i. Paving of surface parking and exterior storage and display areas.
 - j. Exception: Where landscaping in the following areas was conforming after March 16, 2001, and before July 8, 2005, it is exempt from the requirements of D.1.b, e, and f, above:

- (1) Landscaped setbacks for surface parking and exterior development areas;
 - (2) Interior parking lot landscaping; and
 - (3) Landscaping in existing building setbacks.
 - (4) This exception expires December 31, 2015.
2. Nonconforming development with an existing nonconforming use, allowed use, limited use, or conditional use. Nonconforming development associated with an existing nonconforming use, an allowed use, a limited use, or a conditional use, must meet the requirements stated below. When alterations are made that are over the threshold of Subparagraph D.2.a., below, the site must be brought into conformance with the development standards listed in Subparagraph D.2.b. The value of the alterations is based on the entire project, not individual building permits.
- a. Thresholds triggering compliance. The standards of Subparagraph D.2.b., below, must be met when the value of the proposed alterations on the site, as determined by BDS, is more than \$131,150. The following alterations and improvements do not count toward the threshold:
 - (1) Alterations required by approved fire/life safety agreements;
 - (2) Alterations related to the removal of existing architectural barriers, as required by the Americans with Disabilities Act, or as specified in Section 1113 of the Oregon Structural Specialty Code;
 - (3) Alterations required by Chapter 24.85, Interim Seismic Design Requirements for Existing Buildings;
 - (4) Improvements to on-site stormwater management facilities in conformance with Chapter 17.38, Drainage and Water Quality, and the Stormwater Management Manual; and
 - (5) Improvements made to sites in order to comply with Chapter 21.35, Wellfield Protection Program, requirements.
 - b. Standards which must be met. Development not complying with the development standards listed below must be brought into conformance or receive an adjustment.
 - (1) Landscaped setbacks for surface parking and exterior improvement areas;
 - (2) Pedestrian circulation systems, as set out in the pedestrian standards that apply to the site;
 - (3) Bicycle parking by upgrading existing racks and providing additional spaces in order to comply with 33.266.220, Bicycle Parking. Sites that do not have accessory surface parking or are inside the Central City Core Area or Lloyd District, as shown on Map 510-8, are not required to meet this standard for long-term bicycle parking, but are required to meet this standard for short-term bicycle parking;
 - (4) Interior parking lot landscaping. See Subsection 33.730.130.D, Expiration of adjustments approved prior to March 16, 2001;

- (5) Landscaping in existing building setbacks;
 - (6) Minimum landscaped area (where land is not used for structures, parking, or exterior improvements);
 - (7) Screening; and
 - (8) Required paving of surface parking and exterior storage and display areas.
 - (9) Exception: Where landscaping in the following areas was conforming after March 16, 2001, and before July 8, 2005, it is exempt from the requirements of D.2.b.1, 4, and 5, above:
 - Landscaped setbacks for surface parking and exterior development areas;
 - Interior parking lot landscaping; and
 - Landscaping in existing building setbacks.
 - This exception expires December 31, 2015.
- c. Area of required improvements.
- (1) Generally. Except as provided in D.2.c(2), below, required improvements must be made for the entire site.
 - (2) Exception for sites with ground leases. Required improvements may be limited to a smaller area if there is a ground lease for the portion of the site where the alterations are proposed. If all of the following are met, the area of the ground lease will be considered as a separate site for purposes of required improvements. The applicant must meet the following:
 - The signed ground lease – or excerpts from the lease document – must be submitted to BDS. The portions of the lease must include the following:
 - The term of the lease. There must be at least one year remaining on the ground lease; and
 - A legal description of the boundaries of the lease.
 - The boundaries of the ground lease must be shown on the site plan submitted with the building permit application;
 - The area of the lease must include all existing and any proposed development that is required for, or is used exclusively by, uses within the area of the lease; and
 - Screening is not required along the boundaries of ground leases that are interior to the site.

- d. Timing and cost of required improvements. The applicant may choose one of the following options for making the required improvements:
- (1) Option 1. Under Option 1, required improvements must be made as part of the alteration that triggers the required improvements. However, the cost of required improvements is limited to 10 percent of the value of the proposed alterations. It is the responsibility of the applicant to document the value of the required improvements. When all required improvements are not being made, the applicant may choose which of the improvements listed in Subparagraph D.2.b to make. If improvements to nonconforming development are also required by regulations in a plan district or overlay zone, those improvements must be made before those listed in Subparagraph D.2.b.
 - (2) Option 2. Under Option 2, the required improvements may be made over several years, based on the compliance period identified in Table 258-1. However, by the end of the compliance period, the site must be brought fully into compliance with the standards listed in Subparagraph D.2.b. When this option is chosen, the following applies:
 - Before a building permit is issued, the applicant must submit the following to BDS:
 - Application. An application, including a Nonconforming Development Assessment, which identifies in writing and on a site plan, all development that does not meet the standards listed in subparagraph D.2.b.
 - Covenant. The City-approved covenant, which is available in the Development Services Center, is required. The covenant identifies development on the site that does not meet the standards listed in subparagraph D.2.b, and requires the owner to bring that development fully into compliance with this Title. The covenant also specifies the date by which the owner will bring the nonconforming development into full compliance. The date must be within the compliance periods set out in Table 258-1. The covenant must be recorded as specified in Subsection 33.700.060.B.
 - The nonconforming development identified in the Nonconforming Development Assessment must be brought into full conformance with the requirements of this Title within the compliance periods. The compliance period begins when a building permit is issued for alterations to the site of more than \$131,150. The compliance periods are based on the size of the site. The compliance periods are identified in Table 258-1.
 - By the end of the compliance period, the applicant or owner must request that the site be certified by BDS as in compliance with the standards listed in Subparagraph D.2.b. A permit documenting full conformance with these standards is required and must receive final inspection approval prior to BDS certification. If certification is not requested, or if the site is not fully in conformance by the end of the compliance period, no

additional building permits will be issued until the site is certified.

- If the regulations referred to by Subparagraph D.2.b, or in D.2.b itself, are amended after the Nonconforming Development Assessment is received by BDS, and those amendments result in development on the site that was not addressed by the Assessment becoming nonconforming, the applicant must address the new nonconforming development using Option 1 or Option 2. If the applicant chooses Option 2, a separate Nonconforming Development Assessment, covenant, and compliance period will be required for the new nonconforming development.

Table 258-1 Compliance Periods for Option 2	
Square footage of site	Compliance period
Less than 200,000 sq. ft.	2 years
200,000 sq. ft. or more, up to 500,000 sq. ft.	3 years
More than 500,000 sq. ft., up to 850,000 sq. ft.	4 years
More than 850,000 sq. ft.	5 years

E. Loss of nonconforming development status.

1. Discontinuance. If a nonconforming exterior development, such as an exterior storage area, is unused for 2 continuous years, the nonconforming rights are lost and a nonconforming exterior development may not be re-established. If the exterior development is unused for less than 2 continuous years, a nonconforming exterior development may be re-established, unless stated otherwise in Subsection D. above.
2. Destruction. When a structure or other development that has nonconforming elements is removed or intentionally destroyed, replacement structures and other development must comply with the development standards of the base zone, overlay zone and plan district. When a structure that has nonconforming elements is partially or totally damaged by fire or other causes beyond the control of the owner, the structure may be rebuilt using the same structure footprint. An adjustment is required to allow the replacement structure to be more out of compliance with the development standards than the previous structure. However, detached garages in residential zones are subject to the provisions for accessory structures of 33.110.250 and 33.120.280 (Single-Dwelling and Multi-Dwelling chapters, respectively).

F. Sites that are nonconforming in parking spaces. When a site is nonconforming in the number of required or allowed parking spaces, this subsection applies:

1. Minimum required parking spaces. If changes to a use or building are made that increase the number of required parking spaces over the existing situation, only the number of spaces relating to the increase need to be provided.
2. Maximum allowed parking spaces. If changes to a use or building are made, existing parking spaces that are in excess of the maximum may be retained if

none of the dimensions of the parking area increase. Within the existing parking area, the layout of the parking spaces may be redesigned and the parking area re-striped if all requirements for setbacks, landscaping, and parking space and aisle dimensions in Chapter 33.266, Parking and Loading, are met.

- G. Nonconforming signs.** The regulations for nonconforming signs are stated in Title 32, Signs and Related Regulations.

33.258.075 Determination of Legal Nonconforming Status Review

- A. Purpose.** This review will determine if a use or site has legal nonconforming situation rights. In addition, it will determine what the current legal use is, based on the use categories in Chapter 33.920.
- B. When this review is required.** Determination of Legal Nonconforming Status Review is required where a land use review or building permit is requested, and the applicant does not provide standard evidence or the Director of BDS does not find the evidence to be satisfactory. (See 33.258.038). This review also may be requested by an applicant when it is not required.
- C. Procedure.** Determination of Legal Nonconforming Status Reviews are processed through a Type II procedure.
- D. Approval criteria.**
1. The legal status of the nonconforming situation will be certified if the review body finds that:
 - a. The nonconforming situation would have been allowed when established; and
 - b. The nonconforming situation has been maintained over time.
 2. The review body will determine, based on the evidence, what the current legal use is, using the definitions in Chapter 33.910 and the use categories in Chapter 33.920.

33.258.080 Nonconforming Situation Review

- A. Procedure.** A nonconforming situation review is processed through a Type II procedure.
- B. Approval criteria.** The request will be approved if the review body finds that the applicant has shown that all of the following approval criteria are met:
1. With mitigation measures, there will be no net increase in overall detrimental impacts (over the impacts of the last legal use or development) on the surrounding area taking into account factors such as:
 - a. The hours of operation;
 - b. Vehicle trips to the site and impact on surrounding on-street parking;
 - c. Noise, vibration, dust, odor, fumes, glare, and smoke;

- d. Potential for increased litter; and
 - e. The amount, location, and nature of any outside displays, storage, or activities; and
2. If the nonconforming use is in an OS or R zone, and if any changes are proposed to the site, the appearance of the new use or development will not lessen the residential character of the OS or R zoned area. This is based on taking into account factors such as:
 - a. Building scale, placement, and facade;
 - b. Parking area placement;
 - c. Buffering and the potential loss of privacy to abutting residential uses; and
 - d. Lighting and signs; and
 3. If the nonconforming use is in a C, E, or I zone, and if any changes are proposed to the site, the appearance of the new use or development will not detract from the desired function and character of the zone.