



Changing or Expanding Nonconforming Uses

By Mark S. Dennison

The ultimate purpose of zoning ordinances is to confine certain classes of uses and structures to certain areas. The law generally frowns on nonconforming uses because they undermine that goal. The general rule is this: If prior to the adoption of an original zoning ordinance—or a subsequent amendment or revision—property was being used for a then-lawful purpose that the ordinance prohibits and renders nonconforming, the property owner acquires a vested right to continue the nonconforming use.

Thus, the policy of zoning ordinances is to secure the gradual or eventual elimination of nonconforming uses. To further this goal, state zoning enabling acts confer powers on local zoning bodies to impose restrictions on the expansion or change of nonconforming uses. This issue of *Zoning News* evaluates the circumstances under which a change or expansion of a nonconforming use is considered illegal under most zoning ordinances. (Where case citations are missing in the text, they appear in the accompanying sidebar.)

Establishment of Nonconforming Use

What is required to establish a nonconforming use as lawful? The land use must meet two basic requirements:

- It must have existed before the prohibitory regulation was enacted. [See, for example, *Heyman v. Zoning Hearing Board of Abington Township*, 601 A.2d 414 (Pa. Commw. 1991).]
- It must have been lawful when commenced. [See, for example, *Oceanview Homeowners Association, Inc. v. Quadrant Construction & Engineering*, 680 P.2d 793 (Alaska 1984); *Hooper v. City of St. Paul*, 353 N.W.2d 138 (Minn. 1984).]

The burden of proving the extent or existence of a nonconforming use rests on the landowner, who must establish both of the above points. [See, for example, *R.K. Kibblehouse Quarries v. Marlborough Township Zoning Hearing Board*, 630 A.2d 937 (Pa. Commw. 1993); *City of Peoria v. Danz*, 585 N.E.2d 1207 (Ill. App. 1992); *Town of Ithaca v. Hill*, 571 N.Y.S.2d 609 (App. Div. 1991).]

A use that was begun in violation of the ordinance in effect at the time cannot gain status as a preexisting and lawful nonconforming use. [See, for example, *Lantos v. Zoning Hearing Board of Haverford Township*, 621 A.2d 1208 (Pa. Commw. 1993).] The use in question must have been in full conformance with all applicable land-use regulations in effect when the activity began. [See, for example, *City of Dublin v. Finke*, 615 N.E.2d 690 (Ohio App. 1992).] In a few cases, the landowner's failure to obtain a certificate of occupancy when the use was established under a former zoning ordinance has prevented the property from acquiring nonconforming use status under subsequent amendments to the ordinance that prohibited the

use. [See, e.g., *Bernstein v. District of Columbia Board of Zoning Adjustment*, 376 A.2d 816 (D.C. App. 1977).]

However, where the invalidity of a use lies in the fact that the landowner failed to obtain a business license or to comply with requirements imposed by an ordinance other than the one regulating land use, such invalidity generally will not preclude the property from acquiring nonconforming use status. [See, for example, *Carroll v. Hurst*, 431 N.E.2d 1344 (Ill. App. 1982) (failure to obtain license for operation of automobile junkyard as required by state motor vehicle code did not defeat nonconforming use status under zoning ordinance).]

Limitations on Change

A zoning ordinance can proscribe a new nonconforming use or one of a different character. The questioned use may not

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❖ Permissible Changes

Types of changes that the courts have deemed permissible:

DiBlasi v. Zoning Board of Appeals of the Town of Litchfield, 624 A.2d 372 (Conn. 1993) (change in use from a construction office to an adult probation office).

Hall v. Brazzale, 624 A.2d 916 (Conn. App. 1993) (change from a secondary storage site to the sole storage site for construction business).

Limley v. Zoning Hearing Board of Port Vue Borough, 625 A.2d 54 (Pa. 1993) (change from private club to public restaurant and bar).

Appeal of Schneider, 521 A.2d 528 (Pa. 1987) (change of use of property from storage and repair of general hauling trucks to storage and repair of empty trash trucks).

About v. Wallace, 463 N.Y.S.2d 572 (App. Div. 1983) (change from doctor's office to professional lobbying group's office).

Kastendike v. Baltimore Association for Retarded Children, 297 A.2d 745 (Md. App. 1972) (change from nursing home for treatment of elderly and alcoholics to home for treatment of retarded children).

❖ Impermissible Changes

Types of changes that the courts have deemed impermissible:

Gilmore v. County of DuPage, 597 N.E.2d 1111 (Ill. App. 1991) (change from chiropractor's office to dentist's office).

Boivin v. Town of Sanford, 588 A.2d 1197 (Me. 1991) (change from auction barn to antique business).

Tier Oil Corp. v. Egan, 472 N.Y.S.2d 505 (App. Div. 1984) (change from gasoline service station to combination gas station and convenience store).

Stevens v. Town of Rye, 448 A.2d 426 (N.H. 1983) (change from automobile garage to bath shop and plumbing supplies showroom).

Board of Zoning Appeals v. McCalley, 300 S.E.2d 790 (Va. 1983) (change from auto body shop to metal forge and machine shop).

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be grandfathered from the operation of new zoning restrictions if it:

- fails to reflect the nature and purpose of the preexisting nonconforming use
- is different in quality or character as well as in degree
- is different in kind in its effect on the neighborhood where it is located. [See, for example, *Keith v. Saco River Corridor Commission*, 464 A.2d 150 (Me. 1983).]

To qualify as a continuation of an existing nonconforming use, a proposed use must be similar to the original use. (See, for example, *Boivin v. Town of Sanford*.) However, it need not be identical. [See, for example, *Pappas v. Zoning Board of Adjustment of the City of Philadelphia*, 589 A.2d 675 (Pa. 1991) (pizza restaurant with seating for 40 customers was similar to preexisting nonconforming use as sandwich shop that had very limited customer seating and sold primarily take-out food).]

In determining whether a new use bears adequate similarity to an existing nonconforming use, courts evaluate various factors, including:

- the extent to which the current use reflects the nature and purpose of the original use;
- whether the use is different in character, nature, and kind;
- whether the current use has a substantially different effect on the neighborhood.

[See *Zachs v. Zoning Board of Appeals; Knowlton v. Browning-Ferris Industries*, 260 S.E.2d 232 (Va. 1979); *Town of Bridgewater v. Chuckran*, 217 N.E.2d 726 (Mass. 1966).]

Determining whether a questioned use meets this test necessarily involves consideration of the specific facts of each case. [See, for example, *Mason v. Crooker-Mulligan*, 570 A.2d 1217 (Me. 1990).] For instance, in *Ka-Hur Enterprises, Inc. v. Zoning Board of Appeals of Provincetown*, 661 N.E.2d 120 (Mass. App. 1996), the court evaluated whether a nonconforming use as a fuel oil storage and distribution depot was terminated by a change in use. The property at issue was used as a fuel oil storage and distribution facility before the city enacted a 1951 zoning ordinance that zoned it for residential use. This use continued until 1979, when the Nauset Trawling Company acquired the property and operated a fishing business and truck repair shop on the premises that lasted until August 1987. The evidence showed that Nauset used the property primarily to operate its fishing business and to garage and repair trucks used for hauling fish.

While there was evidence that Nauset continued to store fuel in the two tanks on the premises and to make deliveries to its fishing vessels, out-of-town fishing boats, and a few homes of its employees, neighboring property owners testified that they never saw any fuel oil trucks enter or leave the premises. The town's building inspector also testified that, on his numerous visits to the property from 1985 to 1987, he never saw any evidence that the property was being used as a fuel storage and distribution facility. The court was unpersuaded by the fact that the property continued to be used for incidental storage of fuel oil. It concluded that a substantial change in use had occurred during Nauset's ownership, and the property lost its nonconforming use status.

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On the other hand, some courts have held that incidental storage activities that were part of the preexisting nonconforming use may be continued despite a change or discontinuance of the property's primary nonconforming business use. [See, for example, *Toys R Us v. Silva*, 639 N.Y.S.2d 881 (Sup. Ct. 1996); *Hendgen v. Clackamas County*, 849 P.2d 1135 (Ore. App. 1993).]

Some zoning ordinances allow a change in use provided that the new use would have been permitted in the most restrictively zoned district in which the original use was allowed. [See, for example, *Prudence v. Town of Ithaca Zoning Board of Appeals*, 599 N.Y.S.2d 749 (App. Div. 1993).] Others allow changes to a less intensive nonconforming use or one that would be less detrimental to the neighborhood's character than the existing nonconforming use. [See, for example, *McLaughlin v. City of Brockton*, 587 N.E.2d 251 (Mass. App. 1992).] These ordinances are designed to achieve eventual eradication of nonconforming uses through gradual change to uses that are "more appropriate" to the district. [See, for example, *Kopietz v. Zoning Board of Appeals for the City of the Village of Clarkston*, 535 N.W.2d 910 (Mich. App. 1995).]

Zoning ordinances seldom contain an absolute prohibition against all expansions of nonconforming uses, and some courts, most notably in Pennsylvania, have ruled that local ordinances cannot impose such an absolute prohibition.

Limitations on Expansion

The rationale for prohibiting a change from one nonconforming use to another applies also to expansions of preexisting nonconforming uses. The only nonconforming use entitled to protection is the one that existed when passage of the zoning ordinance made it nonconforming. Allowing the nonconforming use of land and buildings to be expanded or enlarged would further exacerbate the offense to the general community and undermine the public policy that nonconforming uses should eventually be eliminated and made to conform to the zoning laws. [See, for example, *SLS Partnership v. City of Apple Valley*.]

Zoning ordinances seldom contain an absolute prohibition against all expansions of nonconforming uses, and some courts, most notably in Pennsylvania, have ruled that local ordinances cannot impose such an absolute prohibition. [See, for example, *Gatti v. Zoning Hearing Board of Salisbury Township*, 543 A.2d 622 (Pa. Commw. 1988).] Most zoning ordinances permit some expansion. Permissible expansions typically include an increase in business volume that does not include an enlargement of the size of a nonconforming building or an extension of the nonconforming use within the confines of the same nonconforming lot or building. Impermissible expansions commonly include structural alterations that increase the size of a nonconforming building or its expansion onto additional land that was not formerly used for that purpose. The applicable zoning ordinance determines which expansions are deemed either lawful or illegal.

Adding new facilities or enlarging existing ones is a prohibited expansion of a nonconforming use if it is incompatible with the permitted use or if the nature of the use substantially changes. Even where the ordinance in question does not state specifically that a nonconforming use could not be expanded, courts have held that a nonconforming use may not be expanded, as this would offend the regulation's purpose. [See, for example, *Lower Mount Bethel Township v. Stabler Dev. Co.*, 509 A.2d 1332 (Pa. Commw. 1986); *Norton Shores v. Carr*, 265 N.W.2d 802 (Mich. App. 1978).] In the absence of specific guidelines in the zoning ordinance, a court seeking to determine how much a nonconforming use may be expanded must look to the facts existing when the nonconforming use was created. [See, for example, *New London Land Use Associates v. New London Zoning Board*, 543 A.2d 1385 (N.H. 1988).]

For example, in *Ray's Stateline Market, Inc. v. Town of Pelham*, the owner of a nonconforming convenience store applied for permits to make alterations to the premises that involved replacing two sign facings on the exterior and relocating a coffee counter inside the store. On appeal of the town zoning board of appeals' decision to deny the permits, the trial court concluded that the proposed alterations did not constitute an impermissible expansion or change of a nonconforming use. Affirming the trial court, the New Hampshire Supreme Court applied provisions of the state zoning enabling act pertaining to alterations to nonconforming uses. The statute granted protection to a nonconforming use unless the use was altered "for a purpose or in a manner which is substantially different from the use to which it was put before alteration." [N.H. Rev. Stat. sec. 674:19.]

The town zoning ordinance was consistent with this provision, which the court construed as limiting any extension, expansion, or enlargement of a nonconforming use and prohibiting its change to a "substantially different" nonconforming use. The court therefore evaluated the facts to determine whether granting the permits would result in an impermissible change or extension of the nonconforming use in light of "the extent to which the challenged use reflects the nature and purpose of the prevailing nonconforming use, whether the challenged use is merely a different manner of using the original nonconforming use or whether it constitutes a different use, and whether the challenged use will have a substantially different impact upon the neighborhood."

Applying these factors, the court found that the landowner's proposed alterations involved nothing more than the internal expansion of a business within a preexisting structure and that there was no substantial change in its effect on the neighborhood. Granting the sign permit would not affect the dimensions of the existing signs and would result only in lettering changes. Granting the coffee counter permit would merely result in relocating a coffee counter within the store. The court concluded that these facts supported the trial court's rulings that the requested permits would not result in a substantial change or an illegal expansion of the nonconforming use.

The general rule with regard to extending a nonconforming use to additional property is that a nonconforming use is restricted to the area that was nonconforming at the time the relevant ordinance was enacted. Furthermore, a nonconforming use cannot be expanded onto property that was acquired after the use became nonconforming. [See, for example, *Smith v. Zoning Hearing Board of the Borough of Bellevue*, 619 A.2d 399 (Pa. Commw. 1992).]

Where the use of property involves a physical extension of a nonconforming use to a part of the land not used for the

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(continued from front)

Taylor v. Metropolitan Development Commission, 436 N.E.2d 1157 (Ind. App. 1982) (change from liquor store to tavern).

Belleville v. Parillo's, Inc., 416 A.2d 388 (N.J. 1980) (change from restaurant to discotheque).

Phillips v. Village of Oriskany, 394 N.Y.S.2d 941 (App. Div. 1977) (change from restaurant and soda fountain to restaurant and tavern).

❖ Lawful Expansion

Types of expansions that the courts have deemed lawful:

Ray's Stateline Market, Inc. v. Town of Pelham, 665 A.2d 1068 (N.H. 1995) (replacement of two sign facings on exterior and relocation of a coffee counter on the interior of a store).

Zachs v. Zoning Board of Appeals, 589 A.2d 351 (Conn. 1991) (increase in the use of a nonconforming radio tower through the addition of eight radio antennas).

Planning & Zoning Commission v. Craft, 529 A.2d 1328 (Conn. App. 1987) (increase in use of vacation dwelling from weekends and holidays to year-round occupancy).

Oceanview Homeowner's Association v. Quadrant Construction & Engineering, 680 P.2d 793 (Alaska 1984) (increase in number of planes using an airstrip).

Redfearn v. Creppel, 455 So.2d 1356 (La. 1984) (expansion of restaurant in nonconforming hotel).

Hunziker v. Grande, 456 N.E.2d 516 (Ohio App. 1982) (nursery's increase in retail business as opposed to wholesale business).

❖ Unlawful Expansion

Types of expansions that the courts have deemed unlawful:

Smith v. Palone, 642 N.Y.S.2d 119 (App. Div. 1996) (expanded operation of a nonconforming speedway).

SLS Partnership v. City of Apple Valley, 496 N.W.2d 429 (Minn. App. 1993) (increase in the size of a mobile home located on a preexisting pad in a mobile home park).

Country Sam, Inc. v. Bennett, 597 N.Y.S.2d 13 (App. Div. 1993) (construction of an awning in the rear yard of a nonconforming restaurant).

Metropolitan Development Commission of Marion County v. Goodman, 588 N.E.2d 1281 (Ind. App. 1992) (expanded use of a carriage house for three rental units was an impermissible expansion of the legal nonconforming use of the structure for two rental units).

Bailey v. Town of Kennebunk, 593 A.2d 1055 (Me. 1991) (construction of an exterior deck from the third floor of a nonconforming residential dwelling).

City of Rochester Hills v. Southeastern Oakland County Resource Recovery Authority, 481 N.W.2d 753 (Mich. App. 1991) (expanded use of landfill to include composting activities).

Blake v. City of Phoenix, 754 P.2d 1368 (Ariz. 1988) (plant nursery drastically expanded retail sales).

Helicopter Associates, Inc. v. City of Stamford, 519 A.2d 49 (Conn. 1986) (helicopter service's expanded use from five to unlimited number of commercial helicopter flights).

Bastian v. City of Twin Falls, 658 P.2d 978 (Idaho App. 1983) (enlargement of supermarket).

Cannon v. Zoning Board of Adjustment, 308 S.E.2d 735 (N.C. App. 1983) (construction of storage shed on adjacent property).

prohibited purpose before the restrictive ordinance was enacted, the extension is frequently deemed to violate an ordinance that in general language prohibits the extension of nonconforming uses. [See, for example, *Stop & Shop v. Board of Zoning Appeals*, 399 S.E.2d 879 (W.Va. 1990).] For example, in *Smith v. Palone*, the New York Supreme Court held that the expanded operation of a nonconforming speedway was unlawful when the owners expanded the use onto certain other properties and changed the character of the vehicles raced to include stock cars.

And in *Country Sam, Inc. v. Bennett*, the zoning board revoked an alteration permit for construction of an awning in the rear yard of a nonconforming restaurant, based on its interpretation of an ordinance that defined “enlargement” as “an increase in that portion of a tract of land occupied by an existing use.” The court upheld the permit revocation, stating that “a backyard patron waiting area might increase the nonconforming use of these premises as a restaurant by drawing larger crowds and traffic into this residentially zoned area.”

Some courts have ruled that it makes no difference whether the landowner is seeking to expand the nonconforming use to the remaining portions of a single lot or onto adjacent lots owned by the landowner. [See, for example, *Berkey v. Kosciusko County Board of Zoning Appeals*, 607 N.E.2d 730 (Ind. App. 1993) (landowner could not expand junkyard onto other portions of same lot); *Stuckman v. Kosciusko County Board of Zoning Appeals*, 506 N.E.2d 1079 (Ind. 1987) (landowner could not shift automobile salvage yard from one set of lots to another set of adjacent lots).] For example, this general principle has been applied to the proposed expansion of a nonconforming mobile home park. Courts have repeatedly held that an owner’s right to a nonconforming use extends only to those mobile home lots in existence or under construction at the time the land-use regulation was implemented and does not include sites that were merely planned. [See, for example, *McFillan v. Berkeley County Planning Commission*, 438 S.E.2d 801 (W.Va. 1993); *Llewellyn’s Mobile Home Court, Inc. v. Springfield Township Zoning Hearing Board*, 485 A.2d 883 (Pa. Commw. 1984).]

Natural Expansion Doctrine

Pennsylvania courts have adopted a natural expansion doctrine, which recognizes a property owner’s right to expand a nonconforming business use to meet the demands of normal growth. The rationale for this rule is that, “once it has been determined that a nonconforming use is in existence, an overly technical assessment of that use cannot be utilized to stunt its natural development and growth.” [*Chartiers Township v. W.H. Martin, Inc.*, 542 A.2d 985, 988 (Pa. 1988).] However, the landowner must show that the expansion is necessary to accommodate an increase in business. [See, for example, *Heyman v. Zoning Hearing Board of Abington Township* (see cite on page

1) (expansion of cemetery was not warranted as a natural expansion necessary to accommodate increased business).]

A few other states apply an exception to the policy against enlargement or extension of a nonconforming use similar to Pennsylvania’s doctrine. Courts in these states have held that an increase in the amount of use within the same area is generally permissible, so that a nonconforming use may not only be continued but also increased in volume and intensity. [See, for example, *Town of Ithaca v. Hill* (see cite on page 1).] As long as “there is no substantial change in the use’s effect on the neighborhood, the landowner will be allowed to increase the volume, intensity, or frequency of the nonconforming use.” [*Town of Hampton v. Brust*, 446 A.2d 458, 461 (N.H. 1982).]

Accordingly, these courts have held that a mere increase in the amount of business done pursuant to a nonconforming use is not an illegal expansion of the original use. [Compare *Zachs v. Zoning Board of Appeals* (addition of eight antennas to radio tower was lawful expansion of nonconforming use) with *Boivin v. Town of Sanford* (change in use from auction barn to antique business was unlawful change, not mere intensification of nonconforming use).] Many of the cases permit a landowner to accommodate an expansion of a building or existing parking area because of an increase in the volume of business conducted on the same parcel. [See, for example, *Rotter v. Coconino Cty.*, 818 P.2d 704 (Ariz. 1991); *Gilbertie v. Zoning Board of Appeals*, 581 A.2d 746 (Conn. App. 1990).]

Remedy for Illegal Change or Expansion

There is often a fine line between what constitutes an expansion of the same nonconforming use and a change to a new and different use. In fact, some courts have found that the expansion was so substantial as to constitute a prohibited change to a new and different use. [See, for example, *County Council of Prince George’s County v. E.L. Gardner, Inc.*, 443 A.2d 114 (Md. 1982); *Edwards v. Zoning Board of Appeals*, 420 N.E.2d 288 (Ill. App. 1981).] This distinction can be important because the remedy for an illegal expansion is generally different from the remedy for a change in use.

If a landowner has illegally expanded a nonconforming use, he will not lose all rights in the preexisting nonconforming use unless state enabling legislation delegates such power to local zoning authorities. [See, for example, *Hulshof v. Missouri Highway & Transportation Comm.*, 737 S.W.2d 726 (Mo. 1987).] The landowner is usually permitted to scale back the expanded use to the nonconforming use that existed previously. [See, for example, *Smith v. Palone; Poulathas v. Atlantic City Zoning Board of Adjustment*, 660 A.2d 7 (N.J. Super. App. Div. 1995); *Metropolitan Development Commission of Marion County v. Goodman; 3M National Advertising Co. v. City of Tampa Code Enforcement Board*, 587 So.2d 640 (Fla. App. 1991).] Accordingly, the proper remedy for illegal expansion has been to enjoin the expansion but to permit the continuance of the nonconforming use at the level that existed when the ordinance rendered it nonconforming. [See, for example, *Township of Fairfield v. Likanchuk’s, Inc.*, 644 A.2d 120 (N.J. Super. App. Div. 1994).]

On the other hand, if the court concludes that the expansion caused a change to a different use, the landowner will usually be prohibited from reverting to the preexisting use. [See, for example, *Village of Burr Ridge v. Elia*, 382 N.E.2d 876 (Ill. App. 1978).] All rights in the nonconforming use would be lost, and the landowner would be compelled to conform the property to a use permitted under the zoning ordinance. [See, for example, *Rosbar Co. v. Board of Appeals*, 420 N.E.2d 969, 438 N.Y.S.2d 777 (1981).]

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