

Nonconforming Uses & Structures

by Susan G. Connelly, Esq.

Nonconforming uses and structures have been with us ever since zoning first emerged in the 1920s. Since that time, they have represented the “Achilles heel” of planning and zoning. ^{p. 12} The root of the problem is that nonconformities reduce the effectiveness of what a community is trying to accomplish through its comprehensive plan, as implemented by its local zoning regulations. The continued existence of nonconforming uses, for example, undermines what a community is seeking to achieve when it establishes specific allowable uses for a zoning district.

At the same time, communities — quite understandably — have been reluctant to call for the removal of ongoing businesses and existing structures, reflecting substantial financial investments, just because they fail to comply with current zoning requirements. The “solution” has been to subject nonconforming uses and structures to a diverse assortment of restrictions, all intended to hasten the day when the particular use or structure either “disappears” or comes into compliance with the existing zoning regulations.

Nonconformities come in all shapes and sizes. But what they represent is simple enough to state: non-compliance with the relevant requirements of a particular zoning district or classification. The Zoning Ordinance of the City of McHenry, Illinois, for example, defines a nonconformity as:

[A]ny characteristic of a building, structure, or lot or parcel of land, or of the use thereof, which was lawful prior to the date of enactment of this Ordinance or any amendment

thereto but that does not currently conform to the requirements applicable to the zoning district in which it is located.

One aspect of nonconformities which is often overlooked in zoning regulations and which contributes to the general confusion often experienced on the subject is the significant distinction between nonconforming uses and bulk nonconformities.

“THE CONTINUED EXISTENCE OF NONCONFORMING USES, . . . UNDERMINES WHAT A COMMUNITY IS SEEKING TO ACHIEVE WHEN IT ESTABLISHES SPECIFIC ALLOWABLE USES FOR A ZONING DISTRICT.”

Nonconforming uses are activities or functions carried on as principal or accessory uses that are not allowed in the particular zoning district (uses that may be allowed by conditional or special use permit are not considered to be nonconforming). Examples of typical nonconforming uses are commercial or industrial uses in residential zoning districts.

In contrast, bulk nonconformities, also referred to as structural or “standards” nonconformities, involve existing structures that do not meet the ordinance’s “bulk regulations.” Bulk regulations include matters such as building height, lot

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The Origins of Nonconformities

The draftsmen of the early Euclidean zoning ordinances anticipated that each comprehensive zoning ordinance would contain maps and regulations prescribing the exact uses that could be made of land throughout the community ... Because the whole idea of comprehensive zoning was based on the principle that land use should be neatly separated, it was feared that the whole philosophical justification for zoning would be impaired if nonconforming uses, i.e., preexisting uses that did not conform with these homogeneous zoning districts, were legitimized. ... [But] they feared that public and judicial opposition to the elimination of existing land uses might jeopardize the acceptance of any zoning legislation at all

It was decided to compromise by allowing uses of land that were inconsistent with the zoning regulations to continue, but by imposing various restrictions that would cause such nonconforming uses gradually to disappear. The result was a standardized series of regulations, restricting change of uses, alterations, repair and restoration of structures, and abandonment or discontinuance of nonconforming uses. The elimination of nonconforming uses has, however, proven to be a most difficult goal.

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width, setbacks, floor area ratio, off-street parking standards, signage, and landscaping and screening requirements.

The variety of nonconforming situations account for the difficulty in regulating them. Nonconforming uses in residential zoning districts can range from things such as tool sheds in small accessory buildings to bulk storage of gasoline or oil in large buildings suitable only for that specific use.

Nonconforming uses can also involve uses in structures designed for conforming uses (such as a manufacturing operation occurring in an office building in a commercial zoning district) or uses in structures which may be adaptable to conforming uses (such as manufacturing in a factory building, in a multi-family residential district, which could be converted to apartments). Obviously, some of these uses are easier to eliminate than others.

As mentioned, zoning ordinances usually seek the eventual elimination of nonconforming uses and structures. This is primarily accomplished by: (1) limiting repair, restoration, additions, enlargements and alterations of the nonconforming structure or of the structure housing the nonconforming use; and (2) restricting or prohibiting the expansion or change of the nonconforming use itself.

Routine maintenance and minor repairs are ordinarily permitted, as long as the cost of this work within any twelve month period does not exceed a stated percentage of the value of the property. Depending on the particular zoning ordinance, the percentage of value is usually specified as either 33% or 50%. Some zoning ordinances completely prohibit any addition, enlargement or alteration of a structure housing a nonconforming use unless the nonconforming use is eliminated. Expansion of the existing nonconforming use (for example, adding seating in a nonconforming restaurant) or changing from the current nonconforming use to another use not permitted in the zoning district, is often prohibited as well.

Most ordinances specify that once a nonconforming use is discontinued, it may not be resumed. These "abandonment" provisions usually only apply when the discontinuance of the use is "voluntary" — as opposed to when the use is discontinued during bankruptcy or foreclosure procedures. The zoning ordinance will also usually specify a minimum time period before a use is considered to be voluntarily abandoned. In some states, courts will also require proof of an intent to abandon the use.

"Amortization" provisions — through which the local government requires that the nonconforming use or structure be eliminated within a specified number of years — have had mixed results when challenged in court. While the topic of amortizing nonconformities is a complex one that can only be touched on here, a basic rule of thumb is that amortization provisions are more likely to be upheld when they involve simpler uses or structures whose value can be readily amortized over a few years.

Courts will closely examine the extent to which an amortization provision would cause financial hardship or loss to the property owner. Thus, a provision affecting a nonconforming commercial or industrial business facility is much less likely to be upheld than one eliminating a nonconforming advertising sign or fence.

Having provided you with an overview of nonconformities, in a subsequent issue I will discuss what communities that are serious about reducing and eliminating nonconformities can do.

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