

MACPZA SPRING CONFERENCE

Nonconformities

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1. Statutory Language

Minn. Stat. § 394.36 , subd. 1 states “any nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an official control under this chapter, may be continued, although the use or occupation does not conform to the official control. If the nonconformity or occupancy is discontinued for a period of more than one year, or any nonconforming building or structure is destroyed by fire or other peril to the extent of 50 percent of its estimated market value, any subsequent use or occupancy of the land or premises shall be a conforming use or occupancy.”

The terms repair, replacement, restoration, maintenance, and improvement, are not defined by statute. They can be defined by Ordinance. Samples are attached.

2. Prior Use Must be Lawful – Burden on Landowner

A use that is illegal from the outset cannot be classified as a legal nonconforming use just because it predates the township zoning ordinance. To be classified as a legal nonconforming use, the original use must have been legal under township, county, state, and federal laws. In *State v. Reinke*, a landowner had been operating a dog-breeding business continuously for a year and a half before the township passed an ordinance prohibiting three or more dogs on the premises. 702 N.W.2d 308, 310 (Minn. App. 2005). The landowner argued the business was a legal nonconforming use. The Court of Appeals disagreed, because “under the nonconforming use exception, the use of real property must be ‘lawfully existing’ at the time of the zoning change.” The business was in Chippewa County’s Urban Development District, which at the time required a conditional use permit for commercial uses. The landowner had not applied for or received a conditional use permit – making the use unlawful. Therefore, the use “cannot lawfully continue under the preexisting nonconforming use exception.” Always make sure a preexisting use complies with laws at every level. If they are not fully compliant, they cannot be classified as a legal nonconforming use.

If a property owner is claiming to have a legal nonconforming use, they have the burden to establish the use was legal. “The party seeking to continue a nonconforming use bears the burden of proving that an exception is warranted.” *Northgate Homes, Inc. v. City of Dayton*, 126 F.3d 1095, 1100 (8th Cir. 1997)(citing *Freeborn Cty. v. Claussen*, 295 Minn. 96, 99, 203 N.W.2d 323, 326 (1972)).

A landowner also cannot claim to rely on the passing of time. Uses can often span decades. But the passage of time does not make a previously illegal use of land legal for purposes of nonconformity. *John Wright & Assocs., Inc. v. City of Red Wing*, 254 Minn. 1, 6, 93 N.W.2d 660, 664 (1958). It is clear that a “mere lapse in time does not diminish a

town's ability to enforce its zoning ordinances." *Stillwater Twp. v. Rivard*, 547 N.W.2d 906, 910 (Minn. App. 1996).

3. Replacement

A legal nonconforming use can continue indefinitely, subject to a series of statutory limitations. The "Legislature defined the term 'continue' to include certain activities, such as 'repair, replacement, restoration, maintenance, or improvement,' so long as those activities were non-expansionary." *AIM Dev. (USA), LLC v. City of Sartell*, 946 N.W.2d 330, 337 (Minn. 2020).

In *AIM Dev. (USA), LLC v. City of Sartell*, there was a nontoxic industrial waste landfill that existed as a legal nonconforming use. When the landfill became a legal nonconforming use, it received all its waste from a paper mill, which subsequently burned down. After the paper mill burned down, the owners of the landfill sought to accept nontoxic waste from a new source to continue their business. The Minnesota Supreme Court had to decide whether accepting waste from a new source is a continuation of the original nonconforming use. The Court held the landfill can receive nontoxic waste from a new source because the landowners are allowed to **replace** a nonconforming use. The Court relied on the definition of replace, which means "to take the place of or fill the role of or to provide a substitute for." Here, the Court allowed nontoxic waste from another source as a substitute for the waste previously provided by the paper mill.

Also under replacement, the Supreme Court explained a landowner is entitled to upgrade their equipment "so long as the new equipment was 'merely an improvement over the previous method and did not constitute a change in the nature and purpose of the original use.'" 946 N.W.2d at 338; quoting *Hawkins v. Talbot*, 248 Minn. 549, 554, 80 N.W.2d 863, 866-67 (1957).

4. Expansion is Prohibited

Legal nonconformities are not permitted to expand. See Minn. Stat. § 462.357, subd. 1e. It is a "well-established rule that municipalities are not required to let nonconformities expand, and may restrict any existing nonconforming uses in a way which will be conducive to their ultimately being phased out." *AIM Dev. (USA), LLC*, 946 N.W.2d at 345; citing *Hawkinson v. Cty. of Itasca*, 304 Minn. 367, 231 N.W.2d 279, 282 (1975). "The public policy behind that doctrine is to increase the likelihood that such uses will in time be eliminated due to obsolescence, exhaustion, or destruction. This in turn will lead to a uniform use of the land consistent with the overall comprehensive zoning plan." *Freeborn Cty. v. Claussen*, 295 Minn. 96, 99, 203 N.W.2d 323, 325 (1972). The

legislature wants all properties to conform to zoning ordinances, but they must respect constitutional property rights. By limiting expansion, the Legislature strikes a balance between these conflicting interests.

In *AIM Dev.* the Court had to decide whether to strictly interpret the statute prohibiting expansion or to make a judicial exception for the landfill's special use. The Court made an exception, because prohibiting the landfill to expand "would truncate the landowners' vested right to continue to operate an industrial waste facility." Other special uses mentioned in the decision are quarries and gravel pits. Quarries, gravel pits, and landfills are unique. But staying true to the public policy behind limiting expansion, courts will likely not allow these uses to purchase more land, increase the rate of output or input, or change the nature of the business.

5. Nonconformity Rights – Waiver

A legal nonconforming use is a protectable property right. In *White v. City of Elk River*, Lorraine White (White) owned a campground, which became a legal nonconforming use after the city enacted zoning ordinances prohibiting campgrounds. Subsequently, the city amended the ordinance to allow campgrounds as a conditional use, subject to a conditional use permit (CUP). White obtained a conditional use permit for the campground so they could obtain liquor and other licenses. The CUP imposed nine conditions on the campground. Then the city amended its ordinance again, this time prohibiting campgrounds altogether. Later, the city inspected the property and found the campground to be in violation of the CUP. When White failed to correct the violations, the city revoked the CUP. White brought suit claiming to still have a legal nonconformity.

The Court agreed, concluding "that a landowner does not surrender the right to continue a nonconforming use by obtaining a conditional-use permit unless the landowner validly waives that right." *Id.* at 51. Under Minnesota law, valid waiver requires "(1) knowledge of the right, and (2) an intent to waive the right." *Id.* Here, White's application for a conditional-use permit, standing alone, cannot constitute a valid waiver.

The Court ruled that a municipality's power to terminate a nonconforming use is limited by statute to only four ways: (1) Abandonment, (2) Destruction, (3) Nuisance, and (4) Eminent Domain. Revoking a CUP to terminate a nonconforming use is not authorized by statute. *Id.* Therefore, the city's attempt to revoke the nonconformity using that method must fail. *Id.* The key takeaway from this case is a legal nonconforming use is a protected property right that can only be revoked by means provided by statute.

6. Abandonment v. Discontinued use for more than 1 year

A legal nonconforming use loses its protected status if the use is discontinued for more than a year. See § 394.36 The question turns to when the use was discontinued.

Discontinued case – *AIM II*. Use and discontinuation are generally questions of fact. See *Peterson*, 469 N.W.2d at 468, 471 (affirming district court's determination that landowner's nonconforming use of property was discontinued based on witness testimony and presentation of evidence at trial). City of Sartell argued it is entitled to summary judgment as a matter of law because the record demonstrated AIM discontinued using the property for more than one year. AIM argued that, although it has not deposited waste in the landfill since its purchase in 2013, it has nevertheless “used” the landfill by monitoring and maintaining it.

Abandonment case - In *Meleyco P' ship No. 2 v. City of W. St. Paul*, a landowner owned a commercial property with a large pylon sign. 74 N.W.2d 440, 442 (Minn. App. 2016). The sign became a legal nonconforming use when the city enacted an ordinance restricting pylon signs. The commercial building was leased to a tenant who ceased using the property for retail operations in November 2012, but still used the property for storage. The pylon sign was completely covered in April 2013. In February 2014, the city informed the property owner by letter that the sign had been abandoned for over a year and was no longer a legal nonconforming use. The Court of Appeals disagreed, ruling that the use was continued when the property owner allowed the tenant to cover the sign in April 2013. Therefore, the city's February 2014 letter was incorrect because at that point the use had only been discontinued for 10 months.

7. Destruction – Over 50% of use's market value

A legal nonconforming use may lose its status if it is:

1. “destroyed by fire or other peril to the extent of greater than 50 percent of its estimated market value, as indicated in the records of the county assessor at the time of damage;” and
2. “No building permit has been applied for within 180 days of when the property is damaged. In this case, a municipality may impose reasonable conditions upon a zoning or building permit in order to mitigate any newly created impact on adjacent property or water body.” Minn. Stat. § 394.36, subd. 4

There are two main issues here. First, what kind of “other perils” are covered? And second, when does the 180 day period begin to run? The Court of Appeals provided insight into both in *Ortell v. City of Nowthen*, 814 N.W.2d 40 (Minn. App. 2012).

In *Ortell*, a landowner owned an old farmhouse within the 150 foot setback, making it a legal nonconformity. 814 N.W.2d 40, 42. The landowner applied for and received a permit to replace the roof, siding, and windows of the house. *Id.* In October 2007 during construction, a roofer accidentally swung a boom into the house's rotten frame causing it to collapse – diminishing the value beyond 50% market value. In November 2007, the owner began rebuilding the home without a permit. The City issued a stop-work order, and provided the owner with an application for a building permit to repair the structure. The owner suffered health problems before he could complete the application. In January 2010 the owner applied for a variance to rebuild the house on the existing structure. The City denied the request.

The Court held the 180 day period begins to run when the use is destroyed. “If a building permit is applied for within 180 days of the damage, the municipality [then] may impose reasonable conditions on the building permit to mitigate any newly created impact on adjacent properties or water body. But if no building permit is applied for within 180 days of the damage, the nonconformity must end and any subsequent use or occupancy must be a conforming one.” *Ortell*, 814 N.W.2d 40, 44–45. Additionally, the holding implicitly confirms that destruction caused by “other perils” applies to human error and accidents. If a nonconforming use is destroyed beyond 50% of its value, the owner has 180 days after its destruction to apply for a building permit. If they do not, the use is no longer protected as a legal nonconformity.

8. Nuisance / Conditions

Counties may, by ordinance, “adopt such regulations not contrary to law as it deems desirable or necessary to classify, regulate and control, reduce the number or extent of and provide for the gradual elimination of nonconformities and occupancies, including requiring nonconformities to conform with the official controls of the county or terminate within a reasonable time as specified in the official controls. The board may by ordinance impose upon nonconformities additional regulations relating to appearance, signs, lighting, hours of operation and other aesthetic performance characteristics including but not limited to noise, heat, glare, vibrations, and smoke.” Minn. Stat. § 394.36, subd. 2.

Municipalities may then act by enforcing an ordinance providing for the prevention or abatement of nuisances... or eliminating a use determined to be a public nuisance, as defined by statute without pay of compensation. The status as a legal nonconformity does not make a property immune from nuisance proceedings.

9. Purchase/Eminent Domain

Minn. Stat. § 394.36, subd. 3 “A nonconformity that is determined by the board to be detrimental to the achievement of the goals and objectives of the comprehensive plan may be acquired by the board by purchase.”

Additionally, so long as a County follows the procedural requirements, it can end a legal nonconformity using eminent domain.

10. Equitable Estoppel

To prevail in an estoppel action against a government entity, the plaintiff “has a heavy burden of proof.” *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980). To do so, a plaintiff must establish:

- (1) there must be “wrongful conduct” on the part of an authorized government agent.
- (2) the party seeking equitable relief must reasonably rely on the wrongful conduct.
- (3) the party must incur a unique expenditure in reliance on the wrongful conduct.
- (4) balance of the equities must weigh in favor of estoppel.

City of N. Oaks v. Sarpal, 797 N.W.2d 18, 25 (Minn. 2011).

Wrongful conduct does not include “simple inadvertence, mistake, or imperfect conduct.” *Sarpal*, 797 N.W.2d 18, 25. The wrongful conduct element of equitable estoppel requires some degree of malfeasance. *Kmart Corp. v. Cnty. of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006). In the context of a government official, malfeasance “has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful.” *Jacobsen v. Nagel*, 255 Minn. 300, 304, 96 N.W.2d 569, 573 (1959).

In *Saba v. City of Fridley*, a landowner claims that a local prosecutor promised him: if he built a fence around his land, the city would never enforce the city’s nuisance ordinances against him. No. A16-0705, 2016 WL 7337115, at *3 (Minn. App. Dec. 19, 2016). The Court of Appeals rejected this argument because a prosecutor does not have the authority to make a zoning decision. “A zoning decision can be made only by the city council after notice and a public hearing.” *Saba*, No. A16-0705, 2016 WL 7337115, at *3; citing Minn. Stat. § 462.357 (2014). “A party dealing with a governmental entity is presumed to know the law and to understand that he cannot rely on the conduct of a government agent who does not comply with the law.” *Saba*, No. A16-0705, 2016 WL 7337115, at *3; citing *Matter of Westling Mfg., Inc.*, 442 N.W.2d 328, 333 (Minn. App.

1989). In an equitable estoppel case regarding a legal nonconforming use, the wrongful conduct must be on the part of the authorized zoning authority.

SAMPLE ORDINANCE DEFINITIONS

“Expansion,” “enlargement,” or “intensification” means any increase in a dimension, size, area, volume, or height, any increase in the area of use, any placement of a structure or part thereof where none existed before, any addition of a site feature such as a deck, patio, fence, driveway, parking area, or swimming pool, any improvement that would allow the land to be more intensely developed, any move of operations to a new location on the property, or any increase in intensity of use based on a review of the original nature, function or purpose of the non-conforming use, the hours of operation, traffic, parking, noise, exterior storage, signs, exterior lighting, types of operations, types of goods or services offered, odors, area of operation, number of employees, and other factors deemed relevant to the county.

“Improvement” means making the non-conforming use better, more efficient, or more aesthetically pleasing, including any change that does not replicate what pre-existed, but does not include an expansion, enlargement or intensification.

“Replacement,” or “restoration” means construction that exactly matches pre-existing conditions.

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Section 111. Definitions as Used in this Ordinance

Expansion, enlargement, or intensification. Any increase in a dimension, size, area, volume, or height; any increase in the area of use; any placement of a structure or part thereof where none existed before; any addition of a site feature such as a deck, platform, fence, driveway, parking area, or swimming pool; any improvement that would allow the land to be more intensely developed; any move of operations to a new location on the property; or any increase in intensity of use based on a review of the original nature, function or purpose of the nonconforming use, the hours of operation, traffic, parking, noise, exterior storage, signs, exterior lighting, types of operations, types of goods or services offered, odors, area of operation, number of employees, and other factors deemed relevant by the County.

Nonconformity. “Nonconformity” means the same as that term is defined or described in Minnesota Statutes, chapter 394. (Note: To provide an idea of what this definition is, the “nonconformity” definition in MS 394.22 Subd. 8 on October 28, 2014 was: “Nonconformity” means any legal use, structure or parcel of land already in existence, recorded, or authorized before the adoption of official controls or amendments thereto that would not have been permitted to become established under the terms of the official controls as now written, if the official controls had been in effect prior to the date it was established, recorded or authorized.”)

Repairs and maintenance. An alteration of the interior or exterior portion of a structure that does not involve the replacement of the main structural frame, walls, or changes in the exterior dimensions of the structure.

Replacement, reconstruction, or restoration means construction that exactly matches pre-existing conditions.

Article VII

Nonconformities and Nonconforming Lots of Record

All legally established nonconformities existing as of the date of enactment of this Ordinance may continue provided that they are managed in accordance with applicable state statutes and the following standards. No nonconformity can be expanded, extended, or enlarged except as set forth in this Article.

Section 701. Nonconforming Uses

Any use legally established as of the effective date of this Ordinance which is not in conformity with the regulations contained in this Ordinance shall be considered a nonconforming use. A nonconforming use may be allowed to continue subject to the following conditions:

- A. No nonconforming use shall be expanded, enlarged, or altered, including any increase in volume, intensity, or frequency of use of the property where a nonconforming use exists. Structural alterations, expansions, and additions to a structure devoted in whole or part to a nonconforming use are prohibited as is the creation of a new structure where none previously existed.
- B. A change from one nonconforming use to another nonconforming use is prohibited.
- C. A nonconforming use of a parcel of land may not be extended to cover more land than was occupied by that use when it became nonconforming.
- D. A nonconforming use shall not be moved to any other part of the property on which it is located or to another property where it would still constitute a nonconforming use.

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- E. A lawful, nonconforming use of a structure or parcel of land may be changed to lessen the nonconformity of use. Once a nonconforming use has been so changed, it shall not thereafter be so altered to increase the nonconformity.
- F. If a nonconforming use is replaced by a permitted use, the nonconforming status and any rights that arise under the provisions of this section of the Ordinance are terminated.
- G. A nonconforming use that has been discontinued for a period of twelve consecutive months shall not be re-established, and any further use shall be in conformity with this Ordinance. Time will be calculated as beginning on the day following the last day in which the use was in normal operation and will run continuously thereafter.
- H. If a structure used for a nonconforming use is damaged to the extent that the cost of replacement, reconstruction, or restoration would exceed 50 percent of its estimated market value, as indicated in the records of the County Assessor at the time of damage, then the damaged structure shall not be replaced, reconstructed, or restored except in conformity with this Ordinance.

Section 702. Nonconforming Structures

Any structure legally established as of the effective date of this Ordinance which is not in conformity with the regulation contained in this Ordinance is a nonconforming structure and may be allowed to continue including through repair, replacement, restoration, maintenance, or improvement, but not including expansion, except in conformity with the following conditions:

- A. No nonconforming structure shall be expanded, enlarged, or intensified without first obtaining a variance unless each of the following conditions can be met:
 - 1. The expansion, enlargement or intensification does not further increase the nonconformity or violate any other standards of this Ordinance other than regulation(s) that made the structure nonconforming in the first place.
 - 2. An onsite sewage treatment system can be installed in accordance with Hubbard County Subsurface Sewage Treatment System Ordinance No. 41 or the nonconforming structure is connected to a public sewer.
 - 3. The structure is located outside of a shore impact zone or bluff impact zone.
 - 4. Should such structure be moved for any reason for any distance whatsoever other than in a manner that brings the structure more into compliance with this Ordinance, it shall thereafter conform to this Ordinance in its entirety after the structure is moved.
- B. A nonconforming structure that has been damaged by fire, explosion, natural disaster, or other peril to the extent of greater than 50 percent of its estimated market value, as indicated in the records of the County Assessor at the time of damage, shall not be replaced, reconstructed, restored, expanded, enlarged, or intensified except in conformity with this Ordinance with the exception that homestead and nonhomestead residential real estate and seasonal residential real estate occupied for recreational purposes may be continued including through repair, replacement, restoration, maintenance, or improvement, but not including expansion, if a land use permit has been applied for within 180 days of when the property was damaged. The Department may impose reasonable conditions on the land use permit in order to mitigate any newly created impact on an adjacent property or water body.

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When dealing with such homestead and nonhomestead residential real estate and seasonal residential real estate occupied for recreational purposes, for which a permit has been applied for within 180 days of when the property was damaged, if a nonconforming structure, which is located less than 50 percent of the required setback from the ordinary high water mark, has been damaged by fire, explosion, natural disaster, or other peril to the extent of greater than 50 percent of its estimated market value, as indicated in the records of the County Assessor at the time of damage, the Department may require an increased setback from the ordinary high water mark, if practicable and reasonable conditions are placed on the land use permit, to mitigate created impacts on the adjacent property or water body.

- C. Normal maintenance of a nonconforming structure including nonstructural maintenance and repair is allowed.
- D. Any construction project for which a valid land use permit was granted before the effective date of this Ordinance may be completed although the structure would not meet newly established standards of this Ordinance.

Section 703. Deck and Platform Additions

- 1. A deck or platform that does not meet setback requirements from public waters may be allowed without a variance to be added to dwelling unit structures existing on the date the shoreland structure setbacks were established by ordinance on July 12, 1971, if all of the following criteria and standards are met:
 - A. a thorough evaluation of the property and structure by the Environmental Services Department reveals no reasonable location for a deck or platform meeting or exceeding the existing ordinary high water level setback of the structure;
 - B. the deck or platform encroachment toward the ordinary high water level does not exceed fifteen (15) percent of the existing setback of the principal residential dwelling from the ordinary high water level, or does not encroach closer than thirty (30) feet, whichever is more restrictive.
 - C. the deck or platform is constructed of environmentally friendly materials, and the deck or platform is not roofed or screened;
 - D. Only one deck or platform per this Section is allowed for a dwelling unit on a lot.
 - E. The deck or platform must not be located in a bluff impact zone.

Section 704. Nonconforming Lots of Record

- 1. All lots or tracts, the plat or deed to which has been recorded in the Office of the County Recorder on or before the effective date of this Ordinance shall be considered a lot of record. Any such unimproved lot or tract may be used for the legal use for which it is zoned subject to the following conditions:
 - A. the use is permitted in the shoreland district;
 - B. the lot has been in separate ownership from abutting lands at all times since it became substandard;
 - C. the lot was created compliant with official controls in effect at that time;

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- D. the applicable setback requirements of this Ordinance are met;
 - E. the lot contains a minimum contiguous lawn area, that is free of limiting factors, sufficient for the construction of two standard onsite sewage treatment systems;
 - F. The lot contains an adequate supply of water for domestic purposes that meets or exceeds standards of the Minnesota Department of Health.
 - G. maximum impervious surface coverage shall be less than 25%; and
 - H. the following lot width standards are met:
 - 1. For Natural Environment Lakes a minimum of 150 feet in width.
 - 2. For Recreational Development Lakes a minimum of 100 feet in width.
 - 3. For General Development Lakes, River Segments and Tributaries a minimum of 75 feet in width.
2. In a group of two or more contiguous lots of record under a common ownership, an individual lot must be considered as a separate parcel of land for the purpose of sale or development if it meets the following requirements:
- A. The lot must be at least 66 percent of the dimensional standard for lot width and lot size for the shoreland classification consistent with Minnesota Rules, Chapter 6120.
 - B. The lot must be connected to a public sewer, if available, or must be suitable for the installation of a Type I subsurface sewage treatment system in accordance with Hubbard County Subsurface Sewage Treatment System Ordinance No. 41.
 - C. Impervious surface coverage must not exceed 25 percent of each lot.
 - D. Development of the lot must be consistent with the intent, purpose, and objectives of this Ordinance and the Hubbard County Comprehensive Land Use Plan.
3. If, in a group of two or more contiguous lots under the same ownership, any individual lot does not meet the requirements of Section 704, Item 2 of this Ordinance, the lot shall not be considered as a separate parcel of land for the purposes of sale or development. The lot must be combined with one or more contiguous lots so that they equal one or more parcels of land, each meeting the lot area and lot width requirements of Section 501 of this Ordinance as much as possible.
4. Contiguous nonconforming lots of record under a common ownership must be able to be sold or purchased individually if each lot met the "improved lot" definition in Section 111 of this Ordinance at the time the lots came under common ownership and the lots are suitable for, or served by, a subsurface sewage treatment system consistent with Hubbard County Subsurface Sewage Treatment System Ordinance No. 41 or connected to a public sewer.
5. Development on lots which do not meet the development standards detailed in this Section must be authorized by a variance pursuant to Article XI of this Ordinance. In evaluating the variance, the Board of Adjustment shall consider sewage treatment and water supply capabilities or constraints of the lot and shall deny the variance if adequate facilities cannot be provided.

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6. In evaluating all variances, zoning and land use permit applications, or interim or conditional use permit applications, the County shall require the property owner to address, when appropriate, storm water runoff management, reducing impervious surfaces, increasing setback, restoration of wetlands, vegetative buffers, sewage treatment and water supply capabilities, and other conservation-designed actions.
7. A portion of a conforming lot may be separated from an existing parcel as long as the remainder of the existing parcel meets the lot size and sewage system requirements of the zoning district for a new lot and the newly created parcel is combined with an adjacent parcel.