



Nonconforming Structures and Uses

Guidance on the Chesapeake Bay Preservation Area

Designation and Management Regulations

September 16, 2002, February 2022

Purpose:

This document provides local planners and officials with guidance on administering those sections of the Chesapeake Bay Preservation Area Designation and Management Regulations (Regulations) related to nonconforming structures and uses.

Nonconforming structures and uses (i.e., structures and uses that were legally constructed or established but that no longer meet current legal requirements) are protected under the Chesapeake Bay Preservation Act (Bay Act) and Regulations. These structures and uses may, in some cases, be expanded provided that the local government reviews the requested expansion or alteration through a standardized process and makes certain findings.

Regulations:

- Section 9 VAC 25-830-150(A)(1) permits, but does not require, local governments to allow for the continued use of, but not necessarily the expansion of, any structure or use in existence at the time of the local program adoption. This section also allows local governments to administratively review and approve requests to modify structures on nonconforming lots.
- Sections 9 VAC 25-830-150(A)(1)(a) and (b) outline the criteria that must be considered when approving such expansions, including (1) that there be no net increase in the nonpoint source pollution load, and (2) that any land disturbance exceeding 2,500 square feet in size complies with erosion and sediment control requirements.
- Section 9 VAC 25-830-150(A)(2) permits the reconstruction of a nonconforming structure that is lost to casualty, provided the structure complies with all other local requirements.
- Section 9 VAC 25-830-150(C)(4) permits local governments to administratively review and approve exception requests to modify nonconforming **principal** structures, provided that the two criteria identified above are met and the findings required by Sections 9 VAC 25-830-150(C)(1)(a-f) are made. This provision does **not** apply to nonconforming **accessory** structures located within the Resource Protection Area (RPA), the expansion of which may only be approved through the complete exception process.

Discussion:

Nonconforming structures and uses enjoy certain rights under general land use practices. Generally, nonconforming structures and uses may continue to be used provided they are not expanded in area or intensity. For purposes of this guidance, the Department of Environmental Quality (DEQ) relies on the definition of “structure” contained in the Virginia Uniform Statewide Building Code (effective date July 14, 2014), which defines “structures” to be “an assembly of materials forming a construction for occupancy or use.”

In the context of the Bay Act and Regulations, nonconforming structures and uses are most directly related to restrictions placed on land use and development in RPAs. The Regulations specifically permit the local government to approve the modification or expansion of these structures and uses, provided that the local government makes certain findings regarding the potential effect of the modification or expansion on water quality. A Water Quality Impact Assessment (WQIA), reviewed before final approval for the development is given, must be an integral part of the approval process.

Nonconforming Structures

An example of a nonconforming structure is a small cottage or vacation-home that was constructed within the area now designated as an RPA, but prior to the adoption of the Bay Act and Regulations, and the owner now wants to expand to accommodate year-round occupancy. The use (a single family dwelling) is not a permitted use within the RPA and is considered nonconforming. Under the Regulations, local governments may administratively review a request to modify such a structure, and may grant the request provided that certain findings are made.

These findings are contained in two separate sections of the Regulations: 9 VAC 25-830-150(A) and 9 VAC 25-830-150(C). Section 9 VAC 25-830-150(A) requires that there be no net increase in the nonpoint source pollutant load and that any land disturbance or development exceeding 2,500 square feet in area must comply with all erosion and sediment control requirements. Additionally, the findings in Sections 9 VAC 25-830-150(C)(1)(a-f) must be made. These findings are the same findings that must be made for the granting of an exception and include, (1) the requested modification is the minimum necessary to afford relief from the Regulations; (2) granting the approval will not confer any special privilege upon the applicant, but instead is based upon unique conditions associated with the parcel; (3) the modification is in harmony with the purpose and intent of the Regulations and is not of substantial detriment to water quality; (4) the modification is not required as a result of a self-created or self-imposed hardship; (5) reasonable and appropriate conditions are imposed as warranted; and, (6) the local government has made other findings, as appropriate.

Modifications to nonconforming accessory structures may also be permitted, but these modifications must be reviewed and approved using the process for considering exceptions to the Regulations. For purposes of this guidance, DEQ considers decks, garages, and other customary and incidental structures that are attached to the principle structure to be part of the principal structure. As such, the review and approval of these structures may be done administratively. Detached structures, such as detached garages, gazebos, tool sheds, and similar structures are clearly accessory to the principle use, and modifications or expansions of these structures must be reviewed and approved using the formal exception process. In-ground pools, patios, terraces, and other impermeable landings are considered accessory uses of land, not structures, and any modification or expansion to such a use must be reviewed and approved using a formal exception process.

In both cases, every effort should be made to site the modification or expansion so that no further encroachment into the RPA occurs. Where possible, existing areas of impervious cover should be

used for site modifications or expansions of nonconforming uses, thereby allowing for increased usable area while not increasing impervious area.

Nonconforming Uses

Uses, too, can be nonconforming with respect to the Bay Act and Regulations. A parking lot serving a long-established marina or waterside restaurant is an example of a use that pre-dates the Bay Act and Regulations and which may need to be modified or expanded under the nonconforming use provisions of the local ordinance. Because the modification or expansion of such uses typically results in significant land disturbance, all modifications or expansions to nonconforming uses of land must be reviewed and approved using the formal exception process. Changes in use from one nonconforming use to another nonconforming use may require a formal exception, depending upon whether land disturbing or other development activities will take place.

Conclusions:

- All development activity, including additions to nonconforming structures, within a RPA must be reviewed and approved by the local government.
- Development activity not specifically permitted elsewhere in the Regulations may be permitted within the RPA either through the approval of an administrative waiver or when approved through a formal exception process.
- Local governments may administratively approve the modification or expansion of a nonconforming **principal** structure. The findings outlined in 9 VAC 25-830-150(1)(a-f) must be made.
- Local governments must use the exception process contained within the local ordinance to approve all other modifications to nonconforming structures and uses.
- DEQ recognizes a difference between nonconforming **uses** and nonconforming **structures**. Nonconforming uses could possibly exist within the RPA buffer that do not require any structures (e.g., active recreation fields, boat storage, etc.). Consideration of requests to expand such uses must be through the full exception process, including a public hearing. Such uses will, most likely, require significant land disturbance or buffer destruction and these potential effects warrant a public hearing and public participation in the decision-making process.
- Decks and garages that are attached to the principal structure may be considered a part of the principal structure. Pools, patios, tennis courts, and other impermeable surfaces do not permit infiltration to groundwater and are to be considered accessory uses of land. They are not to be considered structures and their expansion may not be processed administratively.
- Expansions to nonconforming **accessory** structures may not be processed through an administrative waiver process and must be reviewed through an exception process involving public notice and a public hearing. Accessory structures include, but are not

limited to, detached garages, gazebos, storage buildings, guest houses, and similar forms of development that are customarily incidental and subordinate to the principle structure.

- DEQ recommends that additions to nonconforming structures, either principle or accessory, not be allowed to encroach further into the RPA than does the existing structure and that, to the extent possible, additions should be within an area of existing impervious cover. In keeping with the General Performance

Criteria any encroachment permitted must minimize impervious area, minimize land disturbance, and maintain indigenous vegetation to the extent practicable. Encroachments into the seaward 50' of the RPA buffer are discouraged.

- A Water Quality Impact Assessment (WQIA) must accompany any request to expand a nonconforming structure or use, and the WQIA must be reviewed and approved **prior** to the issuance of any permits for development activity within the RPA. Accessory structures may require only a minor WQIA, and allowances should be made in the local ordinance for such instances.
- Additions to structures that have previously received exceptions are discouraged. All required encroachments should be identified and addressed in one action, if at all possible.