

THE LAW OF NONCONFORMING USES

By Clifford H. Bloom
Law, Weathers & Richardson, P.C.
Bridgewater Place
333 Bridge Street NW, Suite 800
Grand Rapids, Michigan 49504
May, 2001

THE LAW OF NONCONFORMING USES

A. Identifying and Handling Nonconforming Uses

1. **The Meaning of “Grandparented” Uses.** A nonconforming use is a use that was legal at the time it was created but which has since become impermissible because of a subsequent modification or adoption of a zoning ordinance. This is sometimes referred to as a “grandparented” use meaning that it was a use which was allowed before the law was changed to prohibit it. For example, a two-family home may be built and utilized in a multiple family area which is subsequently rezoned to single family. Another example would be a restaurant built in an area that was not zoned at all but subsequently became zoned for residential uses. In either instance, the use can continue as is. Eveline Twp v H & D Trucking, 181 Mich App 25 (1989). There is case law which suggests that an ordinance which required the immediate elimination of a nonconforming use would be an unconstitutional deprivation of property without compensation (i.e. a “taking”). Austin v Older, 283 Mich 667 (1938). In addition, the various Michigan Zoning Enabling Acts are arguably not broad enough to support an ordinance which would require the immediate elimination of a nonconforming use.

There are three Zoning and Enabling Acts in Michigan which apply to the area of nonconforming uses:

- (a) The City or Village Zoning Act, MCL 125.583(a).
- (b) The Township Rural Zoning Act, MCL 125.286.
- (c) The County Rural Zoning Enabling Act, MCL 125.216.

All of these statutes provide for the regulation by ordinance of nonconforming uses. They authorize the elimination of nonconforming uses only through voluntary purchase or condemnation proceedings.

Nonconforming uses run with the land. The sale or lease of property to another party that continues the same use does not extinguish the right to use the property for the nonconforming use. Civic Assoc v Horowitz, 318 Mich 333 (1947). Nonconforming uses are not transferable to another location, however. Gackler Land Co v Yankee Springs Twp, 138 Mich App 1 (1984); affirmed, 427 Mich 562 (1986).

One final issue must be noted. In order to obtain a vested interest, the use must have been legal before it was made nonconforming. In fact, the term “nonconforming use” is actually shorthand for “vested lawful prior nonconforming use.” An illegal use cannot obtain status as a nonconforming use. Wyoming v Herwever, 321 Mich 611 (1948).

A question sometimes arises as to whether a landowner has obtained vested rights in a use prior to a change in the ordinance. A case which addresses this issue is Heath Twp v Sall, 191 Mich App 716 (1991). The Defendants obtained a rezoning of property from a classification which did not allow a mobile home park to one which did. Township residents dissatisfied with the rezoning successfully pursued a referendum which overturned the new zoning. Prior to the vote, Defendants had made tangible changes to the land including paving a roadway and installing a well. The Court of Appeals held that Defendants held a vested right in the use of the property for a mobile home park. Therefore, their rights could not be divested by the referendum vote.

2. **The Expansion or Enlargement of Nonconforming Uses.** Most zoning ordinances provide that nonconforming uses may continue in their present form and scope, but that they will not be allowed to expand. Eveline Twp v H & D Trucking, above. Alternatively, some ordinances provide that expansion is permitted in a limited fashion but only after a specific zoning approval has been obtained from the municipality.

In those municipalities where expansion is prohibited by the zoning ordinance, a variance is necessary in order to allow expansion. Expanding a nonconforming use by variance normally involves a “use variance.” *Rathkopf, The Law of Zoning and Planning*, Section 51A.05. In theory and normally in practice as well, use variances are difficult to obtain. In order to be entitled to a use variance, the applicant must show that there is an unnecessary hardship which justifies the granting of the variance. This requires the applicant to prove that the property cannot be used as presently zoned, in addition to proving that the other variance standards exist. This is an extremely difficult standard which essentially requires the municipality to admit that there is an error in its zoning ordinance. The situation is even more severe in counties and townships. The County Rural Zoning Act and the Township Rural Zoning Act do not expressly provide for use variances and some land use attorneys argue that use variances are not available in a county or township. In fact, most county and township zoning ordinances do not contain a specific procedure for granting use variances. Most municipal attorneys believe, however, that the zoning enabling legislation for counties and townships is broad enough to allow these entities to grant use variances. There are also reported cases involving use variances in townships.

In applying for a variance, the applicant should remember that since the general policy of the law favors the elimination of nonconforming uses, most municipalities will look with disfavor upon any activities which would expand a nonconforming use.

In some municipalities the zoning regulations expressly provide that limited expansions may be approved (i.e. a fifty percent (50%) expansion of floor space) so long as approval is obtained from the municipality and certain standards (which are usually less stringent than variance standards) are met. For example, the City of Walker Code provides that an expansion of a nonconforming use can occur if the Zoning Board of Appeals finds (1) that such expansion is made on adjoining land, (2) such expansion could not exceed fifty percent (50%) of the floor area of the nonconforming use, and (3) a reasonable need for expansion exists and an absence of an injurious effect on contiguous property is shown.

Even when limited expansion is allowed by a zoning ordinance, questions can arise regarding compliance with the ordinance. A case of local significance will illustrate this problem. In High v Cascade Hills Country Club, 173 Mich App 622 (1988); Iv app den, 434 Mich 556 (1990), the country club pursued what it believed to be a legitimate expansion of its operations. It built a maintenance shed for its golf carts pursuant to a township ordinance which allowed an expansion of up to fifty percent (50%) of the floor area of an existing building devoted to a nonconforming use. The new maintenance building was completely separate from and not physically attached to any other country club building, however. Grand Rapids Township had determined that the new building was a lawful extension of an existing nonconforming use. The Kent County Circuit Court agreed with this decision. The Michigan Court of Appeals reversed the trial court's holding. The

Appellate Court held that the erection of a new building was not a permitted enlargement or extension of a nonconforming use, but rather the new building was a completely separate and distinct structure serving a whole new use. This case illustrates how strictly the law regarding nonconforming uses may be construed.

One of the toughest issues regarding nonconforming uses is what constitutes an expansion of the use. Recent case law has held that mere changes in technology would not necessarily be treated as an expansion. Independence Twp v Eghigian, 161 Mich App 110; lv app den, 429 Mich 871 (1987). In that case, the court found that the applicant was able to store a larger truck than he had previously owned on his residentially zoned property because trucks were now bigger than they use to be.

The decisions become even more difficult when the expansion occurs slowly and over time. For example, the party with a nonconforming use may have five trucks in one year, six trucks the next, and seven the year thereafter. In any one year, the difference does not seem substantial. Over a period of ten years, however, the difference may, in fact, be significant.

There are other examples of how difficult it can be to determine whether a use has been expanded. For instance, would changing the hours of operation of an establishment be treated as an expansion of a nonconforming use? In Garb-Ko v Carrollton Twp, 86 Mich App 350 (1978), the Michigan Court of Appeals upheld the trial court's finding that the extension of operating hours constituted an expansion of a nonconforming use. This ruling was based upon a series of Michigan cases which have held that the continuation of a nonconforming use must be of substantially the same size, intensity and essential nature as

the use which existed at the time of passage of a valid zoning ordinance or amendment thereto. Deardon v Detroit, 70 Mich App 163 (1976); Norton Shores v Carr, 81 Mich App 715 (1978). Even extending a roof over an existing patio to allow year-round use has been found to constitute an expansion of a nonconforming use. Jobert v Morant, 192 A2d 553 (Conn 1963).

3. What Constitutes a “Change of Use”. Related to the issue of expansion of a nonconforming use is the issue of a change of use. The Michigan Zoning and Enabling Acts permit municipalities to adopt regulations regarding the substitution of nonconforming uses. Such ordinances will normally allow a change to use that is more appropriate to the district in which it is located than the existing nonconforming use. An example would be a change of use from an office use that generated significant traffic, such as a doctor’s office, to an office use which generated very little traffic, such as an insurance broker that did not deal with the general public. While the ordinance will normally require that the permission of the municipality be obtained to change the use, such permission is usually freely given on the basis that the “new use” is a move toward the eventual elimination of a nonconformity.

Many changes of use are prohibited by local ordinances as they would be treated as establishing a new nonconforming use. It is not always easy to determine whether a change of use has occurred, though. For example, if a restaurant is operating as a nonconforming use, would it be a change of use for that restaurant to obtain a liquor license? No Michigan case has addressed this question, but the courts in New York, Connecticut, and Massachusetts have all found that obtaining a liquor license was a change in use which

would require a variance. Would it be a change of use for a nonconforming hardware store to begin to sell an expanded product line? It might be, but it could also be considered a change in technology such as the change that was condoned in the Eghigian case noted above.

A 1991 Michigan Court of Appeals decision illustrates how confusing decisions in this area can be. In Rochester Hills v SOCRRA, 192 Mich App 380 (1991); reversed in 440 Mich 852 (1992), the Defendant obtained a license to operate a landfill in 1958 at a time that its land was zoned agricultural. The property subsequently underwent several zoning changes which made the operation of the landfill a lawful nonconforming use. In 1971 the defendant started to compost leaves, and in 1988 the composting of lawn clippings began. The Court of Appeals held that the landowner could not change the nature of the nonconforming use and that the ordinances allowing nonconforming uses protected only those uses which were legally established before the zoning change in question. Of particular significance in this decision was the fact that the defendant's landfill operation was coming to a close at a time that the composting operations were greatly increasing in size and could continue indefinitely. Since the law favors the eventual elimination of nonconforming uses, this change of use was considered a significant extension of the preexisting nonconforming use and therefore was not allowed. Ultimately, the Michigan Supreme Court reversed the Court of Appeals, thus demonstrating the difficulty of what really constitutes a substantial change of use.

4. **Dealing with Abandonment or Discontinuance.** Ordinances will often provide that a nonconforming use cannot be resumed after discontinuance

or abandonment. Sometimes a specific time frame is provided by ordinance. Courts are often reluctant to enforce such provisions, however. Even when the time frame contained in the ordinance to evidence discontinuance has been exceeded by several months, courts will generally require some proof of affirmative interest to abandon the nonconforming use before holding that the use cannot be resumed. Case law dictates that it is necessary to show more than mere nonuser. The burden is on the municipality to show abandonment. Rudnik v Mayers, 387 Mich 379 (1972); Dusdal v Warren, 387 Mich 354 (1972). This puts a substantial burden upon the municipality because it may be difficult to show in many instances that the property owner clearly intended to abandon the nonconforming use unless there has been a substantial physical alteration which would signal an end to the use. Please note that there is some older case law that indicates that discontinuance combined with substitution of a conforming use may eliminate the right to continue the nonconforming use. Howell v Kaal, 341 Mich 585 (1954).

The case law in this area can be extremely frustrating to a municipality. If the nonconforming use has existed for many years, there may be numerous activities which would be considered nonconforming. Arguably, the property owner may revive any of these activities at any time if he or she has not clearly manifested a voluntary decision to abandon the use. Barring substantial physical changes to the property, the ability to show an intention to abandon may be extremely difficult. Accordingly, it is not uncommon for a municipality to rely upon the time frames contained in the municipality's ordinance as an

indication of intent to abandon. This may well result in a court action to determine whether the nonconforming use has actually been abandoned so that it can no longer be revived.

5. Modifying the Use - Receiving Administrative Approval. As noted in subsection 2 above, some ordinances allow limited expansion of nonconforming uses if specified standards are met. In certain instances, this approval may be granted administratively by the building inspector or zoning administrator. Such personnel may also have the authority under local ordinance to approve changes of use where the new use is more appropriate than the former use. Not all municipalities have ordinances which contain these provisions. If modification of an existing nonconforming use is desired, it is certainly appropriate to first check with the municipality to see what approval process will be required to modify the use. In those instances where administrative approval is permissible, the applicant's chances for successfully modifying the use are greatly increased.

B. Distinguishing Nonconforming Lots and Structures

1. Similarities and Differences From Nonconforming Use. A nonconforming structure is a structure which was lawfully in existence at the time the zoning regulations were adopted or amended and which no longer conforms to the new zoning regulations. The structure might be nonconforming because it is too close to the lot line or because the structure takes up too much lot area. A nonconforming lot is a lot which previously met the zone district requirements or was platted before the area was zoned but is now too small for the zone district or has some other dimensional problem. In either instance, the similarity with a nonconforming use is that the structure or lot conformed with

local regulations at one time but has become nonconforming because of a change in the zoning regulations.

It is quite possible that the use carried on in a nonconforming structure is still permitted in the zone district and that it is only the structure itself which is not in compliance with the new regulations. It is also possible that both the use and the structure would not be permitted by the new zoning regulation.

Both ordinances and case law have tended to view nonconforming structures less critically than nonconforming uses. The ability to expand a nonconforming structure by variance is normally easier than a nonconforming use because the test which is applied to review the expansion application is less stringent. This will be discussed below.

It is sometimes difficult to determine whether an expansion constitutes an impermissible expansion of a nonconforming structure. For example, there is case law which indicates that the installation of a roof deck which did not increase the physical nonconformity of a structure would not be treated as an expansion of a nonconforming structure but would still be treated as the extension or expansion of a nonconforming use. Shackford v Kennebunk, 46 A2d 102 (ME 1984). Had there not been a nonconforming structure involved in that case, the construction of that same roof deck would not have required a variance because the increase in the deck did not increase the physical nonconformity of the building. The problem with the building was not its height, but its location to the property line which involved an infringement into a required setback area.

Distinguishing between whether a change is change of use or a structural type change is not always as easy as it may sound. For example, a store may be located in a

residentially zoned district. The store can continue to operate as is because it preexisted the zoning ordinance and is a legal nonconforming use. Under the local zoning ordinance, however, legal nonconforming uses cannot be changed or expanded in any manner without either rezoning the property or obtaining a variance. If the store owner wants to add an addition onto the building and if the addition would encroach into the required side yard setback (i.e., the addition would make the building too close to the lot line), would the variance request involving the setback line be a use or a nonuse variance? The store owner will assert that it is a nonuse variance since he or she is already lawfully operating the store and is simply requesting a setback variance. However, since the store use is not normally permitted in that district and since the store owner is attempting to add floor space to a use which is otherwise prohibited (i. e., expanding a nonconforming use), many experts would argue that the store owner is asking for a use variance. Legal authorities are split over whether this would constitute a use or nonuse variance, although most would probably agree that it is both.

2. Applying Local Ordinances - Expansion or Enlargement of Nonconforming Structures. Many ordinances prohibit the expansion of a nonconforming structure unless prior approval is obtained. Interestingly enough, most ordinances will allow an applicant to expand a nonconforming use within the confines of an existing structure (within the existing “footprint”), even if that existing structure is nonconforming itself. There are sometimes limitations on this expansion, however, such as the requirement that the proposed use was contemplated at the time the structure was built.

Almost any type of physical expansion of a nonconforming structure is considered an extension or expansion. For example, extending a roof over a patio to allow year around use has been found to be an expansion of a nonconforming use. Jobert v Morart, 192 A2d 553 (Conn 1963).

The expansion of a nonconforming structure is normally accomplished through the filing of a variance. The type of variance which is granted is termed a nonuse variance. The burden on the applicant to obtain a nonuse variance is lower than the burden of obtaining a use variance. The standard for granting a nonuse variance is “practical difficulty,” that is, whether the literal application of the zoning ordinance provision would cause practical difficulty. Generally, this would involve showing (1) whether compliance with the restrictions of the zoning ordinance would unreasonably prevent the owner from using the property for a permitted purpose or would be unduly burdensome, (2) whether a grant of the variance would do substantial justice to the applicant as well as other property owners, and (3) whether relief can be granted in such a fashion that the spirit of the ordinance will be observed and public safety and welfare will be secured.

Some common examples of nonuse variances are requests to build within required setback areas and relief from restrictions on fence height. In industrial and commercial areas, there are often requests to exceed maximum lot coverage requirements which may exist or to obtain relief from parking requirements.

3. Eliminating Nonconforming Lots - Merger of Lots. In many older communities, areas were platted before they were zoned or at least before newer zoning ordinances were adopted which require larger lots. This leads to

situations where the platted lots which exist are smaller (sometimes significantly) than what the present zone district requires. In order to address this discrepancy, many municipalities have adopted ordinance provisions which require nonconforming lots to be merged when possible to meet the zone district requirements.

Merger requirements are placed only on lots which are in common ownership since the land owner who owns a single nonconforming lot should be allowed to use that lot under the general rules of nonconforming uses and lots discussed above. The person who owns multiple contiguous lots is not so fortunate, however. Merger ordinance provisions require that person to combine those lots in order to meet the underlying zone district requirements. For example, if a person owns 3 platted 50-foot lots and the zoning ordinance now requires a minimum lot width of 75 feet, that person will have to divide the middle lot in half in order to create 2 conforming 75-foot lots. Such provisions foster the municipality's policy of eliminating nonconforming situations. These provisions have often made unsuspecting landowners upset, however. Referring to the above example, if the three 50-foot lots were owned by 3 different individuals, they would be developed as 3 building sites. The mere fact that one person has acquired all three lots has suddenly changed the nature of the lots from three building sites into two. If an area is substantially developed with the smaller lot size, it is not uncommon for such a landowner to seek a variance on the basis that the rest of the neighborhood is already developed with 50-foot lots so that there is no detriment to the community in allowing that property owner's lots to be developed likewise. If the area is not well developed, however, or if the area has already developed through numerous combinations of lots, the ability of the landowner to obtain such a variance will be severely

limited. The Michigan Supreme Court has upheld a municipality's right to enforce a merger ordinance finding that such an ordinance did not result in a regulatory taking without just compensation. Bevan v Brandon Twp, 438 Mich 385 (1991).

You should also realize that merger statutes can sometimes create very harsh results. If the property owner noted above owned two 50-foot lots instead of three, that property owner would be required to use both lots to meet the zone district requirements and thereby have a lot with an extra 25 feet.

In representing purchasers of property it is always wise to know what the zoning requirements for an area are. The purchaser should be certain that he or she will be able to use or sell separate lots as building sites if that is his or her intention. It is very unpleasant and costly for the purchaser to find out after purchase that some merger of lots may be required. It is equally important for the purchaser to be certain that the proposed use of those lots is allowed by the zoning ordinance.

4. When the Structure Becomes Abandoned—Voluntarily or Through Destruction. The rules governing abandonment of nonconforming structures are somewhat different than those which deal with the abandonment of nonconforming uses. In the case of a nonconforming structure, the only way to abandon the nonconformity is to bring it into compliance with the zone district requirements. Once this has occurred, no nonconformity remains. Once such a structure has been brought into compliance, almost all ordinances will require that the structure remain in compliance. Since it is obvious in the case of a physical alteration whether a nonconformity has been abandoned, the proof problems associated with the abandonment of a nonconforming use are not present.

Likewise, if a structure is destroyed most ordinances will require that any new structure be built in compliance with the zone district requirements. This is consistent with the theory of the law that eventually nonconformities will be brought into compliance through attrition. It is always possible for a homeowner to seek a variance if the application of this rule will result in a hardship.

5. When the Property Owner is Denied—Seeking Relief Through Variance Appeals and Other Administrative Avenues. Unlike the nonconforming use area where some zoning ordinances provide for limited expansion so long as certain tests are met that can be determined by the zoning administrator, physical additions to nonconforming structures are generally not permitted without a variance. The one exception to this rule is in the area of nonconforming lots. Most zoning ordinances do allow construction on nonconforming lots so long as certain limitations are met with regard to the use of the lot. For instance, there may be lot coverage requirements which would generally not be applicable to a conforming lot. There may also be reduced setback requirements. The zoning administrator or building inspector would be authorized to review plans and allow construction so long as the ordinance requirements are met. It should be noted that the provisions which deal with the use of a nonconforming lot will often relax some of the restrictions to fit the lot size. For example, required side yards may be reduced in proportion to the amount by which the lot does not meet the zone district requirements.

It is interesting that expansion of a nonconforming structure generally is not allowed administratively even though a nonconforming use may sometimes be expanded without

obtaining a variance. Since a variance is basically a license to violate the law, the distinction which has arisen is that in certain instances expansion of a nonconforming use is permissible so long as certain requirements are met. This is somewhat akin to the area of special uses whereby certain land uses are authorized in a zoning district under certain circumstances even though such uses would otherwise be prohibited. The further expansion of a structure which is nonconforming is not likewise tolerated perhaps because the expansion will physically increase the existing nonconformity.

As noted in Section 2 above, the property owner may seek a variance to expand the nonconforming structure which would be considered a nonuse variance so long as the use contained inside the structure is a conforming use. If the use itself is also nonconforming, any expansion will likely be treated as the expansion of a nonconforming use and require a use variance unless expansion of such use is allowed by ordinance. In analyzing any expansion request, be certain to determine whether the expansion is merely a structural one or also is an expansion of an area where the use which is not permitted by the zoning ordinance will be conducted.

C. Regulating Nonconforming Uses by Means of a Police Power Ordinance. Although the Michigan appellate courts have long held that nonconforming uses cannot generally be eliminated or prohibited by means of zoning regulations, prior lawful nonconforming uses normally can be regulated and even eliminated by means of general police power ordinances. In other words, if a land use regulation (i.e., zoning regulation) is involved, “grandparented” structures and uses must be protected. If an

activity is sought to be regulated, however, it can normally be regulated or even prohibited so long as a general police power ordinance is utilized.

In Natural Aggregates Corp v Brighton Twp, 213 Mich App 287 (1995), Brighton Township sought to eliminate or restrict mineral extraction operations by means of zoning regulations. The township was unsuccessful where nonconforming mineral extraction operations were involved. Thereafter, the township enacted a general police power ordinance which regulated numerous aspects of a mineral extraction operation, including imposing permit requirements. The Michigan Court of Appeals generally upheld the separate police power ordinance and confirmed that property owners cannot normally utilize the nonconforming use defense if the ordinance involved is not a zoning regulation.

99999 (710) 587318.1