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MILLS RIVER

UNIFIED DEVELOPMENT ORDINANCE

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CHAPTER 5.

NONCONFORMITIES

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CHAPTER 5. NONCONFORMITIES - KEY CHANGES IN THE NEW UDO

Chapter 5, Nonconformities consolidates and replaces the various nonconforming standards for land uses in the Mills River Town Code of Ordinances. Key changes in this Chapter 5 include:

- Changes related to Session Law 2024-57 related to downzoning. The basic strategy is to grant amnesty to all existing nonconformities (so they don't have to be tracked or distinguished from those nonconformities that exist without need of consent versus those that do). Then to allow existing development to continue in perpetuity as is, but require any changes to existing development to come into compliance with the rules in place at the time of the application. Existing development that contemplates change but can not reach full compliance may attempt to secure a variance, obtain conditional rezoning approval, or a nonconforming authorization. The basic aspect of the strategy is that it relies on a more expansive definition of what is "new" development in order to require full compliance. Changes of principal use, changes to site features that increase the amount of impervious surface, or expansions of existing buildings after the UDO's effective date are all considered "new" development. A broader definition of what constitutes new development, along with basic requirements for new development to reach full compliance with standards in place at the time of submittal, avoids the need for the Town to apply differing development standards to development as it changes over time. Development codes that apply differing standards to the same kinds of development based solely upon when it was approved requires local governments to maintain multiple sets of development standards over time which is impractical, burdensome, and difficult to explain to applicants. Instead, this approach simply allows existing development to exist as is until it changes. When it changes, it must comply with all new rules, regardless of when the new rules were adopted.
- The standards in this Chapter include provisions for nonconforming lots of record, structures, signs, and uses. These standards apply only after the nonconformity has received authorization to exist from the Town (adoption of the new UDO grants amnesty to/abolishes all existing nonconformities).
- There are a set of general standards applicable to all nonconformities.
- There are a set of standards that apply to nonconforming lots – which are allowed to remain and be developed without having to be authorized as nonconforming. However, any subsequent subdivision of a nonconforming lot of record in a conventional zoning district after the effective date of the UDO must bring the lot into full compliance with the dimensional standards applicable in the zoning district where located.
- The nonconforming sign standards have been revised to recognize recent changes in the General Statutes that allow nonconforming signage to be replaced, relocated, and re-established in accordance with its current conditions. However, the UDO does include new provisions that prohibit continuation of a nonconforming sign that is a danger to public safety – in those instances, the nonconforming sign must be subject to maintenance or improvements that ensure the sign is not a safety hazard.
- There are new standards for nonconforming structures (that are considered nonconforming if they don't meet required setbacks, even though setbacks are traditionally thought of as nonconforming lot aspects).
- There are new standards for nonconforming uses, that include limits to changing a nonconforming use unless the new use complies with the UDO.
- This chapter clarifies that, except with regard to nonconforming signs, changes to nonconformities are generally prohibited unless the changes result in compliance with the UDO or conditions of approval associated with a Variance or Conditional Rezoning.
- There are new cessation and abandonment provisions for nonconforming structures and uses.
- There are new casualty damage provisions for nonconforming structures and uses.



§ 5.1 CHAPTER INTRODUCTION

5.1.1. CHAPTER ORGANIZATION

This section identifies the six main sections in the Nonconformities Chapter, explains the differing types of nonconforming situations contemplated under the Ordinance, and sets out the general provisions related to the establishment and replacement of a nonconformity.

5.1.2. PURPOSE AND INTENT

There are existing structures, uses of land, signs, site features, and lots of record that became nonconforming in accordance with the standards and procedures identified in this Ordinance. Nonconformities do not comply with the applicable standards of this Ordinance or with a condition of approval applied to the development at the time of its approval. The purpose of this Chapter is to establish the rules under which nonconformities may continue and how their continued existence may be affected by changing conditions. More specifically, these standards are intended to:

- A.** Recognize that development existing prior to *(insert the effective date of this Ordinance)* is permitted to continue in kind and in footprint unless and until there is an application that seeks to change the principal use, increase the amount of impervious surface on a lot, or that proposes to alter the size or footprint of an existing principal building;
- B.** Establish the procedure under which development existing prior to *(insert the effective date of this Ordinance)* may come to be considered as nonconforming;
- C.** Clarify that the opportunity to become nonconforming with respect to the standards in this Ordinance or an applicable condition of approval shall require the landowner to furnish tangible or de facto consent to become nonconforming;
- D.** Clarify that nonconforming status may only be established following approval of a Nonconforming Authorization by the Town (see Section <>, Nonconforming Authorization);
- E.** Encourage routine maintenance and activities necessary to preserve or improve public safety associated with a lawful nonconformity;
- F.** Clarify that any alteration to a nonconformity shall require full compliance with the applicable standards in this Ordinance, or shall require prior authorization from the Town to continue as a nonconformity;
- G.** Clarify how certain nonconformities may be continued or re-established following casualty damage; and
- H.** Limit the re-establishment of a nonconformity following its discontinuance.

5.1.3. NONCONFORMITIES DISTINGUISHED

- A.** Nonconformities may take the form of a nonconforming lot of record, a nonconforming sign, a nonconforming site, a nonconforming structure, or a nonconforming use.
- B.** Aside from the standards in Section <>, Nonconformities Generally, the requirements that apply to a particular type of nonconformity may differ from the standards in this Chapter applied to new development.

§ 5.2 NONCONFORMITIES, GENERALLY¹⁰

5.2.1. EXISTING NONCONFORMITIES ABOLISHED UPON UDO EFFECTIVE DATE

- A.** This section clarifies that the nonconforming status of any development in existence prior to the effective date of this Ordinance is waived and the prior nonconformity is granted amnesty upon its effective date.

¹⁰ NOTE: This section sets out the standards associated with Session Law 2024-57 pertaining to prohibition of downzoning. While the Mills River UDO is exempted from this session law until July 1, 2026, once adopted, the UDO will need to comply. This section sets out the proposed strategy. Essentially, the strategy includes three basic elements: 1) granting amnesty to all nonconformities in place at the time of UDO adoption (to avoid the need for tracking which ones do or do not have consent after adoption), 2) broadening the definition of what constitutes “new” development that is subject to the standards in the UDO at the time of application (so that the UDO can continue to be revised over time as necessary and appropriate without the Town having to track which developments are subject to which versions of the standards as they change over time), and 3) a procedure for changes to existing development that qualify as new development to come into compliance or become nonconforming. These standards may remain in this Chapter, or may be relocated to new Chapter 1, Administration.



- B. As of (insert the effective date of this Ordinance) prior nonconforming status is removed, and all existing and approved but not yet complete development shall be considered conforming with respect to the standards in this Ordinance.

5.2.2. AUTHORITY TO CONTINUE¹¹

- A. Based on the standards in this Section, existing development in place or approved prior to (insert the effective date of this Ordinance) may:
01. Remain in place;
 02. Continue to operate;
 03. Cease and be re-established as it existed on the date the development ceased; and
 04. Be reduced in size, scope, density, intensity, or impact, provided that any subsequent changes following such reduction remain subject to the standards in Section <>, Alterations to Existing Development.
- B. In no instance shall existing development be altered in ways that exceed the limitations in sub-section (A) above unless and until the development reaches full compliance with the standards in place at the time of alteration.

5.2.3. ALTERATIONS TO EXISTING DEVELOPMENT

A. GENERALLY

01. Except as authorized in accordance with Section <>, Exemptions, below, any alteration to existing or approved but incomplete development subject to this Ordinance shall be considered as “new” development subject to full compliance with all applicable provisions of this Ordinance and any applicable conditions of approval.
02. A development may be considered to be fully-compliant only if it:
 - a. Meets all applicable Town requirements, standards in this Ordinance, and conditions of approval; or
 - b. Is subject to an approved Variance in accordance with Section <>, Variance, that addresses aspects of the development that do not meet all applicable Ordinance standards and conditions of approval; or
 - c. Is subject to a conditional rezoning approval established in accordance with Section <>, Conditional Rezoning, that includes conditions of approval intended to mitigate instances where the subject development does not meet all applicable Ordinance standards; or
 - d. The development has authorization to be nonconforming, established in accordance with Section <>, Authority to Become Nonconforming.
03. Examples of alterations to existing development that are considered as new development subject to the standards in this Ordinance include, but are not limited to:
 - a. Changes in principal use type;
 - b. Any subdivision or change to a lot line;
 - c. Any change that increases the amount of impervious surface on a lot;
 - d. Any change that increases the height of a building, sign, or other structure subject to the height standards in this Ordinance; or
 - e. Any alteration to a principal building that increases the building’s floor area or that changes the building’s footprint.

B. EXEMPTIONS

The following activities or forms of development shall not be considered an alteration to existing development subject to Section (A) above:

01. Sale or re-sale without a change in use type;
02. Complete demolition and removal of all above-ground structures and site features;
03. Replacement of existing landscaping, provided the pre-existing planting standards and screening performance objectives are maintained;
04. Restriping or refreshing of on-site vehicular use area provided that the number of parking spaces provided or the amount of impervious surface is not increased;
05. Changes in exterior building materials;

¹¹ NOTE: We suggest the Town apply these standards for a three-to-six-month window before considering addition of the ability to make de minimis expansions or other alterations without reaching full compliance.



- 06. Replacement of signage subject to NCGS§160D-912.1, and provided the signage complies with any applicable uniform sign plan requirements;
- 07. Establishment of or changes to a secondary use or structure, subject to the standards in Section <>, Secondary Uses; or
- 08. Establishment of a temporary use or structure, subject to the standards in Section <>, Temporary Uses.

5.2.4. AUTHORITY TO BECOME NONCONFORMING

Development proposed for alteration in accordance with Section <>, Alterations to Existing Development, that cannot reasonably comply with the applicable standards of this Ordinance or an applicable condition of approval, cannot meet the standards for approval of a Variance in accordance with Section <>, Variance, or is not subject to an approved Conditional Rezoning that authorizes the proposed development's configuration (see Section <>, Conditional Rezoning), may only be altered by an applicant in accordance the requirements in this section.

A. REQUEST FOR NONCONFORMING AUTHORIZATION

- 01. Prior to the establishment of a nonconformity, a landowner shall file a request for a Nonconforming Authorization to establish a nonconformity in accordance with these standards.
- 02. The Nonconforming Authorization application shall include a signed statement of consent from all landowners of record granting the ability for a nonconformity to be established.
- 03. The ability for development to become nonconforming shall not commence unless and until approval of a Nonconforming Authorization in accordance with Section <>, Nonconforming Authorization.

B. STATEMENT OF CONSENT

- 01. Statements of consent filed with an application for a Nonconforming Authorization shall, upon approval, be recorded by the Town in the Office of the Henderson County Register of Deeds.
- 02. Once a statement of consent has been recorded, it shall run with the land and may not be rescinded unless the nonconformity subject to the statement conforms with this ordinance or an amendment thereto.

C. SUBSEQUENT ALTERATION FOLLOWING NONCONFORMING AUTHORIZATION

- 01. A pre-existing Nonconforming Authorization may not be used to expand or increase an existing nonconformity or establish a new nonconformity of the same site or the same principal building.
- 02. Existing development subject to a prior-approved Nonconforming Authorization that then becomes the subject of a subsequent request to change a principal use, increase impervious surface, or alter an existing building's height, floor area, or footprint shall be required to reach full compliance with all applicable requirements of this Ordinance in place at the time of the request except for the nonconformity authorized by the prior-approved Nonconforming Authorization.

5.2.5. MAINTENANCE AND CONTINUATION OF AUTHORIZED NONCONFORMITIES

Only nonconformities subject to an approved Nonconforming Authorization in accordance with Section <>, Authority to Become Nonconforming, may be maintained and continued, subject to the following:

A. CONTINUATION

Authorized nonconformities are allowed to continue in-kind and in footprint in accordance with the requirements of this Chapter.

B. COMPLETION

Authorized nonconformities that are under construction shall be permitted to be completed in accordance with their associated approvals despite not complying with all applicable standards in this Ordinance or a an associated condition of approval.

C. MAINTENANCE ALLOWED

- 01. Incidental or minor repairs and routine maintenance necessary to keep an authorized nonconformity in safe and sound condition are permitted and encouraged.
- 02. Nonconforming signage that demonstrates a hazard to public safety shall be subject to repairs or maintenance in order to preserve and protect public safety. Failure to repair or remedy an unsafe nonconforming sign is a violation of this Ordinance subject to the provisions in Chapter 7, Violations.



03. Except as permitted in Section <>, Strengthening Allowed, repair or maintenance activities that amount to an expansion of an authorized nonconformity are prohibited.

D. STRENGTHENING ALLOWED

Nothing in this Ordinance shall prevent the strengthening or restoration to a safe or lawful condition of any part of any building or structure declared unsafe or unlawful by a duly authorized Town or County official.

5.2.6. TENANCY AND OWNERSHIP CHANGES

Except as indicated with respect to outdoor advertising rules, authorized nonconforming status shall run with the land and is not affected by a change in tenancy, ownership, or management.

5.2.7. LOSS OF AUTHORIZED NONCONFORMING STATUS

A. CESSATION AND ABANDONMENT

01. Cessation of a nonconformity is the stoppage or pause of an authorized nonconformity. Cessation may be either temporary or permanent. Temporary cessation for a period of up to 180 days allows for the recommencement or continuation of an authorized nonconformity. Permanent cessation means the authorized nonconformity is abandoned, and may not be recommenced or continued. Recommencement or continuation of a nonconformity following cessation is a violation of this Ordinance subject to the standards in Chapter 7, Violation.
02. Authorized nonconformities that are ceased for a period of time longer than specified in this Ordinance shall be considered abandoned, and may not be reestablish, recommenced, or continued unless conforming with the provisions of this Ordinance.

B. CASUALTY DAMAGE

01. Casualty damage to a nonconforming use or structure is condition resulting from fire, flooding, Acts of God, or other instances that render the nonconformity damaged to an extent that re-establishment to its prior condition will cost more than 51 percent of the nonconformity's assessed value immediately prior to the casualty event.
02. Authorized nonconformities that suffer casualty damage (damage costing more than 51 percent of the nonconformity's pre-damage assessed value to repair) shall be considered abandoned and may only be re-established in full compliance with the standards in this Ordinance.

C. ALTERATION THAT INCREASES NONCONFORMITY

Alterations, expansions, or other changes to an authorized nonconformity that increase the amount or degree of nonconformity are prohibited, shall be considered a violation of this Ordinance, and may result in the loss of authorized nonconformity status.

D. ALTERATION THAT REDUCES THE DEGREE OF NONCONFORMITY

Alterations to an authorized nonconformity that reduce the degree of nonconformity may be permitted in accordance with the provisions of this Chapter. Alterations that render the development conforming to the provisions in this Ordinance are strongly encouraged.

E. EFFECT OF LOSS

Loss of authorized nonconforming status, whether by cessation and abandonment, casualty damage, or alteration that increases the degree of nonconformity, shall require the development to be removed or reconfigured in ways that conform to this Ordinance and prohibit the recommencement or replacement of the development in ways that are nonconforming with the standards of this Ordinance.



§ 5.3 NONCONFORMING LOTS OF RECORD

5.3.1. APPLICABILITY

- A. A nonconforming lot of record is a lot that has been lawfully-established and recorded in the office of the Henderson County Register of Deeds, but that does not comply with the applicable dimensional requirements of the zoning district where located or that does not maintain access to the larger street network as required under this Ordinance.
- B. Lawfully-established nonconforming lots of record may be developed in accordance with the standards in this section.

5.3.2. AUTHORIZATION FOR NONCONFORMITY NOT REQUIRED

Nonconforming lots of record that are lawfully-established prior to *(insert the effective date of this Ordinance)* are not subject to the standards in Section <>, Authority to Become Nonconforming, though any development located upon a nonconforming lot of record is subject to the standards in Section <>, Alterations to Existing Development, or Section <>, Authority to Become Nonconforming, as appropriate.

5.3.3. CREATION PROHIBITED

- A. Except in accordance with Section <>, Governmental Acquisition of Land, in no instance shall a subdivision or other development approval sought under this Ordinance result in the establishment of a nonconforming lot of record.
- B. Development approvals granted after *(insert the effective date of this Ordinance)* that could result in the creation of a new nonconforming lot of record shall be null and void.

5.3.4. DEVELOPMENT AUTHORIZED

- A. Development existing on a nonconforming lot of record prior to *(insert the effective date of this Ordinance)* may continue in accordance with Section <>, Authority to Continue.
- B. Alterations or modifications to existing development on a nonconforming lot of record after *(insert the effective date of this Ordinance)* shall be subject to the standards in Section <>, Alterations to Existing Development.
- C. New development on an existing lot of record after *(insert the effective date of this Ordinance)* shall comply with all applicable requirements in this Ordinance.
- D. New structures proposed on a nonconforming lot of record after *(insert the effective date of this Ordinance)* that do not meet the required setbacks or other dimensional standards of the zoning district where located shall require approval of an Administrative Adjustment, Alternative Plan, Conditional Rezoning, Variance, or Nonconforming Authorization, as appropriate.

5.3.5. FURTHER SUBDIVISION LIMITED

Subdivisions, recombinations, or changes to existing lot boundaries of a nonconforming lot of record proposed after *(insert the effective date of this Ordinance)* shall only be permitted in cases where such change renders the nonconforming lot of record conforming with all applicable provisions in this Ordinance.

5.3.6. GOVERNMENTAL ACQUISITION

Lawfully-established conforming lots subject to governmental acquisition of a portion of the lot for a public purpose where the acquisition renders the lot nonconforming with respect to the applicable dimensional requirements shall nonetheless be deemed conforming with respect to the applicable standards in this Ordinance

5.3.7. SPECIAL PURPOSE LOTS

In cases where a use or feature on a lawfully-established special purpose lot ceases or is abandoned, the special purpose lot shall be considered a nonconforming special purpose lot. Development on a nonconforming special purpose lot shall comply with all applicable dimensional requirements of the zoning district where it is located, or shall be subject to an approved Administrative Adjustment, Alternative Plan, Conditional Rezoning, Variance, or Nonconforming Authorization, As appropriate.



§ 5.4 NONCONFORMING SIGNS

5.4.1. APPLICABILITY

The standards in this section shall apply to any nonconforming sign or sign-supporting structure that is authorized to be nonconforming in accordance with Section <>, Authority to Become Nonconforming, and that does not comply with applicable development standards in this Ordinance.

5.4.2. MAINTENANCE ALLOWED

- A. This section permits routine maintenance and change of sign copy provided such changes do not impact the degree of nonconformity.
- B. Maintenance does not include digitization or internal illumination of an existing sign that is not digital or internally illuminated as of the effective date of this Ordinance.

5.4.3. RELOCATION, RECONSTRUCTION, OR RE-ESTABLISHMENT

- A. A lawfully-established and authorized nonconforming sign may be relocated, reconstructed, or re-established at any time provided:
 - 01. The nonconforming sign remains on the same lot;
 - 02. The nonconforming sign face area is not increased above what existed prior to relocation, reconstruction, or re-establishment;
 - 03. The nonconforming sign's height is not increased; and
 - 04. The relocation, reconstruction, or re-establishment is completed within two years of commencement.
- B. Nonconforming aspects of the relocated, replaced, or re-established sign, such as structure, height, mounting style, illumination, color, or other features may be continued, but in no instance shall the new signage increase the level or degree of nonconformity without first obtain a Variance, Conditional Rezoning, or Nonconforming Authorization.
- C. In no instance shall a relocated, reconstructed, or re-established sign be permitted within:
 - 01. Required sight distance triangles;
 - 02. Public utility or access easements;
 - 03. Required open space set-aside;
 - 04. A lot different from the sign's original location; or
 - 05. The right-of-way of a public street.

5.4.4. RELATIONSHIP TO ALLOWABLE CONFORMING SIGNAGE

In no instance shall a lot with an authorized nonconforming sign also be permitted to have additional signage of the same sign type if the addition of such additional signage would cause the lot to exceed the maximum allowable number signs or the maximum allowable sign face area permitted for the lot in question.

5.4.5. REZONING OF A LOT

- A. Rezoning approvals that would render an existing sign nonconforming shall not be permitted unless the nonconforming signage is removed prior to issuance of a Certificate of Occupancy.
- B. A Conditional Rezoning may include a condition of approval that creates or addresses nonconforming signage.



§ 5.5 NONCONFORMING STRUCTURES

5.5.1. APPLICABILITY

The standards in this section shall apply to any nonconforming building or other non-habitable structure that is authorized to be nonconforming in accordance with Section <>, Authority to Become Nonconforming, and that does not comply with required setbacks, applicable dimensional requirements, or other applicable standard in this Ordinance.

5.5.2. CONTINUATION AND REPLACEMENT

A. CONTINUATION

A nonconforming structure may be operated and continued in accordance with Section <>, Maintenance and Continuation of Authorized Nonconformities.

B. REPLACEMENT

01. Replacement of a authorized nonconforming structure shall be permitted provided the replacement does not increase the level or degree of nonconformity.
02. Replacements that seek to increase the degree of nonconformity shall require prior approval of an Administrative Adjustment, Alternative Plan, Conditional Rezoning, Variance, or Nonconforming Authorization, as appropriate.

C. RELOCATION

A nonconforming structure shall not be moved, in whole or in part, to another location on the parcel of land on which it is located, unless the relocation removes or lessens the degree of nonconformity.

5.5.3. ALTERATION AND EXPANSION

No nonconforming structure may be altered in any way which increases the size, density, intensity, impervious surface, or other impact of nonconformity; however, any nonconforming structure or portion thereof may be altered in ways that decrease the degree of nonconformity.

5.5.4. COMPLIANCE WITH DESIGN STANDARDS

In cases where an existing nonconforming structure pre-dates or is exempted from any applicable design standards in Chapter 6, Standards, any allowable modifications or expansions to the nonconforming structure shall also be exempted from the otherwise applicable design standards.

5.5.5. RECONSTRUCTION FOLLOWING DAMAGE OR DESTRUCTION

- A. If a nonconforming structure is damaged or destroyed by any means to an extent of 51 percent or more of its assessed value, it may only be reconstructed in accordance with the requirements of this Ordinance.
- B. The Planning Director may, in the Director's sole discretion and on a case-by-case basis, utilize the cost of replacement in lieu of assessed value in determining the ability of a damaged or destroyed nonconforming structure to be reconstructed.
- C. A nonconforming structure damaged to an extent that the cost of reconstruction is less that 51 percent of its assessed value may be reconstructed.



§ 5.6 NONCONFORMING USES

The lawful nonconforming use of a structure, land, or water existing as of (*insert the effective date of this Ordinance*), may only be continued in accordance with the standards in this section. The standards in this section shall apply to both principal and secondary uses, unless otherwise indicated.

5.6.1. DECLARED INCOMPATIBLE

All nonconforming uses are hereby declared generally incompatible with the permitted uses in the district in which they are located and with the provisions of this Ordinance.

5.6.2. CONTINUATION ALLOWED

Authorized nonconforming uses are allowed to continue and be maintained only in accordance with the requirements of this Chapter.

5.6.3. USE SEPARATION REQUIREMENTS

In cases where a use type is lawfully established and in compliance with the applicable standards of this Ordinance, and another use type is subsequently established within a minimum required separation distance required by [Section <>](#), [Standards for Specific Principal Uses](#), the initial existing use shall not be rendered nonconforming.

5.6.4. PARTIAL NONCONFORMANCE

In cases where the principal use of a lot is nonconforming, the entire use, including all related, partial, or secondary uses, or associated activities shall also be considered nonconforming.

5.6.5. EXPANSION OR EXTENSION

No expansion or extension of an authorized nonconforming use shall be permitted.

5.6.6. CONVERSION

No nonconforming use shall be converted to another nonconforming use. Nonconforming uses may only be converted to a conforming use.

5.6.7. RECONSTRUCTION FOLLOWING DAMAGE OR DESTRUCTION

- A.** If a nonconforming use is damaged or destroyed by any means to an extent of 51 percent or more of its assessed value, it may only be reconstructed in accordance with the requirements of this Ordinance.
- B.** The Planning Director may, in the Director's sole discretion and on a case-by-case basis, utilize the cost of replacement in lieu of assessed value in determining the ability of a damaged or destroyed nonconforming use to be reconstructed.
- C.** A nonconforming use damaged to an extent that the cost of reconstruction is less than 51 percent of its assessed value may be reconstructed.

5.6.8. RESTORATION FOLLOWING ABANDONMENT

Restoration of a nonconforming use following abandonment for a period for 180 days or more shall be prohibited unless the restoration renders the use conforming.

