



## **VESTING FAQs:**

# **How Changes in Land Use Regulations May Affect Land Use Review and Building Permit Applications (updated October 5, 2021)**

### **Regulatory changes**

The City's Comprehensive Plan and two of its implementation tools –the zoning maps and zoning code (Title 33) – undergo periodic updates. Applicants often ask the Bureau of Development Services (BDS) staff about the anticipated timeline for adopting changes, when the proposed changes will become effective, how the changes will apply to land use review and building permit applications that may be “in the pipeline”, and how to become vested in the current zoning regulations. This handout explains the vesting process (the terms “vest,” “vested,” and “vesting” are used to describe when a development application will be reviewed under the zoning regulations in effect at the time of the application.) This handout is intended to offer only general guidance and cannot address every potential development situation. Questions about specific development projects or unique situations should be directed to BDS Land Use Services staff.

More information about planning projects that may result in updated zoning regulations or zoning map changes can be found on the Bureau of Planning & Sustainability website, located at the following link: [www.portland.gov/bps](http://www.portland.gov/bps).

### **What does the zoning code say about vesting?**

The Portland Zoning Code addresses the regulations that apply to applications for land use reviews, building and other development permits, and land divisions. They are:

#### **Timeliness of Regulations**

##### **33.700.080 Regulations That Apply at the Time of an Application**

The regulations of this section apply to applications for land use reviews and building or development permits.

##### **A. Applications.**

1. Application for land use review. Applications for land use reviews will be processed based on the [zoning] regulations in effect on the date an application is filed with the City, as follows:
  - a. Complete at filing. If, on the date the application is filed with the City, the application contains all the information stated in 33.730.060, Application Requirements, as well as any additional information required in the pre-application conference notes, the application will be processed based on the [zoning] regulations in effect on the date the application is filed;
  - b. Complete within 180 days. If, on the date the application is filed with the City, the application does not contain all the information stated in Section 33.730.060, Application Requirements, as well as any additional information required in the pre-application conference notes, but the applicant provides the information within 180 days of the date the application was filed, the application will be processed based on the [zoning] regulations in effect on the date the application was filed.
2. Application for building or development permit. Applications for building or development permits will be processed based on [zoning] regulations in effect on the date a complete application is filed with the City. For the purposes of this section, a complete building or development permit application contains the information necessary for BDS to determine

whether the proposal conforms with all applicable use regulations and development standards.

**B. Revisions to building or development permit applications.** Revisions will be processed based on the [zoning] regulations in effect when the original complete application was received if:

1. The use remains within the same use category as in the original application;
2. The revision does not increase the total square footage of the proposed use;
3. The original application has not expired; and
4. The revised development meets all applicable development standards.

**C. Use of new regulations or mapping.** Applications will not be accepted for building permits or land use reviews based on [zoning] regulations or changes to zoning maps that have been approved but not yet implemented or have been adopted but have not yet become effective. However, pre-application conferences may be requested and held.

### **33.700.090 Regulations That Apply After Approval**

The regulations of this section apply to land use approvals that are subject to expiration as provided in 33.730.130, Expiration of an Approval.

**A. Building permits.** Applications for building permits for development approved by a land use decision that has not expired are subject only to the [zoning] regulations in effect on the date a land use application was filed with the City, as specified in 33.700.080.A.1.

**B. Land divisions.** Applications for Final Plat approval where the Preliminary Plan approval has not expired are subject only to the [zoning] regulations in effect on the date an application for Preliminary Plan was filed with the City, as specified in 33.700.080.A.1.

These zoning code sections may not directly address all situations. Therefore, we have provided a response to questions that have been asked about the timing and applicability of the pending code changes. See below.

## **Frequently Asked Questions and Answers**

- 1. Will a Pre-Application Conference/Early Assistance Meeting/Design Advice Request vest a project under the current code?** No. Pre-Application Conferences, Early Assistance Appointments and Design Advice Requests are not considered land use applications or building/development permit applications and therefore do not vest projects.
- 2. Does submitting a complete land use review application vest the proposed project in the existing zoning code regulations through the building permit review?** Generally, yes, if the land use review and the building permit review are closely associated, such as a design review for a proposed building. (If a land use review application addresses only part of a larger development, such as an adjustment review for a mechanical structure, or the minimum required dimensions of a parking space, the entirety of the development is not vested in the zoning regulations in effect at the time of the application for the adjustment review.) A land use review application and the associated building permit for a development project will be reviewed under the zoning regulations in effect on the date the land use review application is filed with BDS if: (1) the application and plans submitted are complete enough to allow BDS to determine that all applicable requirements of the zoning code are met; or (2) if the application is not complete when filed with BDS, any missing information is submitted to BDS within 180 days of the filing date. There are exceptions to this general rule as follows:
  - An approved land use decision expires if a building permit has not been issued within three years of the final land use decision (see Zoning Code Section 33.730.130). If the building permit has not been issued within this three-year period and the final land use decision has expired, the zoning code regulations that applied to the project when it was approved no longer apply. A new

land use review application may be required for the development and must comply with the zoning code regulations in effect at the time the new application is filed with BDS.

- **Phased projects:** A phased plan will not vest future phases unless a building permit for each phase is issued within three years of the final land use decision.
  - **Replat/Property Line Adjustment:** A replat to remove or reconfigure lot lines does not approve development on the lots, therefore the land use review would not vest future development in the zoning code in effect at the time the replat application was filed. A property line adjustment is not a land use review and there is no vesting associated with that application.
  - **Land divisions:** Preliminary land division approvals do not include approval of the future development on the lots, therefore the land use review does not provide vesting for future development, with the exception of subdivisions. Development in a subdivision (a land division creating 4 or more units of land) approved after September 1, 1995 is vested in the zoning map and zoning code development standards, such as height and building setbacks, that were in place on the date the land use review application for the subdivision was filed. State law (ORS 92.040) states that a subdivision approval is vested in the zoning regulations in effect at the time of application and allows for a vesting period of up to 10 years from the land use decision for the subdivision (effective date of the preliminary plan approval). Permits must be issued prior to the 10 year deadline. There is no similar state law provision for parcels created by a partition (a land division creating 3 or fewer units of land). This means that development on parcels created by a partition is not vested in the zoning code standards in effect on the date the land use review application for the partition is filed.
  - **Master plans reviews – Central City & conditional use:** Development approved under a master plan will be vested in the zoning regulations that were in effect when a complete land use review application was filed for the master plan. This vesting will be limited to the timeframe covered by the master plan.
  - **Comprehensive plan map/zoning map amendment:** Map changes do not vest development projects unless the decision approves a specific development.
  - **Other land use reviews:** If there is a question about what zoning regulations apply to a project, please confer with BDS Land Use Planning staff before submitting an application. Communication with staff is imperative during this transition.
3. **What happens if a land use review decision expires before the permit is issued for approved development?** Zoning Code Section 33.730.130 identifies when land use review decisions expire. When a land use review expires, it is no longer vested in the zoning code regulations that applied when it was approved. There is no review mechanism available to extend a decision beyond the time frames identified in this section.
4. **What happens if a building permit application expires before the permit is issued?** BDS follows established time limits for permit application expiration. BDS Permitting Services staff should be consulted if there are questions about the timeframe a permit is effective and what is needed to maintain its active status prior to permit issuance. More information is available here: <https://www.portland.gov/bds/documents/permit-extension-abandonment-expiration-and-reactivation-program-guide>
5. **What happens if a building permit is submitted prior to the effective date but it is determined the project requires a land use review?** Applications for building or development permits will be processed based on regulations in effect on the date a complete application is filed with the City as identified in Zoning Code Section 33.700.080.A.2. The applicant would have the option to redesign the project so that a land use review is not required or submit for the land use review. Applications for building permits for development approved by a land use decision are subject only to the regulations in effect on the date a land use review application was filed with the City as specified in Zoning Code Section 33.700.080.A.1 and 33.700.090.A. As a result, if a land use review is requested, the building or development permit will not be reviewed under the regulations in effect on the date of the permit, but instead those in effect on the date of the land use review application.

6. **What happens if a building permit expires before the project is constructed?** BDS follows established time limits for expiration of issued building permits. BDS Permitting Services staff should be consulted if there are questions about the timeframe a permit is effective and what is needed to maintain its active status following permit issuance. More information is available here: <https://www.portland.gov/bds/documents/permit-extension-abandonment-expiration-and-reactivation-program-guide>
7. **What happens if a building permit is issued, but later, revisions are needed to that issued permit?** This is addressed in 33.700.080:
- B. Revisions to building or development permit applications.** Revisions will be processed based on the regulations in effect when the original complete application was received if:
1. The use remains within the same use category as in the original application;
  2. The revision does not increase the total square footage of the proposed use;
  3. The original application has not expired; and
  4. The revised development meets all applicable development standards.
8. **What happens if a land division is approved for a specific development or housing type that no longer conforms to the new zoning designation applied to the property?** As stated above, land divisions do not approve future development on the lots. Subdivisions are vested in the zoning map and regulations for a period of 10 years from application submittal per State law. Partitions do not have vesting for subsequent development on the lots (unless they include a concurrent review that approves a specific development proposal). After the 10 year vesting period for subdivisions, development on the lots is required to conform to the regulations in effect at the time of the building permit. Depending on the specific situation, a land division amendment could be required to address conflicts between the proposed development and the land division approval or conditions.
9. **May an applicant choose to develop under the new zoning code after a project is originally approved through the previous code provisions?** Yes, if the applicant reapplies for land use or building permit review under the new zoning code and map after the effective date of the new regulations.
10. **How will code changes to the definition of “site” and “floor area” be addressed?** If a project is vested in the zoning code in effect at the time of application, the definitions of site and floor area at the time of application will apply.
11. **How does vesting apply to other City codes that affect projects?** Vesting for projects described above is for Title 33 (zoning code) only and does not include other City titles and technical requirements such as Title 11 (Trees), Title 17 (Public Improvements), or the Stormwater Management Manual.
12. **What happens when an existing use is a conditional use and the new zoning regulations list the use as prohibited?** If a use is a conditional use under the existing code and as a result of subsequent code amendments the use is no longer allowed or exceeds the size allowance of the new code, the use becomes a nonconforming use after the amendments. Nonconforming uses differ from conditional uses in that they are not allowed to be reestablished if they are discontinued or intentionally destroyed. Specifically, Zoning Code Section 33.258.050.D states the following:
- D. Loss of nonconforming use status.**
1. Discontinuance. If a nonconforming use is discontinued for 3 continuous years, the nonconforming use rights are lost. If a nonconforming use ceases operations, even if the structure or materials related to the use remain, the use has been discontinued. If a nonconforming use changes to another use without obtaining all building, land use, and development permits that would have been required at the time of the change, the legal nonconforming use has been discontinued. A nonconforming use that has been discontinued for more than 3 continuous years may request re-establishment through a nonconforming

- situation review. Re-establishment of a nonconforming use that has been discontinued for 5 or more continuous years is prohibited.
2. Accidental destruction. When a structure containing a nonconforming use is damaged by fire or other causes beyond the control of the owner, the re-establishment of the nonconforming use is prohibited if the repair cost of the structure is more than 75 percent of its assessed value.
  3. Intentional destruction. When a structure containing a nonconforming use is intentionally damaged by fire or other causes within the control of the owner, the reestablishment of the nonconforming use is prohibited.

**13. What happens when an existing use is an allowed use and becomes a conditional use or nonconforming use?** The new code may include amendments that require conditional use review for some types of uses or prohibit other uses. If a site has an existing allowed use that is allowed only as a conditional use under the new code, the use will be considered an automatic conditional use. Subsequent changes to that use may require conditional use review. If a site has an existing allowed use that is prohibited under the new code, the use will be considered a nonconforming use. Nonconforming uses are allowed to continue to operate, but changes to the use may be subject to a Nonconforming situation review. Specifically, zoning code Section 33.258.050 states the following:

- A. Continued operation.** Nonconforming uses may continue to operate. Changes in operations are allowed. However, nonconforming uses in residential zones may not extend their hours of operation into the period of 11 pm to 6 am.
- B. Change of use.** A change to another use in the same use category is allowed by right, provided that the off-site impact standards of Chapter 33.262, Off-Site Impacts, are met. The applicant must document in advance that the nonconforming use will meet the off-site impact standards. For changes of use within the same use category which do not meet the off-site impact standards, the change may be allowed through a nonconforming situation review.

A change to a use in a different use category which is prohibited by the base zone may be allowed through a nonconforming situation review. In R zones, a change from a nonconforming nonresidential use to an allowed residential use that exceeds the allowed density may be allowed through a nonconforming situation review. An example of this is conversion of a storefront in an R7 zone (nonconforming use) to a triplex (allowed use, nonconforming residential density).

- C. Expansions.** Nonconforming uses may expand under certain circumstances. Exterior improvements may expand by increasing the amount of land used. Changing the exterior use, for example from parking to storage, is an expansion of exterior storage. Adding parking spaces to an existing lot is also an expansion. However, increasing the amount of goods stored on an existing exterior storage area is a change in operations, not an expansion. Examples of expansion of gross building area include expanding a nonconforming use into a newly constructed building or addition on the site, and expanding the amount of gross building area occupied by a nonconforming use within an existing building.

**14. How can I participate in the processes to amend zoning code regulations?** Interested/affected persons are encouraged to participate in the legislative and public hearings processes. When there is an opportunity to testify, you may convey your preferences and concerns. The planning projects have information posted on the BPS website: <https://www.portland.gov/bps>.

If you have questions about which zoning regulations apply to a specific development, please contact BDS staff at (503) 823-7526 or schedule a 15-Minute Appointment with a Planner <https://www.portland.gov/bds/early-assistance/15-minute-appointments>. If you want a written response, please submit an application for a zoning confirmation letter, and list your questions about vesting. The application form is available on the BDS website at <https://www.portland.gov/bds/zoning-land-use/planning-services/zoning-confirmation-letters-and-land-use-compatibility>