

Nonconforming Uses: Part One

Deborah M. Rosenthal, AICP



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Nonconforming uses, the natural by-products of zoning, are created when zoning rules change over time and the old uses are grandfathered in under the original approvals.

How the grandfathered uses are treated, how long they survive, and how much they are allowed to change are all decided, in the first instance, by the planning commission. This article and part two (coming in Winter 2011) discusses the governing rules.

Know the Basics

The goal of most nonconforming use ordinances is to prevent expansion and encourage eventual termination of the use while, at the same time, protecting investments made in reliance on the original zoning. Nonconformities come in two types: activities on the property and the physical condition of the lot or structures. Both are referred to as nonconforming uses; the rules governing the two types often differ, and they pose different planning problems.

A nonconforming use is not listed as permitted in the applicable zone under the local zoning ordinance. A nonconforming lot or structure fails to meet one or more of the design requirements of the ordinance, such as setbacks, height, access, parking, width, and depth. The types may be combined when, for instance, a nonconforming industrial building is only suitable for industrial use in a newly created commercial zone. In contrast, the nonconformity may be as minor as a 4.5-foot side yard where five feet is required. To qualify as a legal nonconforming use, the use must have been legal when established. If it was not lawful at inception, it remains illegal, regardless of longevity and extent of agency knowledge.

Know Your Ordinance

The fate of nonconforming uses is controlled by the precise language of the local ordinance with, in some states, an overlay of state law. Two neighboring cities, identical in most respects, may have very different ordinances. For example, some cities allow moderate expansion of nonconforming uses; others prohibit it. Application of a nonconforming use ordinance depends on its specific language, even if interpretation is challenging. It is crucial that these ordinances be clearly drafted to express the public agency's intent, and be fully understood by administrators and officials.

Creation of Nonconforming Uses

Nonconformities are created when a new zoning ordinance is adopted that disallows the existing activity or structure in a given zone. The use is then considered legal if it met the relevant local zoning criteria when it was built or if it commenced before the first zoning ordinance was adopted. Some ordinances also require that the use met other legal requirements when it was established, such as state law or business licensing. A use not legally allowed on the date of the zone change, or that starts afterward, is an illegal nonconforming use. Such uses can be abated and are not subject to the special rules discussed here.

Nonconforming uses always involve either the use or physical configuration of the land or structure, and arise in unlimited variety, ranging from lot sizes to the details of sophisticated business operations. The extent of potential nonconformity is as broad as the scope of the zoning. Every inconsistency with the ordinance can be

considered a nonconformity. As zoning ordinances and uses become more complex, so does the law.

Abandonment

Most ordinances provide that the right to continue a nonconforming activity terminates if it ceases for a period of time. The abandonment time varies widely. Instead of or in addition to a time period, some ordinances look at whether the owner intended to cease nonconforming operations.

Once the right to continue a nonconforming use is abandoned through nonuse, legal status cannot be regarded by resuming the use, regardless of how long the use then continues. Nonuse typically is not considered abandonment if the owner is prevented from using the property by operation of law, such as a lawsuit, or if he is actively trying to resume the use. Nonconforming buildings generally do not lose status unless the offending portion of the structure is demolished. Rarely do local ordinances require demolition due to abandonment unless the building is a vacant nuisance.

Expansion and Reconstruction

Expansion of nonconforming uses is another common issue. Decisions are controlled by the language of the ordinance. Ordinances usually establish a percentage by which the structure can be expanded; 15 percent is typical provided that the nonconformity is not thereby increased. Expansion, therefore, cannot decrease an already inadequate setback. However, square footage can be increased within the current allowed zoning envelope.

Questions may arise when a lawful second story is proposed on a nonconforming footprint. Usually the addition needs to be set back to current standards, or is prohibited. Cities can elect to allow a new structure if a troublesome nonconformity is terminated or mitigated as a result. Most ordinances allow maintenance but not full replacement. Some of these situations can be handled with variances, as will be discussed in part two in the next issue.

More challenging is the decision whether new activities constitute prohibited expansion of an existing nonconforming use. Example: an owner applies for a business license or building permit and is rejected on zoning grounds. Nonconforming use ordinances are not intended to freeze uses at a point in time, and the "natural development" of a business is allowed. New products can be sold, new equipment installed, and interiors updated.

The difference between "natural development" and "expansion" is not always clear. For example, many buildings now have ground-floor coffee shops, regarded as standard amenities. In a different context, mining may only affect a small portion of the property at a time, but eventually affect the entire parcel. Whether these types of use are allowed depends on the ordinance's language, local custom, and, sometimes, state law. Be prepared with substantial evidence to justify your decision. Remember that allowing uses to change is often essential to the financial health of the nonconforming use but can be equally aggravating to neighbors.

Nonconforming Uses: Part Two

Deborah M. Rosenthal, AICP



Carolyn Toma

Nonconforming use ordinances seek to encourage replacement of nonconforming buildings and uses over time, preferably through natural market forces.

This continues the article that appeared in the Fall 2010 issue.

Termination and Amortization

Nonconforming use ordinances seek to encourage replacement of nonconforming buildings and uses over time, preferably through natural market forces. Most ordinances prohibit reconstruction of structures that are destroyed or damaged by more than a specified percentage, usually 50 percent. This rule can be unpopular and hard to enforce, especially after natural disasters. However, it serves an important public purpose, such as making sure homes are rebuilt to current safety standards after a major flood event. Local governments should assist owners in meeting the new rules; many owners may have been unaware that their homes were nonconforming before the disaster. Destruction or replacement is commonly used to terminate nonconforming structures. Nonconforming lots are almost impossible to correct, unless the same owner acquires an adjacent parcel. If allowed by state law, many communities provide for automatic merger of substandard lots when they come into common ownership as a solution.

In contrast to structures, nonconforming uses are generally permitted to continue indefinitely unless abandoned. However, in most states, local governments are allowed—to not required—to set a time limit for termination of nonconforming activities. Known as the amortization period, it is short or long, depending on the size of the owner's investment and the harm caused by the use. The

legal test is generally whether the length of the time imposes a substantial and unfair loss on the landowner when compared to the public benefit, including the need to avoid physical harm to neighbors.

The most common short amortization period is for terminating billboards, where investment is relatively small and profits high. Consequently, Congress and some state legislatures adopted prohibitions on amortizing certain billboards and other uses. Other ordinances may give high-investment uses, like manufacturing plants, up to 10 or 20 years before the use must end. Legal in most states, amortization periods, if of appropriate duration, are often controversial because they can require profitable businesses to cease operations. Typically, amortization ordinances immediately depress the property value because of the impact on the owner's expectation of continued use.

Variances and Conditional Use Permits

A legal, nonconforming structure requires no variance to be lawful under changed zoning. However, a structure that was illegal when built can become legal retroactively through a variance. This is a simple way to address uncertainties, while assuring the local agency that it complies with current rules. However, in most jurisdictions, variances cannot legitimize disallowed activities as opposed to structures. In some places, a conditional use permit would serve the purpose, unless the use is completely excluded in the zone. Variances and conditional use permits can allow expansion of nonconforming uses where there are no adverse public effects.

Takings and Vested Rights

Owners whose property is made nonconforming often file a takings complaint under the Fifth Amendment to the U.S. Constitution or their state constitution. However, as long as the property owner retains some legal use of the property and the financial loss is not disproportionate, adopting a new zoning ordinance is unlikely to be a taking.

There are circumstances where takings law, and the related concept of vested rights, come into play. To qualify as legal, the activity or structure must have existed on the date of the zone change. In most states, the owner must have vested the right to continued use by obtaining a permit and making substantial expenditures. Rules vary from state to state; generally, the preliminary activities, even coupled with intent, are not enough to vest a nonconforming use. However, if the right to continued use is vested under state law, the local government must comply with its own ordinances and state law when applying a zone change to an existing use, or face liability.

Due Process

The right to continue existing uses is protected by state and federal law. While the local government can change zoning and declare a use or structure nonconforming, it must follow due process. An owner who abandons a nonconforming use or structure, or who was denied a permit, should be allowed to appeal administratively to the planning commission and final decision makers. Where appropriate, the owner should be able to apply for an after-the-fact variance or conditional use permit.

Even if not required, it is prudent to notify owners individually when proposed zone changes will make their property nonconforming, especially with amortization periods.

Plan Carefully

Consider zone change impacts carefully. Often the change affects a few structures in minor ways. However, nonconforming use ordinances could prevent necessary, normal building function change. With amortization periods, owners may decide not to invest in maintenance because they will not recoup costs. Property insurance is harder to get when reconstruction is not permitted after catastrophic loss; business operations may cease. Without an amortization period, nonconforming uses function as a monopoly, increasing property value due to exclusive use in the area and delaying use conversion anticipated by the zone change.

Depending on the percentage of nonconforming uses and structures, the planning commission may consider mixed use zones that incorporate, rather than exclude, compatible existing uses. Conditional uses can be designed to encourage mixed supportive uses customized to the neighborhood. Finally, the planning commission must explain its reasons for new directions, without leaving the existing uses behind. Legal tools are available for aggressive action to change the future of an area, or for gentle encouragement of the market to act.