

MEMORANDUM

To: Sunriver Rules & Regulations Update Task Force

From: Paul Conte, 7 & 8 McKenzie Lane, Sunriver

Re: Adding a new Section 1.05 to the *Sunriver Rules & Regulations* —
Addressing Permitted Nonconforming Uses

Date: December 31, 2025

EXECUTIVE SUMMARY

Purpose of the New Section

The proposed new Section 1.05 in Exhibit A establishes clear rules for **Permitted Nonconforming Uses**—uses that were lawful when they began but later became nonconforming due to amendments to the *Sunriver Rules & Regulations* (R&R). Informally, this is often referred to as a “grandfather” right.

Adding this section would fill a significant void in the R&R and ensure fairness to owners. The proposed section would also provide predictable enforcement standards, and alignment of Sunriver’s governance with widely accepted legal principles.

Why the Amendment Is Needed

The R&R regulate many types of property uses (parking, signage, vegetation, lighting, commercial activities, noise, temporary accommodations, etc.) but contain no provisions addressing how previously lawful uses should be treated when rules change. This gap creates:

- **Uncertainty** for owners with long-standing uses
- **Inconsistent enforcement** when staff must informally decide whether a use is “grandfathered”
- **Inequity** between owners with similar historical uses but different documentation or staff interactions

A formal nonconforming use section would resolve these issues and harmonize the R&R with the *Design Manual’s* treatment of nonconforming development.¹

Key Features of the Proposed Section

- Protects uses that were lawful when they began
- No record of approval is required
- Allows continuation of such uses
- Prohibits expansion, intensification, relocation, or change to a non-permitted use

¹ The current *Design Manual* has a provision for “Nonconforming Development (Section 2.02) which attempts to address previously lawful development. However, the current text is seriously flawed and a separate communication to the Design Committee will recommend amendments consistent with the proposed new R&R section.

- Defines abandonment (12-month discontinuance or removal of a dependent physical element)
- Lists clear conditions under which nonconforming use status is lost
- Includes a reserved section for adding mandatory-compliance uses
- Integrates with existing enforcement authority (Community Development and Natural Resources Departments)

Legal and Policy Foundations

1. Fifth Amendment Principles — Protection of Vested Rights

Owners have a vested interest in uses that were lawful when established. Retroactively prohibiting such uses risks interfering with reasonable investment-backed expectations. Courts have long recognized the need to protect pre-existing lawful uses (e.g., *Village of Euclid v. Ambler Realty*; *Penn Central*; *Lucas*).

2. Fourteenth Amendment Due Process — Clarity and Non-Arbitrary Enforcement

Due process principles require clear, predictable rules. Without a formal framework, enforcement may become *ad hoc* and inconsistent. Courts emphasize the need for clear standards to prevent arbitrary application (e.g., *Grayned*; *Morales*).

3. Fourteenth Amendment Equal Protection — Consistent Treatment

A formal nonconforming use section prevents unequal treatment of similarly situated owners. Courts have invalidated inconsistent or irrational distinctions between property owners (e.g., *Olech*).

4. Alignment With Established Land-Use Doctrine

Zoning and land-use systems nationwide protect lawful nonconforming uses while limiting expansion and defining abandonment. (See **ORS 215.130**, **Deschutes County Code 18.80.058 Non-Conforming Uses**.) Courts consistently uphold these frameworks as reasonable and necessary (e.g., *Gage*; *Parrillo's*; *Austin*).

Benefits to Sunriver

- Protects owners' reasonable expectations
- Ensures fair, consistent, and predictable enforcement
- Reduces disputes and administrative burdens
- Aligns Sunriver with national best practices
- Strengthens the SROA's regulatory authority
- Harmonizes the R&R with the *Design Manual*

Conclusion

Adding **Section 1.05 — Permitted Nonconforming Uses** would be a prudent, legally grounded improvement that enhances fairness, clarity, and enforceability within the *Sunriver Rules & Regulations*. Adopting this section would protect owners while preserving the SROA's ability to regulate future uses and maintain community standards

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DISCUSSION

I. Purpose of the Amendment

This memorandum provides the legal and policy justification for adding a new section to the *Sunriver Rules & Regulations* (R&R) establishing a framework for **Permitted Nonconforming Uses**. The proposed section in Exhibit A would ensure that owners may continue uses that were lawful when they began, while preserving the SROA's authority to regulate future uses and prevent expansion or intensification of nonconforming conditions.

The amendment promotes fairness, predictability, and consistent enforcement, and aligns Sunriver's governance with long-standing constitutional principles and widely accepted land-use doctrine.

II. Background and Need for the Amendment

The R&R regulate a wide range of property uses, including parking, signage, vegetation, lighting, commercial activities, noise, temporary accommodations, and other conditions. However, the R&R currently contain **no provisions** addressing how uses that were lawful under prior rules should be treated when the rules change.

This gap creates three problems:

1. **Uncertainty for owners** who's long-standing uses may suddenly become noncompliant.
2. **Inconsistent enforcement** when staff must decide informally whether a use should be "grandfathered."
3. **Potential inequity** between owners with similar historical uses but different documentation or staff interactions.

A clear, formal section on permitted nonconforming uses resolves these issues and aligns the R&R with the Design Manual's parallel treatment of nonconforming development.

III. Constitutional Principles Supporting Protection of Nonconforming Uses

Although the SROA is not a governmental entity, the **Fifth and Fourteenth Amendments** provide widely recognized standards for fairness and protection of vested rights. Courts routinely apply these principles to private associations when evaluating reasonableness, notice, and consistency in rulemaking.

A. Fifth Amendment: Protection of Vested Property Rights

Owners acquire a vested right in uses that were lawful when established. Retroactively prohibiting such uses can resemble a regulatory taking because it destroys or diminishes an established property interest.

Courts have long held that lawful pre-existing uses cannot be extinguished without compensation or clear statutory authority:

- ***Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)** — Recognized the legitimacy of zoning but emphasized protection of pre-existing lawful uses.

- ***Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)*** — Established that interference with reasonable investment-backed expectations is a key factor in takings analysis.
- ***Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)*** — Reinforced that regulations eliminating all economically beneficial use require compensation.

While HOAs are not governments, these cases articulate the principle that **retroactive elimination of lawful uses is disfavored** and must be handled with care.

A permitted nonconforming use framework protects owners’ reasonable expectations while preserving the SROA’s regulatory authority.

B. Fourteenth Amendment: Due Process — Clarity, Predictability, and Non-Arbitrary Enforcement

Due process principles require that rules affecting property be:

- Clear
- Predictable
- Non-arbitrary
- Applied consistently

Courts have repeatedly invalidated regulations that lack clear standards or rely on discretionary, undocumented decision-making:

- ***City of Chicago v. Morales, 527 U.S. 41 (1999)*** — Struck down vague standards that allowed arbitrary enforcement.
- ***Grayned v. City of Rockford, 408 U.S. 104 (1972)*** — Emphasized the need for clear rules that give fair notice and prevent arbitrary application.

A formal nonconforming use section:

- Provides clear notice to owners
- Establishes objective criteria for continuation and loss of status
- Prevents inconsistent or ad hoc enforcement
- Reduces disputes and appeals

C. Fourteenth Amendment: Equal Protection — Consistent Treatment of Similarly Situated Owners

Equal protection principles require that similarly situated individuals be treated alike. Without a formal nonconforming use framework, owners with identical historical uses may be treated differently depending on:

- Whether staff informally “grandfathered” a use
- Whether documentation exists
- Whether a complaint was filed
- Which staff member handled the issue

Courts have repeatedly held that inconsistent treatment of similarly situated property owners violates equal protection principles:

- ***Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)** — Recognized “class of one” equal protection claims where a property owner was treated differently without rational basis.
- ***Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923)** — Invalidated unequal treatment of similarly situated property owners.

A clear nonconforming use section ensures uniform treatment and reduces the risk of arbitrary distinctions.

IV. Alignment with Established Land-Use Doctrine

Across the United States, zoning and land-use systems universally recognize and protect **nonconforming uses** that were lawful when established. Courts have consistently upheld such frameworks as reasonable and necessary:

- ***City of Los Angeles v. Gage*, 274 P.2d 34 (Cal. 1954)** — Affirmed that nonconforming uses may continue but cannot be expanded or intensified.
- ***Town of Belleville v. Parrillo’s, Inc.*, 416 A.2d 388 (N.J. 1980)** — Held that a change in the nature or intensity of a nonconforming use terminates its protected status.
- ***Austin v. Older*, 648 S.W.2d 137 (Mo. 1983)** — Recognized abandonment as a valid basis for loss of nonconforming use status.

The proposed R&R section mirrors these well-established principles:

- Continuation of lawful uses
- No expansion or intensification
- Loss of status upon abandonment
- Clear, objective standards

This alignment strengthens the defensibility and legitimacy of Sunriver’s regulatory framework.

V. Benefits of Adopting Section 1.05

Adopting the proposed section will:

- Protect owners’ reasonable expectations
- Provide clear, predictable rules
- Reduce disputes and enforcement inconsistencies
- Align Sunriver with national best practices
- Harmonize the R&R with the Design Manual’s treatment of nonconforming development
- Strengthen the SROA’s regulatory authority by grounding it in well-recognized legal principles

VI. Conclusion

Adding **Section 1.05 — Permitted Nonconforming Uses** is a necessary and prudent improvement to the Sunriver Rules & Regulations. It would protect owners’ vested rights, ensures fair and consistent enforcement, and align Sunriver’s governance with long-standing constitutional principles and established land-use doctrine. The amendment provides clarity for owners, staff, and the Design Committee, and strengthens the SROA’s ability to regulate uses going forward.

EXHIBIT A. Proposed New Section 1.05 Permitted Nonconforming Uses

SECTION 1.05 — PERMITTED NONCONFORMING USES

1.05.01 Purpose

The purpose of this section is to establish fair, predictable, and consistent rules governing uses of property that were lawful when they began but have become nonconforming due to subsequent amendments to these Sunriver Rules & Regulations. This section ensures that such uses may continue under defined conditions while maintaining the SROA's ability to regulate future uses and protect community standards.

1.05.02 Definition

A **Permitted Nonconforming Use** is a use of land, a structure, or an improvement that:

1. Was lawful and in compliance with the Rules & Regulations in effect at the time the use began;
2. Became nonconforming solely because of later amendments to these Rules & Regulations; and
3. Has continued without abandonment as defined in Section 1.05.05.

No record of prior approval is required for a use to qualify as a Permitted Nonconforming Use.

1.05.03 Continuation of Permitted Nonconforming Uses

A Permitted Nonconforming Use may continue, subject to the limitations and requirements of this section. Continuation is allowed only to the extent the use existed at the time it became nonconforming.

1.05.04 Limitations on Nonconforming Uses

A Permitted Nonconforming Use shall not be:

1. Expanded beyond the scope, scale, or area of the use as it existed when it became nonconforming;
2. Intensified in frequency, duration, or impact;
3. Relocated to another portion of the property, where location is relevant to the nature of the use; or
4. Changed to any use that is not permitted under current Rules & Regulations.

Any such action results in the immediate loss of nonconforming use status.

1.05.05 Abandonment

A Permitted Nonconforming Use is deemed abandoned when:

1. The use is discontinued for a period of twelve (12) consecutive months; or
2. The use is voluntarily discontinued by the owner; or
3. The use depends on a physical element (such as a sign, enclosure, or similar feature) that is removed and not replaced in substantially the same form within sixty (60) days.

Upon abandonment, the use may not be reestablished except in full compliance with current Rules & Regulations.

1.05.06 Loss of Nonconforming Use Status

A Permitted Nonconforming Use loses its status and must thereafter comply with current Rules & Regulations if any of the following occur:

1. Expansion of the use;
2. Intensification of the use;
3. Relocation of the use, where location is relevant;
4. Change to a non-permitted use;
5. Abandonment as defined in Section 1.05.05; or
6. Removal of supporting improvements, but only where the use logically depends on such improvements for its existence.

Once nonconforming use status is lost, the use may not be resumed except in full compliance with current Sunriver Rules & Regulations.

1.05.07 Mandatory Compliance Uses (Reserved)

Certain uses may be designated by the Board of Directors as requiring compliance with current Rules & Regulations regardless of nonconforming status. This subsection is reserved for future designation by SROA Executive Board adoption.

1.05.08 Enforcement

The Community Development Department and the Natural Resources Department, acting as representatives of the Design Committee, are authorized to administer and enforce this section in conformance with these Sunriver Rules & Regulations and any applicable provisions of the Design Committee Manual of Rules and Procedures.