

Sometimes It's Okay to Be Different

Nonconforming Uses in an Evolving Land Use Climate

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There are 2,566 separate municipalities in the commonwealth of Pennsylvania, each with challenges relating to population, infrastructure, generation of tax revenue and the attraction of a successful and sustainable mix of land uses; each grappling with those issues as they relate solely to it and within the larger construct of its interrelationship with neighboring municipalities; each simultaneously dealing with the reality of today and the creation and implementation of its vision of tomorrow.

Recent economic events have necessitated a re-evaluation of once-accepted truths on many fronts. Land use is no exception. From commercial to retail to residential, our real estate "norm" has changed in significant ways, and while the pendulum has begun to slowly move back toward what once was, it is clear that a new paradigm has emerged.

All municipalities periodically examine where they are and where they are going (some more frequently than others) and modify their land use ordinances accordingly. The impact of the recast real estate landscape, and likelihood that some of these changes are permanent, will result in greater self-scrutiny by municipalities to ensure that they effectively manage future development by addressing the issues in a considered manner, rather than by responding to them in a reactive and haphazard fashion. This will prompt some municipalities to look inward for the first time in decades. It will cause others to re-examine recently completed vision plans. For still others where the review process is currently underway, it will accelerate the timeline.

The Pennsylvania Municipalities Planning Code (MPC) is the controlling legislation governing zoning and land use law in the commonwealth of Pennsylvania (except within the cities of Philadelphia and Pittsburgh, which are Home Rule Charter municipalities). Each municipality is permitted by the MPC (or its Home Rule Charter, as the case may be) to enact its own unique zoning ordinance regulating the use and development of real property within its borders.

A zoning ordinance provides a township, borough or city with a toolbox it may use to achieve its land use vision. Chief among these tools is the ability to establish various zoning classifications and sub-classifications, each of which permits or prohibits certain uses. The municipality will designate each area of the community as falling within one of these zoning districts.

As a municipality's ideal for a particular portion of its territory changes — either prospectively as a result of forward planning, or retroactively in response to unanticipated events — the uses for that property may be adjusted through an amendment to the zoning ordinance. Such

amendments may modify the uses permitted (or prohibited) within a zoning district, rezone the area to a different existing zoning district, or abolish the district altogether and create a new one regulating the same real property.

Those changes to the ordinance do not mean, however, that uses lawfully in existence at the time of the ordinance change suddenly become illegal and must close their doors. Rather, such uses, known as nonconforming uses (or, colloquially, as "grandfathered" uses) are permitted to continue and, in some instances, are allowed to increase in scope and intensity. As zoning ordinances evolve in an attempt to control land use within a constantly changing development dynamic, it is important that property owners understand their entitlements with respect to lawful nonconforming uses and how to protect them, as this extra "stick" in their bundle of property rights could prove to be a valuable asset.

A use becomes nonconforming in one of two instances: the use was in existence prior to the date on which the first zoning ordinance of the municipality came into being, and the use is not permitted at that location under the new ordinance; or the use became nonconforming as a result of an amendment to an existing zoning ordinance that rendered such use unlawful at that location. Only the use that was in existence on the date the use became nonconforming is protected.

The right to a pre-existing lawful nonconforming use runs with the land and is not particular to the owner of the property. Pre-existing lawful nonconforming uses are constitutionally protected as a vested property right that cannot be diminished or abrogated by a subsequently enacted zoning ordinance provision unless that use is abandoned by the user, is a nuisance or is abolished by eminent domain.

Zoning ordinances do, however, grant a municipality the tool of regulating nonconforming uses to a certain extent. So while a municipality cannot amend its zoning ordinance to flagrantly legislate away lawful existing uses that no longer fit within its master plan for a particular area, they can (and do) enact principles that govern the expansion of nonconforming uses and effectively ensure that with the passage of time, through abandonment, those discordant uses will fall aside and be replaced with uses that are consistent with the zoning district.

The burden of proof is on the party claiming a pre-existing lawful nonconforming use to show the use existed and that it was legal at the time that the ordinance rendered it nonconforming. "This burden includes a requirement of conclusive proof by way of objective evidence of the precise extent, nature, time of creation and continuation of the alleged nonconforming use," according to the 1983 Commonwealth Court decision in *Jones v. Township North Huntington Zoning Hearing Board*.

The burden is on the party asserting the right to a nonconforming use to provide objective evidence detailing what particular use became nonconforming and also when the ordinance changed to prohibit that use. As a result, it is important that the party seeking to continue the use locate the appropriate historical zoning ordinances. This would be the municipality's initial zoning ordinance for a matter where it is argued that the nonconforming use predated the ordinance. Where a use became nonconforming due to an ordinance amendment, the party claiming the right to the use should locate both the ordinance in effect immediately prior to the date on which the use became nonconforming, as well as the amended ordinance which rendered the use nonconforming.

Pre-existing lawful nonconforming uses are permitted to continue provided that the use has not been abandoned either by non-use or by a change in use. It is the burden of a party asserting the abandonment of a nonconforming use to prove abandonment.

Most zoning ordinances contain a provision setting forth a time period within which non-use of property creates a presumption that the party intended to abandon the nonconforming use. The burden of proof for abandonment is not sustained simply by showing that the use has not operated on the property for that certain amount of time. The intent to abandon must also be established, and evidence of actual abandonment of the use must be shown.

Once the presumption of abandonment has been established and evidence of intent to abandon and actual abandonment have been provided, it then becomes the burden of the party opposing the abandonment to offer rebuttal evidence that there was no abandonment.

Zoning ordinances also typically contain provisions specifying the guidelines under which nonconforming structures may be rebuilt where they have been razed or destroyed by casualty. Depending on the circumstances, the ordinance may require that the structure be rebuilt in conformance with current ordinances. Courts have held, however, that where it is necessary to avoid the extinguishment of a nonconforming use, a municipality must allow such a structure to be rebuilt in a nonconforming fashion and grant the variances necessary to accommodate that structure, because to do otherwise, and eliminate the nonconforming use would constitute a taking.

Only the use that was lawfully in existence at the time the effecting ordinance came into existence or was amended is protected as a legal nonconforming use. Any subsequent change to the nonconforming use is not protected, unless that new or different use is protected by the doctrine of natural expansion. By this tenet, courts have recognized that to forever lock a use within the exact parameters in which it existed at the precise moment it became nonconforming, and not permit any growth over time, would be inequitable.

Natural expansion permits a property owner to expand "as required to maintain economic liability or to take advantage of increases in trade," provided that said expansion is not detrimental to a public health safety and welfare, according to *Smalley v. Zoning Board of Middletown Township*. This right of expansion is a constitutional right protected by the due process clause.

A property owner that seeks to expand nonconforming use has the burden to prove that the use sought to be expanded was created in good faith and that it lawfully existed.

In order to be protected by the doctrine of natural expansion, the use proposed does not need to be identical to nonconforming use, but it must be sufficiently similar such that it does not comprise a new or different use. For instance, a real estate sales office has been found to have been sufficiently similar to a proposed machinery sales office, and a private social club has been found to be sufficiently similar to a proposed public restaurant and bar. The road to expansion, however, is tempered by the need to limit how the nonconforming uses impact the surrounding neighborhood within which the use is no longer contemplated as being appropriate, so municipalities are permitted to enact ordinances reasonably regulating this right of expansion.

The doctrine of natural expansion does not permit the party to change a nonconforming use to a use that is otherwise not permitted in that zoning district or to add another nonconforming use to that nonconforming use that is permitted. The nonconforming use may be expanded onto other portions of the property occupied by the property owner at the time of the enactment of the applicable zoning ordinance, so long as that expansion does not result in new or different use and there are no dimensional nonconformities. The doctrine of natural expansion does not, however, permit a nonconforming structure on a property to expand in violation of existing zoning regulations.

Suffice it to say, the establishment, maintenance and permitted expansion of nonconforming uses is a very fact specific endeavor, and as the real estate terrain continues to shift and as zoning ordinances are forced to adapt in anticipation or in reply, the need to understand a property owner's rights in this area increases in importance.

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