

Plan On It

A Dutchess County Planning Federation eNewsletter



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Non-Conforming Uses and Dark Leases Why They Matter, and How to Address Them

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We have seen our local communities struggle with numerous issues, including non-conforming uses and perennially empty buildings. These two particular issues are highly visible, detract from the community, and can lead to blight. They can also negatively affect a community's development potential if they are perceived by investors as a lack of investment or economic vitality. A non-conforming use is a use of property that either pre-dates zoning or was allowed under the zoning regulations at the time the use was established but which, because of subsequent changes in those regulations, is no longer a permitted use. A dark lease, or "go-dark" lease, establishes the tenant's right to not operate or cease operations at its leased space while the tenant continues to pay rent, resulting in commercial spaces that remain empty indefinitely. To assist our local communities with these issues, the Department of Planning and Development asked the Pace Land Use Law Center (Pace) to develop resources for communities to reference and consider when trying to address non-conforming uses and dark leases.

Non-Conforming Uses

As a community may periodically update its Comprehensive Plan to guide development and reflect shifting priorities, the zoning code should also be updated. The adoption of updates to local land use documents can result in existing uses that are no longer consistent with new land use regulations and are thus determined to be non-conforming. This creates a struggle and conflict for local governments trying to find the right way to maintain a measure of legality for non-conforming uses while simultaneously ensuring they are phased out over the long-term because they have become inconsistent with the community's long-term vision. Meanwhile, property owners have to figure out the development potential of their sites under the rules applying to non-conforming uses versus seeking variances or a rezoning.



[Moving Dutchess Forward](#) is the Dutchess County Transportation Council's (DCTC) new long-range transportation plan. It will serve as the strategic guiding document for improving transportation in the county over the next 25 years. *Moving Dutchess Forward* is digital – designed to be explored online and built to be flexible and interactive. It takes a personal look at transportation, considering the policies and infrastructure needed to improve access, safety, reliability, and equity. It was developed using various forms of [outreach](#).

Our Vision: “By 2045, Dutchess County’s transportation system will be safer, more reliable, resilient, and equitable.”

Our Approach: We shaped the new Plan around four goals and sections:

Learn: We describe trends related to demographics, travel behavior, housing, our economy, freight, climate change, and transportation technology.

Assess: We identify transportation barriers related to safety, reliability, access to basic needs, and equity, identify high crash locations, and analyze walking, bicycling, and transit access.

Advocate: We identify actions that the DCTC, Dutchess County government, and local municipalities can pursue to address the barriers identified under Assess.

Invest: We describe how transportation funding works, how much we expect to be available through 2045, and what investments we will prioritize. We also estimate the funding needed to maintain our transportation system and finance [transformative investments](#).

What Do You Think?: The draft Plan is open for comment through July 16. Please [review the Plan](#) and [share your thoughts](#) with us!



This parcel was formerly used as an autobody shop and service station. During a rezoning process in 1999, the parcel was zoned from commercial to residential and remains vacant to this day. [Photo Credit: Rich Rennia]

Resource Guide and Model Code for Resolving Non-Conforming Uses

The standard approach to handling non-conforming uses is to include a specific set of regulations governing them in the zoning code. Zoning typically addresses non-conforming uses in various ways including prohibiting or limiting changes to them; limiting their expansion or enlargement; prohibiting the reconstruction of damaged structures; disallowing the reestablishment of non-conforming uses after they have been discontinued for a prescribed period of time; or simply terminating them after the passage of a stipulated amount of time.

In developing the [resource guide](#) and model code for us, Pace undertook a comprehensive review of New York State land use regulations, law journal articles, court decisions, and the non-conforming use statutes in effect in a variety of New York localities. The language used in the non-conforming use regulations of these localities was carefully studied and used in concert with other legal guidance documents to prepare the [Non-Conforming Use Model Code](#). It is our hope that local municipalities will find this model code language helpful in any review and discussion of how to address non-conforming uses.

As with all regulations, there are situations where land-use regulations are imperfect and may require a different approach to resolving the situation. To help illustrate the complexities of non-conforming uses, the resource guide presents five scenarios based upon real-world examples of non-conforming use conflicts from municipalities in the Hudson Valley. For each scenario, the conflict is followed by the application of non-conforming use regulations, a variance, or zoning modifications as potential methods for resolving the conflict.

We suggest municipalities that already address non-conforming uses in their zoning should review and compare their existing code to the model code. For those that do not have existing regulations, consider reviewing the codes of other similar communities, followed by review, modification, and adoption of the model code to reflect your community's unique land use concerns.

Dark Leases

As the retail landscape has evolved, it has resulted in related changes to the physical landscape. We all have walked or driven past empty stores and wondered why a new business isn't opening in that location. Some of those stores have been vacant for longer than others, and some may be vacant by choice versus circumstance. Those vacancies of choice are often the result of a business looking to block a competitor from taking the location, or requiring that a landlord obtain their approval before renting a site to a new tenant, resulting in a "dark store" or "dark lease". While this may make business sense for some, it decreases the economic activity in a community, reduces job opportunities, and reduces potential tax revenues. It also diminishes the appeal of the area, disincentivizing people to visit and shop at nearby establishments.



*Site of a former Shop Rite that has been closed and empty since 2001.
[Photo Credit: Eoin Wrafter]*

We again worked with Pace to pull together some helpful information for municipalities, and they reviewed and considered various tools used by communities to tackle the growing trend. As a response to the proliferation of dark leases, municipalities have enacted a variety of vacant property policy and planning actions, including vacant property registries, property maintenance codes, reuse plans, nuisance abatement and repair and demolition laws, and unsafe building ordinances. After an initial review of which strategies might be most useful to local communities, we asked them to focus on [two potential tools](#):

- Vacant Property Registration Ordinances (VPROs)
- Reuse Plans for Large-Scale Development

Vacant Property Registration Ordinances (VPROs)

One of the main struggle's communities may face is truly understanding the status of a property. Without knowing that information, communities are left to make assumptions which can lead to errors and policies that will not get to the root of the problem.

To address the question of property status, a community can create an ordinance that would require vacant property owners to register their properties and pay a fee. Those fees can be used by the municipality to help defray the costs incurred by the communities, set a standard by which the properties must be maintained, provide a way for the community to identify and track them, and opens a line of communication between the municipality and the property owner (who may not live locally). Over 1,000 municipalities in the United State have enacted these types of ordinances.

The ordinance is called a vacant property registration ordinance (VPRO), and it would require the registration of vacant property to help monitor the number of vacant buildings within its jurisdiction. According to the [Center for Community Progress's Building American Cities Toolkit](#), VPROs should clearly define which properties and parties should be registered and include registration requirements and procedures, a fee structure, property maintenance requirements, and penalties for failing to comply. VPROs can apply to residential, commercial, and industrial properties.

The VPRO has three main purposes:

1. To ensure that owners of vacant properties are known to the municipality and other interested parties and can be contacted if necessary;
2. To ensure that owners of vacant properties are aware of the obligations of ownership under relevant codes and regulations; and
3. To ensure that owners meet minimum standards of maintenance for vacant properties.

A VPRO is a discretionary regulation a municipality can implement to meet community needs in addressing vacant properties. Adopting [New York's model VPRO provisions](#) could help municipalities ensure that vacant properties do not create a nuisance within the community and devalue surrounding properties. Municipalities may also include optional provisions such as cash bond requirements and quarterly reports to monitor the status of vacant properties.

Reuse Plans for Large-Scale Development

As part of a more proactive approach to the problem of vacancies and specifically dark leases, some municipalities have passed laws requiring that applicants for large-scale developments establish reuse plans for when vacancies occur. This strategy requires the reuse plan to be submitted as part of the initial project application process. A reuse plan is a design plan that allows for and facilitates the reuse of a building for a purpose other than the originally intended use, in the event the building becomes abandoned or vacant. Based on [City of Moab, UT Code Title 17.80.080\(D\)](#), municipalities can follow the steps outlined below to adopt reuse plan requirements:

- **Step One:** Define Large-scale Development – If the municipality has not defined large-scale developments, it must first define this term in its local law. "Large-scale development" generally means new retail or commercial development exceeding 30,000 to 50,000 square feet of gross floor area. A municipality's "large-scale" threshold should depend on its typical scale of development and generally should be based on existing commercial building stock.
- **Step Two:** Require Reuse Plan Submittal – Add the following reuse plan submittal requirements to appropriate development regulations:
 - ◆ Applicants for large-scale developments shall submit the following:
 - ◇ A building design plan that allows for and facilitates reuse of the building and/or lot(s) in the event the building is abandoned or vacated by the original occupants. This plan shall specifically address reuse of the building(s) and/or redevelopment of the parking lots and hard surfaces, and automobile and pedestrian access.
 - ◇ A building renewal plan that provides for maximum opportunity for rehabilitation or redevelopment of the structure in the event of abandonment, vacating of property, or relocation by the original occupants. The plan shall include a maintenance plan for normal repairs and upkeep of the main building, accessory buildings, parking lots and hard surfaces, landscaping, and signage.

Wrap-Up

We hope the approaches presented to address non-conforming uses and dark leases are useful to local municipalities struggling with one or both of these issues. As with many matters related to land use, these can be complex and likely won't have a one-size-fits-all solution; a nuanced, more flexible approach may be necessary.

More Information

[Preventing Dark Malls & Vacant Big Boxes](#) – Institute for Local Self-Reliance

[New Data on Local Vacant Property Ordinances](#) – HUD Data Shop, 2013

[Building American Cities Toolkit](#) – Center for Community Progress

[Supplemental Regulations for Large-Scale Developments Over
Thirty Thousand Square Feet](#) – City of Moab, Utah

[Resource Guide for Resolving Non-Conforming Uses](#) – Pace/DCPlanning, 2020

[Model Code for Non-Conforming Uses](#) – Pace/DCPlanning, 2020

[Strategies for Preventing and Addressing Vacant Properties and Large-Scale
Development Vacancies and Dark Leases](#) – Pace/DCPlanning, 2020

[New York Model Vacant Property Registration Ordinance](#)

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This newsletter was developed by the Dutchess County Department of Planning and Development, in conjunction with the Dutchess County Planning Federation.

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