

# ARTICLE V. VIII. NONCONFORMITIES<sup>3</sup>

## DIVISION 1. GENERALLY

### Sec. 34-3201. Purpose of article.

The regulations of this ~~chapter code and various amendments thereto~~ have caused or will cause some ~~lots, structures or buildings, or uses, or lots to no longer conform with one or more provisions of this code. of lots, structures or buildings, to be nonconforming.~~

- (1) It is the purpose of this article to set forth the rules and regulations regarding those nonconforming ~~lots, structures or buildings, and uses, or lots~~ which were created by the adoption of this ~~chapter code or amendments thereto.~~
- (2) Nothing contained in this article is intended to preclude the enforcement of federal, state, and other local regulations that may be applicable.

### Sec. 34-3202. Three types of nonconformities nonconforming use defined.

(a) ***Three types of nonconformities.*** There are three distinct types of nonconformities recognized by this article, with a separate division devoted to each. In situations where there is more than one type of nonconformity, for example a nonconforming use in a nonconforming building, all relevant divisions shall apply.

(b) ***Nonconforming building.*** For purposes of this article, the term “*nonconforming building*” means a building or structure, or portion thereof, which was lawful prior to the adoption of any ordinance from which this code is derived, or the adoption of any revision or amendment to this code, or the adoption or amendment to the comprehensive plan, but which fails, by reason of such adoption, revision, or amendment, to conform to specific requirements where the building or structure is located due to its size, dimension, location on the

lot, number of dwelling units or guest units, building type, or compliance with floodplain regulations. See division 2 of this article for regulations on nonconforming buildings.

(c) ***Nonconforming use.*** For purposes of this article, the term “*nonconforming use*” means a use or activity which was lawful prior to the adoption of ~~the any ordinance from which this chapter code is derived, or the adoption of any revision or amendment to of this code, or the adoption or amendment to the comprehensive plan, but which fails, by reason of such adoption, revision, or amendment, to conform to the use requirements of the zoning district in which where the property is located.~~ See division 3 of this article for regulations on nonconforming uses.

(d) ***Nonconforming lot.*** For purposes of this article, the term “*nonconforming lot*” means a lot of which the area, dimension, or location was “lawful” (see definition in §34-2) prior to the adoption of any ordinance from which this code is derived, or prior to the adoption of any revision or amendment to this code, and which fails by reason of such adoption, revision, amendment, or rezoning to conform to the requirements where the lot is located. However, a lot which no longer conforms due to the adoption or revision of any comprehensive plan can only be developed in accordance with § 34-3274. See division 4 of this article for regulations on nonconforming lots.

### Sec. 34-3203. Illegal buildings, uses, and lots.

If a building, use, or lot was not lawful when created and cannot be lawfully modified to comply with this code, it shall not be considered nonconforming but shall be deemed an illegal building, use, or lot and thus not afforded the protection provided by this article to nonconforming buildings, uses, or lots.

- (1) Illegal buildings or uses must be lawfully modified to comply with this code or must be removed in accordance with § 34-1(c).
- (2) Illegal lots must be lawfully combined with adjoining land so as to conform with this code, or must remain vacant but still be maintained in accordance with the property maintenance code in division 1, article I, ch. 6 of this code and other town regulations.

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<sup>3</sup> *Cross reference(s)–Nonconforming marine structures, § 26-48; nonconforming structures on the beach, § 27-51(c)(6); nonconforming beach rental licenses, § 27-53, § 27-55; nonconforming signs generally, § 30-565; nonconforming signs on Captiva Island, § 30-251 et seq.*

**Sec. 34-3204. Amortization.**

Notwithstanding the general provisions of this article, other portions of this code may require that specific types of nonconforming buildings and uses must be modified into conformance with this code, or be eliminated, by a specific date. Such dates are established to allow owners a reasonable period to amortize the value of the nonconforming building or use.

**Sec. 34-3205. Reserved.**

Sec. 34-3203. Enlargement or expansion of nonconforming structure:  
*[moved to § 34-3234(a)]*

Sec. 34-3204. Mobile home and recreational vehicle unit replacements and roof repairs:

Any mobile home or recreational vehicle unit which has been lawfully placed on any rental lot within any rental park, regardless whether the park has been converted to either cooperative or condominium ownership prior to June 25, 1986, may be replaced by a unit of equal or smaller size upon proof that the placement of the unit was lawful. Such proof may consist of copies of official tax records, tag registrations or county permits, or may be by affidavit or any other competent evidence.

*[subject relocated to § 34-694(a)(1)c.]*

Permits shall also be issued for reroofing and roof repairs for any existing mobile home or recreational vehicle located within a mobile home or recreational vehicle park, regardless of lot size:

*[moved to §§ 34-694(c) & 34-3233(a)(4)]*

Sec. 34-3205. Uses approved by special exception or permit:

*[moved to § 34-3246]*

**Sec. 34-3206. Nonconformities created by public acquisition, eminent domain proceedings:**

Public acquisition of a portion of a lot might cause the remainder to become nonconforming as to area, width, depth, setbacks, floor area ratio, or required parking.

- (1) To minimize the adverse effects of such acquisition, previous lawful buildings, structures, or lots that might be rendered

nonconforming as to compliance with a specific requirement of this code shall be deemed conforming with that requirement rather than nonconforming.

- (2) This applies whether the acquisition occurred by eminent domain, purchase, or a publicly accepted donation of land or easements.

A structure, lot, tract, or parcel of land that has been or will be rendered nonconforming as to area, width, depth, setbacks, lot coverage, or parking because of a taking through eminent domain proceedings or by the voluntary sale of a parcel of land under the threat of eminent domain proceedings by a governmental authority, after October 15, 1992, will be deemed conforming under the terms of this chapter.

**Secs. 34-3207--34-3230. Reserved.**

**DIVISION 2:  
NONCONFORMING USE OF LAND**

Sec. 34-3221. Generally:  
*[redundant with division 3 of this article]*

A nonconforming use of land may be continued subject to the provisions of this division:

Sec. 34-3222. Enlargement or replacement:  
*[redundant with §§ 34-3242 and 34-3243]*

No nonconforming use of land shall be extended or enlarged, or replaced by another use not specifically permitted in the zoning district concerned:

Sec. 34-3223. Discontinuance:  
*[redundant with § 34-3244]*

No land used in whole or in part for a nonconforming use, which use is subsequently discontinued for a continuous period of six calendar months, shall again be used except in conformity with the regulations then in effect. The intent of the owner, lessee, or other user shall not be relevant in determining whether the use has been discontinued:

Sec. 34-3224. Erection of additional structures:  
*[moved to § 34-3242(b)]*

**Secs. 34-3225--34-3240. Reserved.**

**DIVISION 2.3-**  
**NONCONFORMING BUILDINGS**  
**AND USE OF BUILDINGS**

**Sec. 34-32341. Nonconforming buildings defined.**  
and structures:

For purposes of this division, the term “*nonconforming building or structure*” means a building or structure, or portion thereof, which was lawful prior to the adoption of the any ordinance from which this chapter code is derived, or the adoption of any revision or amendment to of this chapter, code, or the adoption or amendment to the comprehensive plan, but which fails, by reason of such adoption, revision, or amendment, to conform to specific the proper development requirements of the zoning district in which where the building or structure is located due to its size, dimension, location on the lot, number of dwelling units or guest units, building type, or compliance with floodplain regulations. or location on the lot.

**Sec. 34-3232. Continued use of a nonconforming building.**

The occupancy of a nonconforming building structure may be continued so long as it remains otherwise lawful. However, if the specific use of a nonconforming building is itself nonconforming, then that use is also subject to the provisions of division 3 of this article. subject to the following provisions:

- (1) Except as provided in § 34-3203, no such building or structure may be enlarged; altered, or repaired in a way which, in the opinion of the department director or his designee, increases its nonconformity, but any structure or building or portion thereof may be altered to decrease its nonconformity. If there is more than one structure on a property with a legally nonconforming use, a limited expansion may be allowed subject to there being a determination that there will be an improvement to neighborhood compatibility. The limited expansion shall be to allow a structure or portion of a structure to be destroyed and the equivalent square footage replaced by expansion of another existing structure if the department director makes a determination that such expansion would not be detrimental to the neighborhood

and such expansion is less than 50 percent of the current assessed value of the structure which will be expanded. Any expansion must also conform to setback requirements and all other requirements for the zoning district in which the property is located.

- (2) Except as provided in this section:
  - a. Any nonconforming structure or building, or portion thereof, that is substantially improved (reconstructed, rehabilitated, altered, or demolished) to the extent that the cost of such improvement equals or exceeds a cumulative total of 50 percent of the current assessed value of the structure before the start of construction of the improvement) shall only be reconstructed at, but not to exceed, the lawful density or intensity existing at the time of destruction; provided, however, that the reconstruction of the structure is consistent with federal, state, and local regulations, and all the other provisions of this chapter. Any such alteration, demolition, reconstruction, or rebuilding shall be recorded with the division of codes and building services for the purpose of establishing the value upon which subsequent alterations, demolition, reconstructions, or rehabilitations shall be based.
  - b. Structures which have been damaged by fire or other natural forces to the extent that the cost of their reconstruction or repair exceeds 50 percent of the replacement cost of the structure may be reconstructed at, but not to exceed, the legally documented actual use, density, and intensity existing at the time of destruction, thereby allowing such structures to be rebuilt or replaced to the size, style, and type of their original construction, including their original square footage; provided, however, that the affected structure, as rebuilt or replaced, complies with all applicable federal, and state regulations, local building and life safety regulations, and other local regulations which do not preclude reconstruction otherwise intended by the Lee Plan and Ordinance No. 90-61 of the county, as amended from time to time.
- (3) A lawfully existing single-family residence or mobile home damaged by fire or other natural forces may be repaired or replaced;

provided the new unit is no larger in area, width, and depth than the size of unit being replaced:

- (4) ~~Repairs, reconstruction, or renewal of an existing structure, building, or portion thereof, for the purpose of its maintenance shall be permitted:~~  
*[subject moved to § 34-3233(a)]*  
However, repairs, reconstruction, or renewal of structural elements shall be reviewed by the director of the division of codes and building services to determine applicability under this section, or whether such repairs shall be considered under subsection (b)(2)a of this section. For purposes of this section, a change in the roofline from a flat roof to a peaked roof shall constitute an alteration as indicated in subsection (b)(2)a of this section, provided that there is no increase in floor area. *[subject moved to § 34-3233(b)]*

#### **Sec. 34-3233. Repairing a nonconforming building.**

(a) Internal repairs, reconstruction, and renewal may be made to nonconforming buildings in accordance with this section.

- (1) A nonconforming building may be altered to decrease its nonconformity.
- (2) Awnings and canopies may be attached to nonconforming buildings as provided in § 34-637(d)(1)c.
- (3) Commercial antennas may be installed on nonconforming buildings in accordance with § 34-1443(d).
- (4) Permits may shall also be issued for reroofing and roof repairs for any existing mobile home or recreational vehicle located within a mobile home or recreational vehicle park, regardless of lot size.  
*[subsection (4) moved from § 34-3204]*

(b) Internal repairs, reconstruction, and renewal of certain nonconforming buildings are limited in scope because the town desires for these buildings to be reconstructed in compliance with this code.

- (1) The limitations in this subsection apply only to buildings that are nonconforming:
  - a. due to density or intensity (see § 34-3234(b)(3)), or
  - b. due to floodplain regulations (see § 34-3234(b)(4)), or
  - c. due to building type (see § 34-3234(b)(5)).

- (2) For such nonconforming buildings, the director shall determine whether the repairs, reconstruction, or renewal, alone or in conjunction with other permitted improvements or enlargements, are major enough to be considered a “substantial improvement,” as that term is defined in § 6-405. See § 34-3234(b)(1) for details.

#### **Sec. 34-3234. Enlarging a nonconforming building.**

(a) The following types of A nonconforming buildings may be physically enlarged, either laterally or vertically, so long as they it remains otherwise lawful, as follows: and the enlargement is in accordance with the regulations in this subsection:

Sec. 34-3203. Enlargement or expansion of nonconforming structure.

- (1) (a) structures **If nonconforming due to setbacks.** A nonconforming building structure which is lawful in all respects with the exception of a setback requirement or build-to line (see § 34-662) may be enlarged, provided that:
  - a. (†) The enlargement is otherwise permitted; and
  - b. (2) The enlargement itself, including any enlargement which increases the height or volume of the structure, complies with all the setback requirements and fully complies with any applicable build-to lines.c. Also see § 34-268 regarding certain administrative setback variances that may be available for nonconforming buildings.
- (2) (b) structures **If nonconforming due to lot area.** A nonconforming building structure which is lawful in all respects with the exception of lot area requirements may be enlarged, provided that:
  - a. (†) The enlargement is otherwise permitted;
  - b. (2) All other property development requirements such as setbacks, height, bulk, lot coverage, floor area ratio, density, intensity, parking, and open space are met; and
  - (3) The enlargement does not increase the density or intensity of use.
- (3) (c) structures **If nonconforming due to height.** A nonconforming building structure

which is lawful in all respects with the exception of height restrictions may be enlarged, provided that:

- a. (1) The enlargement is otherwise permitted; and
  - b. (2) The enlargement itself complies with current height and setback requirements.
- (4) ~~(d) structures~~ ***If nonconforming due to bulk or lot coverage floor area ratio.*** A nonconforming building structure which is lawful in all respects with the exception of bulk or lot coverage floor-area-ratio shall not be enlarged.

(b) Certain other types of nonconforming buildings have special limitations on the extent to which they may be repaired and physically enlarged because the town desires for these buildings to be reconstructed in compliance with this code.

- (1) The combined cost of enlargements and any repairs to such nonconforming buildings or structures shall be reviewed by the director to determine whether they are major enough to be considered a “substantial improvement,” as that term is defined in § 6-405.
  - a. If the improvements *do not* constitute a “substantial improvement,” their value shall be recorded with the director for the purpose of establishing the extent of allowable future repairs, enlargements, or replacements, using the same methodology as for improvements in the floodplain (article IV of ch. 6).
  - b. If the improvements constitute a “substantial improvement,” they will be approved only if they result in the building fully complying with all regulations for new buildings on vacant land, except as provided in the buildback regulations found in §§ 34-3237 and 34-3238.
- (2) These special limitations on “substantial improvements” apply to the following types of nonconforming buildings, in addition to the specific limitations provided below for each type.
- (3) ***If nonconforming due to density or intensity.*** A building, or a group of buildings or structures, may be nonconforming because there are more residential dwelling units, or more guest units, or a greater floor-area-ratio, than currently permitted by this chapter or by the Fort Myers Beach Comprehensive Plan. Substantial improvements to such buildings

may not physically enlarge them, either laterally or vertically, and they may not be replaced, except under one of the following three circumstances:

- a. If the enlargement or replacement complies entirely with this code and the comprehensive plan as they apply to new buildings on vacant land, including the current density limits on dwelling units and guest units, current height limits, and current caps on floor-area-ratio; or
  - b. If the replacement has been approved by the town council in accordance with the pre-disaster buildback regulations, as described in § 34-3237; or
  - c. If the building is damaged or destroyed by a natural disaster and its replacement meets all requirements of the post-disaster buildback regulations, as described in § 34-3238.
- (4) ***If nonconforming due to floodplain regulations.*** A nonconforming building whose lowest floor does not meet the base flood elevation requirements for new buildings can only be expanded in accordance with the standards in § 6-472.
- (5) ***If nonconforming due to building type.*** Certain buildings are nonconforming due to fundamental design and construction differences between them and new buildings that are permitted in the same zoning district.
  - a. ***Building type described.*** Examples include recreational vehicles or mobile homes in zoning districts that do not permit them; automobile service stations or drive-through facilities in pedestrian-oriented commercial districts, and storefront buildings in residential districts. However, buildings that might be considered nonconforming solely due to technical changes in the building codes (which are described in article II of ch. 6) are not classified as nonconforming buildings for the purposes of this article and may be expanded if they are otherwise in conformance with all requirements for their location.
  - b. ***Mobile homes outside mobile home parks.*** See § 34-1921.
  - c. ***Mobile homes in mobile home parks.*** See §§ 34-694 and 34-1922.
  - d. ***Other nonconforming building types.*** Other buildings that are nonconforming due to

building type cannot be “substantially improved” as described in § 6-405 unless they are altered to eliminate this type of nonconformity.

#### **Sec. 34-3235. Moving a nonconforming building.**

(a) (5) Should a nonconforming building structure be moved on-site for any reason, for any distance whatever, it shall not be moved unless the relocation decreases the nonconformity.

(b) A nonconforming building that is being moved off-site shall only be placed on its new site in full conformance with this code.

(c) See §§ 34-223 and 34-3103 regarding permits for moving buildings.

(6) Any portion of a nonconforming structure which becomes physically unsafe or unlawful due to lack of repairs and maintenance, and which is declared unsafe or unlawful by a duly authorized county official, but which the owner wishes to repair, restore, or rebuild, shall be repaired, restored, or rebuilt in conformance with the provisions of this chapter. Excluded from this provision are buildings which have been designated as historic by ch. 22.

#### **Sec. 34-3236. Replacing a nonconforming building.**

Nonconforming buildings can be replaced in one of the following manners:

- (1) In full conformance with all current provisions of this code as they apply to new buildings on vacant land; or
- (2) In the same manner as provided for enlargements to the various types of nonconforming buildings as provided in § 34-3234; or
- (3) As provided by the buildback regulations found in §§ 34-3237 and 34-3238.

#### **Sec. 34-3237. Pre-disaster buildback.**

Owners of buildings or groups of buildings that exceed the density, intensity, or height limits for new buildings may seek permission from the town council to voluntarily replace those buildings at up to the existing lawful density or intensity and up to the existing height in accordance with Policy 4-E-1

of the Fort Myers Beach Comprehensive Plan, as follows:

- (1) The replacement building must meet the floodplain regulations for new buildings, as provided in article IV of ch. 6.
- (2) The replacement building must meet the coastal construction requirements, as provided in article III of ch. 6 and in state regulations.
- (3) The replacement building must comply with all current building, life safety, and accessibility codes.
- (4) The replacement building cannot exceed the lawful density and intensity of the existing building:
  - a. as measured for residential buildings in § 34-3238(2)d.;
  - b. as measured for hotel/motels in § 34-3238(2)e.; or
  - c. as measured for all other buildings by the gross square footage.
- (5) Each specific pre-disaster buildback proposal must be proposed to the town council through the planned development rezoning process (see division 6 of article III of this chapter), along with any proposed deviations from this code.
- (6) The town council will approve, modify, or deny each such request based on its opinion of the degree of conformance of the specific proposal with the Fort Myers Beach comprehensive plan, specifically including the plan’s land-use and community design policies, pedestrian orientation, and natural resource criteria.
- (7) If the lowest floor of the rebuilt building must be elevated higher than the existing building to comply with current floodplain or coastal regulations, then the total height of the rebuilt building can be increased by the same amount. However, any pre-disaster buildback request for additional height beyond that increment must comply with Policy 4-C-4 of the comprehensive plan in the same manner as that policy would apply to an entirely new building on vacant land.

#### **Sec. 34-3238. Post-disaster buildback.**

Owners of buildings or groups of buildings that exceed the density, intensity, or height limits for new buildings and that are damaged or destroyed by a natural disaster, including fire, tropical storms, and

hurricanes, shall be permitted to replace those buildings at up to their existing lawful density, intensity, and/or height in accordance with Policy 4-D-1 of the Fort Myers Beach Comprehensive Plan.

- (1) **Less than 50% damage.** If the cost to repair the damaged building is less than 50% of the building's value and the repair is thus not a "substantial improvement" as that term is defined in § 6-405, then the following rules shall apply:
  - i. The repairs may be made without bringing the building into full compliance with the requirements of this code for building size, dimension, location on the lot, number of dwelling units or guest units, building type, or compliance with floodplain regulations.
  - b. The repairs may not physically enlarge the building either laterally or vertically.
  - c. All repairs must comply with all current building, life safety, and accessibility codes.
- (2) **More than 50% damage.** If the cost to repair or rebuild the damaged building is more than 50% of the building's value and is thus a "substantial improvement" as that term is defined in § 6-405, then the following rules shall apply:
  - a. The building must meet the floodplain regulations for new buildings, as provided in article IV of ch. 6.
  - b. The building must meet the coastal construction requirements, as provided in article III of ch. 6 and in state regulations.
  - c. The building must comply with all current building, life safety, and accessibility codes.
  - d. **Residential buildings.** A rebuilt residential building may exceed the density limits for new buildings on vacant land, but cannot exceed the legally documented number of dwelling units in the building immediately before the natural disaster.
    1. All dwelling units legally existing prior to the natural disaster may be rebuilt, provided the total interior square footage of the rebuilt dwelling units does not exceed the interior square footage of the previous dwelling units. For purposes of this subsection, interior square footage excludes hallways, stair towers, elevators, open balconies,

2. underbuilding parking, and similar common or non-air-conditioned space.
  2. At the owner's option, this same square footage can be used for fewer but larger dwelling units.
  3. Also at the owner's option, the size of the new building may instead be determined by this code's current regulations for new buildings on the same site.
- e. **Hotels/motels.** A rebuilt hotel/motel may exceed the intensity limits for new hotel/motel buildings on vacant land, but cannot exceed the documented number of lawful guest units in the building immediately before the natural disaster.
  1. All guest units lawfully existing prior to the natural disaster may be rebuilt, provided the total interior square footage of the rebuilt guest units does not exceed the interior square footage of the previous guest units. However, interior square footage in the new building may be increased by 30 square feet for each bathroom to reflect current code requirements for larger bathrooms, and any lawfully existing guest units that are smaller than the minimum sizes required by this code may be enlarged to meet the minimum size requirements. For purposes of this subsection, interior square footage excludes hallways, stair towers, elevators, open balconies, underbuilding parking, and similar common or non-air-conditioned space.
  2. At the owner's option, this same square footage can be used for fewer but larger guest units.
  3. Also at the owner's option, the size of the new building may instead be determined by this code's current regulations for new hotel/motel buildings on the same site.
- f. **All buildings.** The new building must comply with all other zoning and development regulations except where compliance with such regulations would preclude reconstruction otherwise intended by Policy 4-D-1 of the comprehensive plan. Specifically:
  1. If the lowest floor of the rebuilt building must be elevated higher than the damaged or destroyed building to

comply with current floodplain or coastal regulations, then the total height of the rebuilt building can be increased by the same amount.

2. If a rebuilt building must be set back further from any property lines due to current requirements of this code, then the volume of the building so reduced can be rebuilt elsewhere on the site, including one or more extra stories on the building if in the opinion of the director there is no other suitable location to replace the volume.
3. If current open space or buffer regulations cannot be met, those requirements may be waived administratively by the director.

**Secs. 34-3239--34-3240. Reserved.**

### **DIVISION 3. NONCONFORMING USES**

**Sec. 34-3241. Nonconforming uses generally. of buildings:**

(a) For purposes of this division, the term “nonconforming use” means a use or activity which was lawful prior to the adoption of any ordinance from which this code is derived, or the adoption of any revision or amendment to this code, or the adoption or amendment to the comprehensive plan, but which fails, by reason of such adoption, revision, or amendment, to conform to the use requirements where the property is located.

(b) A residential use may not conform because it contains one or more dwelling units more than are permitted under current regulations. If the extra dwelling unit(s) were fully lawful at the time they were created, for the purposes of this article they shall be deemed a *nonconforming building* rather than a *nonconforming use*. The regulations governing nonconforming buildings are found in division 2 of this article; see especially § 34-3234(b)(3) for restrictions on expanding buildings that are nonconforming due to density or intensity.

(c) A nonconforming use of a building, land, or building and land in combination; may be continued subject to the following provisions: limitations found in this division. If the nonconforming use is

located in a nonconforming building, the additional requirements of division 2 of this article shall also apply to the building.

**Sec. 34-3242. Enlarging a nonconforming use.**

(a) ~~(1) Enlargement or Replacement:~~ No such nonconforming use of a building, or building and land in combination, shall be extended or enlarged;

- (1) by having any buildings or structures replaced or expanded in physical size; or
- (2) by any increase in land or water area devoted to the nonconforming use; or
- (3) by any increase in the size or number or vehicles and boats, or increase in the capacity of services such as parking lots that would expand the operation of the nonconforming use.

(b) ~~Sec. 34-3224. Erection of additional structures:~~ No additional structures which does not conform to the requirements of this chapter shall be erected in connection with a nonconforming use of land.

(c) Nonconforming establishments that sell, serve, or allow the consumption of alcoholic beverages are further limited by § 34-1264(h).

(d) The installation of a commercial antenna on a building containing a nonconforming use will not be deemed to constitute an expansion of the nonconforming use (see § 34-1443(d)).

**Sec. 34-3243. Replacing a nonconforming use.**

No nonconforming use shall be ~~or~~ replaced by another building or use not specifically permitted in the use regulations for the zoning district in which the where the nonconforming use building is located.

**Sec. 34-3244. Discontinuing a nonconforming use.**

(2) ~~Discontinuance:~~ When a nonconforming use of a building, land, or building and land in combination is discontinued or abandoned for nine six consecutive months (~~except when government action impedes access to the land~~), the use building, or building and land in combination, shall not thereafter be used ~~carried out or reestablished~~ except in conformance with all current the regulations, of



the district in which it is located. This subsection shall not apply to seasonal agricultural uses.

**Sec. 34-3245. Repairing a building containing a nonconforming use.**

~~(3) Repair and maintenance. a. Only ordinary repairs and maintenance, including repairs or replacement of roof covering, walls, fixtures, wiring, or plumbing, shall be permitted on any building or structure devoted to a nonconforming use. In no case shall such repairs include structural alterations.~~

~~b. If a nonconforming structure or portion of a structure containing a nonconforming use becomes physically unsafe or unlawful due to lack of repairs and maintenance, and is declared by any duly authorized official to be unsafe or unlawful by reason of physical condition, it shall not thereafter be restored, repaired, or rebuilt except in conformity with the regulations for the district in which located.~~

**Sec. 34-324605. Nonconforming uses approved by special exception or permit.**

Uses approved by special exception or other permits which were issued or granted by the town council or board of county commissioners before the effective date of any the ordinance from which this chapter code is derived, and which are no longer permitted in the zoning district where located, shall be considered to be nonconforming uses and subject to the provisions of this article if the actual use was in operation within two years after its approval by special exception or other permit and has not thereafter been discontinued or abandoned for any nine consecutive months.

**Secs. 34-32473--34-3270. Reserved.**

**DIVISION 4. NONCONFORMING LOTS**

**Sec. 34-3271. Definition of nonconforming lot defined.**

(a) Lot means a parcel of land that has been created from a larger parcel and whose precise dimensions and location were identified through public notice (see § 34-3272).

*[modified from the previous definition, which was found in § 34-2]*

(b) For purposes of this division, the term “Nonconforming or substandard lot” means a lot of which the area, dimension, or location was “lawful” (see definition in § 34-2) prior to the adoption of the any ordinance from which this chapter code is derived, or prior to the adoption of any revision or amendment to of this chapter, code, or prior to being rezoned, and which fails by reason of such adoption, revision, or amendment, or rezoning to conform to the requirements where for the zoning district in which the lot is located. However, a lot which no longer conforms due to the adoption or revision of any comprehensive plan can only be developed in accordance with § 34-3274.

(c) See § 34-3234(a)(2) for the situation where a nonconforming building with a conforming use exists on a lot whose lot area is smaller than required by its zoning district.

**Sec. 34-3272. Lot of record defined; general development standards.**

For the purposes of this division only, a lot of record is a lot which conformed to the minimum lot size for the use permitted for that lot in its zoning district at such time that the lot was created, but which lot fails to conform to the minimum lot size requirements which are established by this chapter.

**Sec. 34-3272. Determining when a lot was created.**

(1) For the purpose of this division, a lot is deemed to have been “created” on such date that one of the following conditions occur, provided the configuration of the lot was not later altered:

(1) a. Individual deed. The date that a deed for the lot containing its full legal description was is lawfully recorded in the official public records books in the office of the clerk of the circuit court of the county;

(2) b. Subdivision plat. The date that a subdivision plat has been lawfully recorded in the plat books in the office of the clerk of the circuit court public records of the county, if the individual lot is clearly identified as a part of that the subdivision;

c. The date that a site plan for a development was approved by the board of county commissioners pursuant to resolution, as long as the development subsequently recorded a subdivision plat that has been approved by

the board of county commissioners in the public records of the county, if the lot is a part of the subdivision; or

d. In the case of mobile home or recreational vehicle parks, *[remainder of subsection deleted; portions applicable to Fort Myers Beach have been relocated to § 34-691-700]*

- (2) The remaining lot after condemnation shall be deemed a lot of record in accordance with § 34-3206. *[moved to § 34-3273(7)]*

### **Sec. 34-3273. General requirements for residential uses on nonconforming lots.**

(3) ~~Nonconforming~~ lots of record may be developed subject to the following provisions:

- (1) ~~a.~~ All other regulations of this chapter shall be met, except as modified by this division.
- (2) A residential building may be placed on a single nonconforming lot provided the lot has at least 40 feet in width, 75 feet in depth, and 4,000 square feet in area.  
*[substance moved from § 34-3273(b)(2)]*
- (3) Minimum residential setbacks on nonconforming lots shall be as follows:
  - a. Street setbacks shall be as set forth in the regulations for the applicable zoning district.
  - b. Side, rear, and water body setbacks shall be as set forth for lots in the RC zoning district (see Table 34-3).
  - c. Certain nonconforming lots may qualify for an administrative setback variance (see § 34-268).
- (4) Any development on nonconforming lots must comply with all density restrictions of the Fort Myers Beach Comprehensive Plan.
  - i. Density computations shall be in accordance with § 34-632.
  - b. If density computations do not allow even one dwelling unit on a nonconforming lot, one single-family residence may still be permitted if a minimum-use determination is obtained in accordance with § 34-3274.
- (5) ~~b.~~ No division of any nonconforming lot parcel may be permitted which creates a lot with width, depth, or area below the minimum requirements stated in this chapter, except for combinations and redivisions in accordance with § 34-3275, provided that contiguous lots of record may be combined and redivided to create larger dimension lots as long as such recombination includes all

parts of all lots, and existing allowable density is not increased, and all setback requirements are met. *[subject of remainder of subsection moved to § 34-3275(a)]*

c. ~~For mobile home or recreational vehicle lots of record, the following shall also apply:~~ *[remainder of subsection deleted; portions applicable to Fort Myers Beach have been relocated to § 34-694]*

- (6) (4) The burden of proof for demonstrating that a the lot is legally a nonconforming lot in accordance with this division, and lawfully existed at the specified date, shall be with the owner.
- (7) (2) The remaining lot after condemnation shall be ~~deemed a lot of record~~ treated in accordance with § 34-3206. *[moved from § 34-3272(2)]*

### **Sec. 34-32743. Minimum use determinations. Construction of single-family residence:**

(a) A single-family residence may also be constructed on a nonconforming lot of record which *does not* comply with the density requirements of the Fort Myers Beach Comprehensive Lee Plan, provided the owner receives a favorable administrative interpretation of the single-family residence provision (also known as a minimum use determination) in accordance with the Lee Plan, ch. 15 of the Fort Myers Beach Comprehensive Plan.

(b) To qualify for a minimum use determination, the following additional requirements must be met:

- (1) Minimum lot requirements:
  - a. Lot area of 4,000 square feet if the lot was created prior to 1962; or
  - b. Lot width of 50 feet and lot area of 5,000 square feet if part of a platted subdivision recorded between 1962 and 1984; or
  - c. Lot area of 7,500 square feet if not part of a platted subdivision created between 1962 and 1984; or
  - d. Lot width, depth, and area were in conformance with the zoning regulations if created after 1984; or
  - e. Lot sizes were explicitly approved as part of a planned development rezoning.
- (2) Ownership requirements:
  - a. Prior to November 21, 2000, the lot shall have been vacant or shall have been improved with one structure located wholly on this lot.

b. If a structure had been placed on two or more adjoining lots at any time prior to November 21, 2000, the individual lots shall not qualify for this determination.

(c) Lots qualifying for a minimum use determination may not place the home, accessory structures, or driveways on any land in the “Wetlands” or “Recreation” category on the future land use map of the comprehensive plan.

(d) The rights granted by a minimum use determination run with the lot and are available to any subsequent owner if the lot is transferred in its entirety.

(e) Applications for a minimum use determination shall be filed with the town clerk in accordance with ch. 15 of the comprehensive plan. Complete applications will be reviewed by the legal counsel for the local planning agency (see § 34-125(3)) and may be referred to the local planning agency for a decision (see § 34-120(6)).

(b) A single-family residence may also be constructed on a lot of record which *does* comply with the density requirements of the Lee Plan, as long as the lot was lawfully created prior to June 1962 and the following conditions are met:

- (1) Lots existing in the AG-2 or AG-3 zoning district require a minimum width of 75 feet, a minimum depth of 100 feet and a lot area not less than 7,500 square feet.
- (2) Lots existing in any other zoning district which permits the construction of a single-family residence require a minimum of 40 feet in width and 75 feet in depth, and a lot area not less than 4,000 square feet.  
[substance moved to § 34-3273(2)]
- (3) The use of any single lot of record for any residential use other than a single-family residential use is prohibited where the area of the lot is less than 6,000 square feet. Neither a guest house nor servants’ quarters shall be permitted on a single lot of record having less than 7,500 square feet, or which is occupied by any dwelling unit or units other than one single-family residence.

(c) A single-family residence may also be constructed on a lot which complies with the density requirements of the Lee Plan, as long as the lot is part of a plat approved by the Board of County

Commissioners and lawfully recorded in the public records of the county after June 1962.

#### **Sec. 34-3275. Combining nonconforming lots.**

(a) Abutting nonconforming lots may be combined and redivided to create larger dimension lots as long as such recombination includes all parts of all lots, allowable density is not increased, and all setback requirements are met. Under these conditions the new lots do not need to meet this code’s dimensional requirements for new lots.  
[subject moved from § 34-3272]

(b) If two or more abutting nonconforming lots each qualify for the right to construct a single-family residence, and if the lots or parcels are located in a zoning district that permits two-family dwellings, the property owner may combine the lots to build a single two-family building in lieu of constructing two single-family residences.  
[moved from 34-1493(2)b.]

#### **Sec. 34-3276. Placement of Replacing a mobile home or recreational vehicle on a nonconforming lot.**

A single-family mobile home or a recreational vehicle may be replaced on a nonconforming lot of record only if allowed by the zoning district regulations and only in accordance with § 34-3234(b)(5), which lot is located within a mobile home or recreational vehicle park, as applicable, provided, however, that the park was properly zoned or approved by special permit for mobile home or recreational vehicle use, and provided further that minimum requirements as set forth in this section were met at the time the lot was created. These requirements are as follows:  
[remainder of subsection deleted]

#### **Sec. 34-3277. Commercial or industrial use on a nonconforming lot.**

(a) A commercial or industrial use of land may be commenced on a single nonconforming lot of record lawfully existing on February 4, 1978, on the effective date of the ordinance from which this chapter is derived, subject to the specific limitations and regulations set forth in this section, provided however, that the lot is zoned for such use. However, the lot must be appropriately located and adequate in size and dimension to accommodate the

use contemplated and all spatial requirements, i.e., proposed structures, setbacks, parking, access, surface water management facilities, and, where required, buffers; in addition to these specific requirements:

- (1) ***Lots created prior to 1962.*** If the nonconforming lot was lawfully created prior to June 1962, it must be at least 4,000 square feet in area and have a minimum width of 40 feet and a minimum depth of 75 feet. Minimum setbacks for structures are as follows:
  - a. Street setbacks, build-to lines, and water body setbacks shall be as set forth in the regulations for the applicable zoning district.
  - b. Side setbacks shall be 20 percent of lot width, or 15 feet, whichever is less.
  - c. Rear setbacks shall be one-half of the lot depth less the street setback, or five feet, whichever is greater, but not more than 25 feet.
- (2) ***Lots created 1962–1978.*** If the nonconforming lot was created between June 1962 and January 5, 1978, and was lawfully existing on February 4, 1978, it must be at least 7,500 square feet in area and have a minimum width of 75 feet and a minimum depth of 100 feet. Minimum setbacks for structures are as follows:
  - a. Street setbacks, build-to lines, and water body setbacks shall be as set forth in the regulations for the applicable zoning district.
  - b. Side setbacks shall be 15 feet.
  - c. Rear setbacks shall be one-half the lot depth less the street setback, or five feet, whichever is greater, but not more than 25 feet.

(b) ~~(3)~~ Nothing in this division section shall be construed to prohibit the rezoning of nonconforming lots ~~of record~~ into commercial ~~or industrial~~ districts where the public interest is served by such a rezoning.