BE MINDFUL OF ZONING CHANGES

New Jersey Appellate Division requires a certificate of nonconforming use be obtained prior to issuance of permit for alterations.

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In a recent unpublished decision, *Kelley v. Township of Rockaway Board of Adjustment*, New Jersey's Appellate Division concluded that zoning officers lack the authority to determine the status of certain nonconforming uses in connection with construction permit applications. This decision has potentially significant implications for owners of commercial properties improved with uses which were rendered nonconforming more than one year earlier, who may now have to apply to the Zoning Board of Adjustment for a certificate of nonconforming use before a construction permit application can be processed.

The *Kelley* case involved a property improved with a single-family residence and a detached garage with a second-floor apartment. These improvements were conforming when constructed, but in 1967, the township adopted an ordinance prohibiting two principal structures on the lot. Apparently the garage and second-floor apartment were considered to be a principal structure.

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In 1999, shortly after acquiring the property, the new owner applied for a construction permit to renovate the apartment. The zoning officer at the time (who was also the building inspector) requested that the owner provide signed statements and tax records indicating that the garage structure had previously been used as an apartment. He performed an inspection, determined that the second-floor apartment was a "valid pre-existing, nonconforming use," and therefore issued zoning approval for the renovations. A certificate of occupancy was issued upon completion of the work, and the apartment was rented out.

Some 12 years later, based on newly discovered information, the prior zoning officer (who had since become the construction official) and his successor to the position of zoning officer jointly issued a letter to the property owner asserting that the apartment was not a prior non-conforming use and that any determination relative to its status as a nonconforming use, made more than one year after the use became nonconforming, must be issued by the Zoning Board of Adjustment. The letter further asserted that any such determinations made by the zoning officer, which would implicitly include the one rendered in 1999 precedent to the issuance of zoning approval for the renovations, "are void from the outset."

The property owner filed an appeal with the Zoning Board of Adjustment, which ruled that the zoning officer had no legal authority to issue a nonconforming use determination in 1999. Its decision relied on a provision in the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-68, whereby a certificate of nonconforming use, upon application by any person with an interest in the land in question, may be issued by the zoning officer within one year of the date of the adoption of the ordinance which renders the use nonconforming, but thereafter may be issued only by the Zoning Board of Adjustment. Since the ordinance prohibiting two principal structures was enacted years earlier, the Zoning Board of Adjustment concluded that the zoning officer's determination was without authority, and, therefore, was of no legal effect.

An appeal to court followed, in which the trial court affirmed the zoning officer's lack of jurisdiction to make a nonconforming use determination. The property owner then appealed to the Appellate Division, contending that a property owner is not required by N.J.S.A. 40:55D-68 to seek a certificate of nonconforming use when applying for a construction permit. The property owner further argued that a construction official may issue a construction permit based on his or her determination of the existence of a pre-existing nonconforming use, even if the property owner has not applied for or obtained a certificate of nonconforming use. The Appellate Division disagreed, concurring with the Zoning Board of Adjustment and the trial court that the zoning officer lacked authority to issue a certificate of nonconforming use. The property owner was then left with three options: apply to the Zoning Board of Adjustment for a certificate of nonconforming use, seek a "d" use variance, or discontinue the residential use of the apartment.

The MLUL makes clear that a zoning officer has authority to issue a certificate of nonconforming use only for one year following adoption of the ordinance which renders the use nonconforming. The Appellate Division's opinion focuses on that narrow issue but provides little explanation or analysis concerning the implicit conclusion that, where a construction permit is required to alter a pre-existing nonconforming use, municipal officials lack authority to issue such a permit unless the property owner first seeks and obtains a certificate of nonconforming use from the Zoning Board of Adjustment. Typically, a certificate of nonconforming use is applied for and obtained voluntarily by a prospective purchaser or a prospective lender to confirm that the municipality acknowledges the protected legal status of the nonconforming use. The Appellate Division's ruling implies that anytime a property owner desires to alter a nonconforming use, even if no expansion of the nonconforming use is contemplated, an application to the Zoning Board of Adjustment for a certificate of nonconforming use must first be obtained, effectively making such an application mandatory. Such an application requires an application fee and typically the posting of escrow for the cost of reviews by the Zoning Board of Adjustment's technical consultants. Additionally, a public hearing is required with notice to owners of property within 200 feet, and the burden of proof is on the applicant to prove that its use precedes the enactment of the ordinance which prohibits it — and, as in this case, that ordinance may have been enacted decades ago, making it difficult to find witnesses and produce sufficient evidence to meet the burden of proof and demonstrate continuous operation of the nonconforming use.

The *Kelley* decision is unpublished and therefore not precedential, but nevertheless serves as a reminder of the significance that changes in zoning may have. It is important that property owners be watchful of any notices they may receive concerning a proposed zoning amendment. It would also be prudent for property owners annually to confirm the zoning of their property, so that if any changes have occurred, a certificate of nonconforming use can be obtained from the zoning officer within one year of the enactment of the ordinance which resulted in the nonconformity.

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