

OWOSSO
Zoning Board of Appeals



Regular Meeting
9:30am, August 18, 2015
Owosso City Council Chambers



MEMORANDUM

301 W. MAIN ▪ OWOSSO, MICHIGAN 48867-2958 ▪ (989) 725-0599 ▪ FAX (989) 723-8854

DATE: August 14, 2015

TO: Chairman Horton and the Owosso ZBA

FROM: Susan Montenegro, Asst. City Manager/Dir. of Community Development

RE: Zoning Board of Appeals Meeting: Tuesday, August 18, 2015

The Zoning Board of Appeals shall convene in the city council chambers at 9:30 a.m. on Tuesday, August 18, 2015 to hear a petition for a dimensional variance to build a fence. The property seeking the variance is located at 229 S. Cedar Street. The property is zoned I-1 light industrial and is considered a nonconforming use under the current zoning ordinance.

Petitioner wishes to construct a fence between its buildings along S. Cedar Street to provide safety, security, improve the aesthetics of the property and act as a sound deadening barrier. The issue is this is more than just adding a fence to a property. It is not a dimensional variance but rather a use variance when you get down to it.

The addition of a fence to the property is considered an "expansion of use" and is not allowed based on the following regulation from the *Owosso Code of Ordinances*:

Section 38-378(3)(4).

- (3) No Class B nonconforming use or structure shall be enlarged, extended or structurally altered, nor shall the nonconforming use be changed to a substantially different nonconforming use.
- (4) No such nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of adoption or amendment to this chapter.

In accordance with the law, the ZBA has authority and is charged with the need to deliberate and rule on each of the following criteria; what follow are staff recommendations/interpretations:

- (3) *Variances.* The board shall have the power to authorize, upon appeal, specific variances from such requirements as lot area and width regulations, building height and bulk regulations, yard and depth regulations, signs and off-street parking and loading space requirements, provided all of the basic conditions listed herein and any one (1) of the special conditions listed thereafter can be satisfied.
 - a. *Basic conditions.* In order to qualify for a variance, the applicant must show that a variance:
 - 1. Will not be contrary to the public interest or to the intent and purpose of this chapter; **This property has been the subject of many nuisance complaints by neighbors and city council; subject to ZBA review.**
 - 2. Shall not permit the establishment within a district of any use which is not permitted by right within that zone district, or any use or dimensional variance for which a conditional use permit or a temporary use permit is required; **subject to ZBA review.**

Owosso Zoning Board of Appeals

3. Is one that is unique and not shared with other property owners; **subject to ZBA review.**
 4. Will relate only to property that is under control of the applicant; **Only relates to this specific property.**
 5. Is applicable whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome; **subject to ZBA review.**
 6. Was not created by action of the applicant (i.e. that it was not self-created); **Adding the fence expands the use and therefore is a self-created action.**
 7. Will not impair an adequate supply of light and air to adjacent property or unreasonably increase the congestion of public streets or increase the danger of fire or endanger the public safety; **Subject to ZBA review.**
 8. Will not cause a substantial adverse effect upon property values in the immediate vicinity or in the district in which the property of the applicant is located; **subject to ZBA review.**
 9. Is applicable whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the area, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners; **subject to ZBA review.**
- b. *Special conditions.* When all of the foregoing basic conditions can be satisfied, a variance may be granted when any one (1) of the following special conditions can be clearly demonstrated:
1. Where there are practical difficulties or unnecessary hardships which prevent carrying out the strict letter of this chapter. These hardships or difficulties shall not be deemed economic, but shall be evaluated in terms of the use of a particular parcel of land; **request is subject to ZBA review.**
 2. Where there are exceptional or extraordinary circumstances or physical conditions such as narrowness, shallowness, shape, or topography of the property involved, or to the intended use of the property, that do not generally apply to other property or uses in the same zoning district. **ZBA must deliberate on these points and issue findings.**
 3. Where such variation is necessary for the preservation of a substantial property right possessed by other properties in the same zoning district.
- c. *Rules.* The following rules shall be applied in the granting of variances:
1. The board may specify, in writing, such conditions regarding the character, location, and other features that will, in its judgment, secure the objectives and purposes of this chapter. The breach of any such condition shall automatically invalidate the permit granted.
 2. Each variance granted under the provisions of this chapter shall become null and void unless:
 - i. The construction authorized by such variance or permit has been commenced within six (6) months after the granting of the variance and proceeds to completion in accordance with the terms of the variance;
 - ii. The occupancy of land, premises, or buildings authorized by the variance has taken place within one (1) year after the granting of the variance.
 3. No application for a variance which has been denied wholly or in part by the board shall be resubmitted for a period of one (1) year from the date of the last denial, except on the grounds of

Owosso Zoning Board of Appeals

newly-discovered evidence or proof of changed conditions found upon inspection by the board to be valid.

4. In granting or denying a variance the board shall state the findings of fact upon which it justifies the action.

Summarily, this request will take much scrutiny and deliberation from the ZBA of the findings, as well as the public hearing. Staff issues no recommendation on this petition, ZBA must deliberate and determine the outcome.

That is all for now. Please go through the rest of your packet contents and **RSVP for the meeting**. Please contact me if you have any questions, comments, or other feedback at susan.montenegro@ci.owosso.mi.us or on my cell at 989.890.1394. I look forward to seeing you all on the 18th.

AGENDA

Owosso Zoning Board of Appeals

Tuesday, August 18, 2015 at 9:30 a.m.

Council Chambers – Owosso City Hall

Owosso, MI 48867

CALL MEETING TO ORDER:

ROLL CALL:

APPROVAL OF AGENDA: August 18, 2015

APPROVAL OF MINUTES: July 21, 2015

SITE INSPECTIONS: None

COMMUNICATIONS:

1. Staff memorandum
2. ZBA minutes from July 21, 2015
3. Variance request – 229 S. Cedar Street – Owosso Iron and Metal
4. Public notice

COMMISSIONER/PUBLIC COMMENTS:

PUBLIC HEARINGS:

1. Variance - (resolution)

BUSINESS ITEMS:

COMMISSIONER/PUBLIC COMMENTS:

ADJOURNMENT: Next regular meeting will be on Tuesday, September 15, 2015 if any requests are received.

Commissioners, please call Bridget at 725-0540 if you will be unable to attend the meeting on Tuesday, August 18, 2015

[The City of Owosso will provide necessary reasonable auxiliary aids and services, such as signers for the hearing impaired and audiotapes of printed materials being considered at the meeting, to individuals with disabilities at the meeting/hearing upon seventy-two (72) hours notice to the City of Owosso. Individuals with disabilities requiring auxiliary aids or services should contact the City of Owosso by writing or calling the following: Amy Kirkland, City Clerk, 301 W. Main St, Owosso, MI 48867 (989) 725-0500]. The City of Owosso website is: www.ci.owosso.mi.us

Affirmative Resolutions
Owosso Zoning Board of Appeals
Tuesday, August 18, 2015, 9:30 a.m.
Owosso City Council Chambers, 301 W Main St.,
Owosso, MI

Resolution 150818-01

Motion: _____
Support: _____

The Owosso Zoning Board of Appeals hereby approves the agenda of August 18, 2015 as presented.

Ayes: _____
Nays: _____

Approved: ____ Denied: ____

Resolution 150818-02

Motion: _____
Support: _____

The Owosso Zoning Board of Appeals hereby approves the minutes of July 21, 2015 as presented.

Ayes: _____
Nays: _____

Approved: ____ Denied: ____

Resolution 150818-03

Motion: _____
Support: _____

Whereas, the Owosso Zoning Board of Appeals, after reviewing the case for 229 S. Cedar Street, parcel # 050-660-023-015-00 hereby make the following findings:

1. _____
2. _____
3. _____

Based upon those findings, the Owosso ZBA hereby approves/denies the petition to permit the building of a fence which is an expansion of use variance as described in the *City of Owosso Code of Ordinances*, conditioned on the following:

1. _____
2. _____
3. _____

Ayes: _____

Nays: _____

Approved: ____

Denied: ____

Resolution 150818-04

Motion: _____

Support: _____

The Owosso Zoning Board of Appeals hereby adjourns the August 18, 2015 meeting, effective at
_____ a.m.

Ayes: _____

Nays: _____

Approved: ____

Denied: ____

MINUTES
REGULAR MEETING OF THE OWOSSO ZONING BOARD OF APPEALS
CITY OF OWOSSO
JULY 21, 2015 at 9:30 AM
CITY COUNCIL CHAMBERS

CALL TO ORDER: The meeting was called to order by Randy Horton at 9:30 a.m.

ROLL CALL: Was taken by Recording Secretary Marty Stinson.

MEMBERS PRESENT: Chairman Randy Horton, Vice-Chairman Christopher Eveleth, Secretary Dan Jozwiak, William Wascher Planning Commission Representative, and Alternate John Horvath

MEMBERS ABSENT: Commissioner Kent Telesz and Alternate Matthew Grubb

OTHERS PRESENT: Ms. Susan Montenegro, Assistant City Manager and Director of Community Development; Charles Rau, Owosso Building Official; Todd Stuive, Exxel Engineering, 5252 Clyde Park Ave., SW, Grand Rapids, MI, representative for Dollar General, 210 S. Shiawassee Street.

AGENDA: IT WAS MOVED BY VICE-CHAIRMAN EVELETH, AND SUPPORTED BY SECRETARY DAN JOZWIAK TO APPROVE THE AGENDA OF JULY 21, 2015 AS PRESENTED.

YEAS: ALL. MOTION CARRIED.

MINUTES: IT WAS MOVED BY SECRETARY DAN JOZWIAK AND SUPPORTED BY PLANNING COMMISSION REPRESENTATIVE WILLIAM WASCHER TO APPROVE THE MINUTES OF MAY 19, 2015 AS PRESENTED.

YEAS: ALL. MOTION CARRIED.

COMMUNICATIONS:

1. Staff memorandum
2. ZBA minutes from May 19, 2015
3. Variance Request – 210 S. Shiawassee Street – Dollar General
4. Public Notice

COMMISSIONER/PUBLIC COMMENTS: None.

PUBLIC HEARINGS:

1. **VARIANCE – 210 S. SHIAWASSEE STREET**

Ms. Susan Montenegro stated that Todd Stuive, from Exxel Engineering, has already been to the Planning Commission to have their site plan approved for the relocation of the Dollar General Store to South Shiawassee Street. The number of parking spaces required for a commercial site is based on the regulation from the Owosso Code of Ordinances Section 38-380, and states 36 spaces would be required. Exxel Engineering is requesting a total of 30 parking spaces with their site plan.

Mr. Suive explained that the proposed site plan includes a corner entrance and complies with all of the setbacks. Exxel Engineering has already worked with MDOT for entries and explained the delivery point for the store will be located in the back. The site plan includes 30 parking spaces, 19 located in the front of the store and 11 spaces in the back. The alley is now gravel, but will be paved. Dollar General is very comfortable with allowing only the 30 spaces for their store, as the existing store does not even accompany this number. Mr. Suive stated the site would be very difficult to squeeze any more parking spaces in, because they are bordered by three streets and an alley. Underground storm water management is being provided for the site which is also necessary to provide the proposed 30 spaces on the property.

Mr. Wascher inquired how many employees Dollar General has per shift. Mr. Suive stated there are usually three or four, and the employees would use the furthest spaces from the store. Mr. Eveleth referred to Zoning B-2, which states there must be special exceptions or extraordinary conditions in the zoning district to request the variance. He feels that due to the proposed store being bordered by three

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streets and an alley, this qualifies as an extraordinary condition. Mr. Eveleth felt comfortable making a motion to approve the variance for 210 S. Shiawassee Street.

MOTION BY COMMISSIONER EVELETH, SUPPORTED BY SECRETARY JOZWIAK AFTER REVIEWING THE CASE FOR 210 S. SHIAWASSEE STREET,(202 S. SHIAWASSEE PARCEL 050-660-021-001-00) (206 S. SHIAWASSEE PARCEL 050-660-021-003-00) (210 S. SHIAWASSEE PARCEL 050-660-021-004-00) (214 S. SHIAWASSEE PARCEL 050-660-021-005-00)(511 CLINTON PARCEL 050-660-021-002-00) (502 GENESEE PARCEL 050-660-021-006-00) AND (508 GENESEE PARCEL 050-660-021-007-00), THE OWOSSO ZBA HEREBY APPROVES THE PETITION TO PERMIT THE PARKING VARIANCE AS DESCRIBED IN THE ATTACHED PETITION DUE TO THE UNIQUENESS OF THE LOT BORDERED BY THREE PUBLIC STREETS AND AN ALLEY. YEAS ALL. MOTION CARRIED.

BUSINESS ITEMS: ELECTION OF OFFICERS

MOTION BY PLANNING COMMISSION REPRESENTATIVE WASCHER TO HEREBY NOMINATE THE CURRENT OWOSSO ZONING BOARD OF APPEALS OFFICERS FOR THE NEXT FISCAL YEAR, SUPPORTED BY VICE-CHAIRMAN CHRIS EVELETH: CHAIRPERSON: RANDY HORTON; VICE-CHAIRPERSON: CHRIS EVELETH AND SECRETARY: DAN JOZWIAK YEAS ALL. MOTION CARRIED.

COMMISSIONER/PUBLIC COMMENTS: There may be a variance request for the S. Lansing Street parking lot at the August meeting.

William Wascher will be stepping off the Owosso Zoning Board of Appeals. This will be his last meeting, as he has a new position in Lansing that will not allow for daytime meetings. ZBA currently has two alternates, but will need a Planning Commission Representative. ZBA would like to thank Mr. Wascher for his service as Planning Commission Representative.

This will also be Recording Secretary Marty Stinson's last ZBA meeting, as she will be retiring at the end of this week. Thank you to Marty for her years of work and dedication to the ZBA and to the City of Owosso.

ADJOURNMENT:

MOTION BY BOARD MEMBER EVELETH, SUPPORTED BY BOARD MEMBER WASCHER TO ADJOURN AT 9:48 A.M. UNTIL THE NEXT REGULARLY SCHEDULED MEETING ON TUESDAY, AUGUST 18, 2015, IF ANY REQUESTS ARE RECEIVED. YEAS: ALL. MOTION CARRIED.

Dan Jozwiak, Secretary

m.m.s

CITY OF OWOSSO
ZONING BOARD OF APPEALS
REQUEST FOR HEARING

NOTE TO APPLICANTS:

1. All applications received by the 25th of the month will be heard on the 3rd Tuesday of the following month at 9:30 a.m., lower level of City Hall.
2. The applicant, or legal representative of the applicant, must be present at the Public Hearing for action to be taken.
3. In order that this application may be processed, the applicant must complete Page 1 of this form and make payment of \$300.00 to the City Treasurer's Office to cover costs the City incurs. Checks are to made out to "City of Owosso".
4. Questions about this application may be directed to (989) 725-0540.

Request is hereby made to the City of Owosso for a hearing before the Zoning Board of Appeals for one or more of the following:

- Variance
- Administrative Interpretation
- Class A Non-Conforming Status or Expansion
- Appeal of Staff or "Board" Decision
- Exception/Special Approval

APPLICANT: Owosso Iron and Metal
ADDRESS: 229 S. Cedar Street LOCATION OF APPEAL: Same
Owosso, MI 48867
PHONE NO.: () DATE APPEAL FILED: July 30, 2015

APPEAL: (Indicate all data pertinent to this case, both present and proposed.)

Construction of a fence between buildings along the western front to provide safety, security and improve the aesthetics of the property. Also to act as a sound deadening barrier.

Property is legally listed as 229 S. Cedar Street. Applicant receives mail at 301 S. Cedar Street.

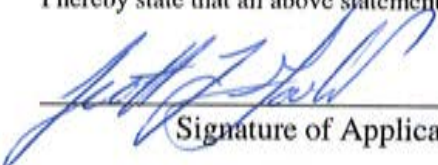
filed by Scott Gould, Legal Representative for applicant (269)998-1030.

If this is a variance request, indicate how the strict enforcement of the Zoning Ordinance would result in practical difficulty to the property owner, and how this difficulty is peculiar to the property.

(Note: For a dimensional variance it is necessary to submit a site plan with this application.)

See attached

I hereby state that all above statements and any attached documents are true and correct to the best of my knowledge.


Signature of Applicant

Denial of a building permit, by the City of Owosso, for the construction a fence, frustrates the ability of the business: 1) to secure its property and building, 2) to improve the property aesthetics 3) to reduce sound emissions created by the operation of the business.

City of Owosso
Zoning Board of Appeals

229 S. Cedar Street





Sec. 38-378. - Nonconforming uses.

- (a) Intent. It is the intent of this section to permit the continuance of a lawful use of any building or land existing at the effective date of this section, although such use of land or structures may not conform with the provisions of this chapter.

There are two (2) types of nonconforming uses, Class A and Class B.

Class A nonconforming uses or structures are those which have been so designated by the zoning board of appeals, after application by the person having interest in the property or the zoning administrator. Where Class A nonconforming uses are identified, it is the intent of this section to provide for their continuance, so long as they fulfill the requirements in this section.

Class B nonconforming uses or structures are all nonconforming uses or structures not designated as Class A. It is the intent of this section not to encourage the survival of Class B nonconforming uses or structures. Class B nonconforming uses or structures shall not be enlarged upon, expanded or extended, nor be used as grounds for adding other uses or structures prohibited elsewhere in the same district.

The continuance of all nonconforming uses and structures within the city shall be subject to the conditions and requirements set forth in this section.

- (b) Procedures for obtaining Class A designation. Any application for a Class A designation for a nonconforming use permit for any land or structural use permitted under this article shall be submitted and processed under the following procedures:
- (1) A written application shall be filed with the zoning board of appeals setting forth the name and address of the applicant, giving a legal description of the property to which the application pertains and including such other information as may be necessary to enable the board of appeals to make a determination of the matter.
 - (2) The zoning board of appeals may require the furnishing of such additional information as it considers necessary.
 - (3) A notice of hearing and subsequent hearing procedures shall be given in accordance with the procedures outlined in section 38-502(e).

Before an application for Class A designation for a nonconforming use can be processed, the zoning board of appeals shall review each application to ensure, beyond a reasonable doubt, that the following standards are met:

- (4) That the continuance of the use would not be contrary to the public health, safety or welfare or the spirit of this chapter.
 - (5) That the use or structure does not and is not likely to significantly decrease the value of nearby properties.
 - (6) That the use or structure was lawful at the time of its inception and that no useful purpose would be served by strict application of the provisions or requirements of this chapter with which the use or structure does not conform.
- (c) Approval of Class A designation. The zoning board of appeals shall approve Class A designation for nonconforming uses that comply with the standards and procedures of this section. The decision of the board of appeals shall be in writing and shall set forth the findings and reasons on which it is based. The board of appeals shall attach conditions, where necessary, to assure that the use or structure does not become contrary to the public health, safety or welfare or the spirit and purpose of this chapter. In addition, no vested interest shall arise out of a Class A designation.
- (d) Revocation of Class A designation. Any Class A designation shall be revoked, following the same procedure required for designation, upon a finding that as a result of any change of conditions or circumstances the use or structure no longer qualifies for Class A designation.

- (e) Regulations pertaining to Class A nonconforming uses and structures. A Class A nonconforming use or structure shall not be repaired, restored, extended, enlarged, moved or substituted for except in accord with the following requirements:
- (1) This chapter shall not prohibit the repair, improvement or modernization of a Class A nonconforming structure to correct deterioration, obsolescence, depreciation and wear, provided that such repair does not exceed an aggregate cost of fifty (50) percent of the structure's replacement cost. Repairs, improvements or modernization in excess of fifty (50) percent of the structure's replacement cost may be permitted by the zoning board of appeals, provided the structure will still meet the qualifications of a Class A nonconforming use or structure.
 - (2) Any Class A nonconforming use or structure damaged by fire, explosion, flood, erosion or other means may be restored, rebuilt or repaired, provided that such restoration does not exceed fifty (50) percent of the structure's pre-catastrophe replacement cost as determined by a qualified appraiser. Restoration of a Class A nonconforming use or structure damaged in excess of fifty (50) percent of the structure's pre-catastrophe replacement cost may be permitted by the zoning board of appeals, provided the restored structure would still meet the qualifications of a Class A nonconforming use or structure. However, no Class A nonconforming structure damaged in a floodplain or other areas of recurring natural hazards in excess of fifty (50) percent of the structure's pre-catastrophe replacement shall be rebuilt except in full compliance with this chapter.
 - (3) Structural changes, including enlargement or extension of a Class A nonconforming structure or use, may be permitted by the zoning board of appeals, except when such extension or enlargement would be incompatible with surrounding land uses or when the structural change would be inconsistent with the intent of this chapter. No extension or enlargement of a Class A nonconforming use or structure shall be approved if approval would result in violation of the setback, side yard or bulk requirements of this chapter.
 - (4) A Class A nonconforming use may be substituted for a similar nonconforming use or structure when the zoning board of appeals determines that the substitution would improve the property, would not increase the structure's or use's nonconformity, or when the substitution would not be contrary to the intent of this chapter.
- (f) Regulations pertaining to Class B nonconforming uses and structures. It is a purpose of this chapter to eliminate Class B nonconforming uses and structures as rapidly as is permitted by law without payment of compensation. A Class B nonconforming use or structure shall not be repaired, restored, extended, enlarged or substituted for except in accord with the following requirements:
- (1) Minor repairs or maintenance of a Class B nonconforming use or structure in order to keep it structurally safe and sound are permitted. A Class B nonconforming use or structure shall not be repaired, improved or remodeled when such repair or improvement exceeds twenty-five (25) percent of the structure's replacement cost. The replacement cost shall be determined, prior to any repairs or improvements, by a qualified appraiser. If a Class B nonconforming use or structure is changed to conform with this chapter, the limitations on repairs or improvements shall not apply.
 - (2) Any Class B nonconforming use or structure damaged by fire, explosion, flood, erosion or other means shall not be rebuilt, repaired or reconstructed if damaged in excess of fifty (50) percent of the structure's pre-catastrophe replacement cost, except when the use or structure would fully comply with the requirements of this chapter.
 - (3) No Class B nonconforming use or structure shall be enlarged, extended or structurally altered, nor shall the nonconforming use be changed to a substantially different nonconforming use.
 - (4) No such nonconforming use shall be moved in whole or in part to any other portion of the lot or parcel occupied by such use at the effective date of adoption or amendment to this chapter.

- (5) No Class B nonconforming use or structure shall be permitted to continue in existence if it was unlawful at the time it was established.
- (6) A Class B nonconforming structure or use may be substituted for by a conforming use or structure, or by a use or structure which meets the requirements of a Class A nonconforming use, when the zoning board of appeals determines that the substitution would not increase the nonconformity of the use or structure or be contrary to the public health, safety and welfare and the intent of this chapter.
- (g) Determination of replacement cost. The replacement cost of repairing, restoring or improving a Class A or B nonconforming use or structure, excluding contents, damaged by fire, explosion, flood, erosion or other means, shall be made on the basis of an appraisal by a qualified individual designated by the zoning board of appeals. The cost of such determination shall be borne by the zoning administrator after:
 - (1) Receiving an estimate of the structural damage from the city fire chief;
 - (2) Receiving a figure representing the difference between the pre-catastrophe market value of the structure and the post-catastrophe value, as determined by the assessing officer for the city;
 - (3) Dividing the sum of the figures derived in subsection (1) from the fire chief and subsection (2) from the assessing officer by two (2).
- (h) Nonconforming lots of record. Any nonconforming lot of record or nonconforming lot described in a deed or land contract executed and delivered prior to the effective date of this chapter or an amendment thereto shall be used only for a use permitted in this chapter. If the use of a nonconforming lot requires a variation of the setback or yard requirements of this chapter in excess of fifteen (15) percent of the requirement, then such use shall be permitted after review of a site plan by the zoning board of appeals under the terms of this chapter. The board may amend the site plan to achieve an objective for reasonableness of the fit of the land use on the available land. The zoning board of appeals shall have the authority to amend structural dimensions and site layout to achieve this objective. The standards to be applied by the zoning board of appeals, in reviewing the site plan, shall be the applicable standards stated in section 38-504(3). The reduction by fifteen (15) percent or less of dimensional requirements for lawful nonconforming lots may be granted by the zoning administrator. When the minimum dimensional requirements of this chapter can be met by the combination of two (2) or more nonconforming contiguous lots owned by the same person, said lots may be combined for use and no variance is necessary.
- (i) Discontinuance or abandonment. Whenever a nonconforming use has been discontinued for twelve (12) consecutive months, or for eighteen (18) months during any three-year period, such discontinuance shall be considered conclusive evidence of an intention to abandonment; the nonconforming use shall not be reestablished, and any future use shall be in conformity with the provisions of this chapter.
- (j) Changing uses. If no structural alterations are made, the board of appeals may, upon an appeal, authorize a change from one (1) nonconforming use to another nonconforming use, provided the proposed use would be more suitable to the zoning district in which it is located than the nonconforming use which is being replaced. Whenever a nonconforming use has been changed to a more nearly conforming use or to a conforming use, such use shall not revert or be changed back to a nonconforming or less conforming use.
- (k) Termination of nonconforming land use. Class B nonconforming uses of land existing at the effective date of this chapter, where no building is located, may be continued, provided that the nonconforming land use shall be terminated and converted to conform with the provisions of this chapter within three (3) years after the effective date of this section, and provided further that the nonconforming land use shall not in any way be expanded or extended during this three-year interval, either on the same property or adjoining property.
- (l) Illegal nonconforming uses. Nonconforming uses of buildings or land existing at the effective date of this section established without a building permit, or those nonconforming uses which cannot be

proved conclusively as existing prior to the effective date of this section shall be declared illegal nonconforming uses and shall be discontinued within a period of three (3) years following the effective date of this section, subject to the review and approval of the city council.

- (m) District changes. Whenever the boundaries of a district shall be changed so as to transfer an area from one (1) district to another district of another classification, the provision of this section shall also apply to any existing uses that become nonconforming as a result of the boundary changes.
- (n) Elimination of nonconforming uses. In accordance with Act 207, Public Acts of the State of Michigan of 1921, as amended, the city council may acquire properties on which nonconforming buildings or uses are located, by condemnation or other means, and may remove such uses or such uses may be used by the city for a public use. The net cost of such acquisition may be assessed against a benefiting district or may be paid from other sources of revenue.
- (o) Uses under exception provisions not nonconforming uses. Any use for which a special exception is permitted as provided in this chapter shall not be deemed a nonconforming use but shall, without further action, be deemed a conforming use in such district.
- (p) Change of tenancy or ownership. There may be a change of tenancy, ownership or management of any existing nonconforming uses of land, structures and land in combination.

(Code 1977, § 5.78; Ord. No. 459, § 1, 4-3-89; Ord. No. 619, § 1, 9-16-02)

State Law reference— Nonconforming uses and structures, MCL 125.583a.

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.

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Non-Conforming Users

SERIES I: Basic Tools and Techniques, Issue Number 4

DEFINITION

A nonconforming use is created when a zoning provision is adopted or amended to prohibit a particular use that lawfully existed prior to the enactment or amendment. Nonconforming land uses are not defined by New York state statutes but are defined in most local zoning codes. A typical local ordinance may state, for example: "a nonconforming use is any use, whether of a building or tract of land or both, existing on the effective date of this chapter, which does not conform to the use regulations of the district in which it is located." Nonconforming use issues arise when the zoning code is first adopted. When a district is zoned residential, for example, all existing nonresidential uses in that district are rendered nonconforming. Later amendments to the zoning ordinance may have the same effect.

When property owners propose the improvement, expansion, rebuilding or other change to their nonconforming property, they must be certain to comply with local regulations governing those matters. Normally, these regulations are found in a discrete article of the local zoning code, entitled "Nonconforming Uses." The nonconforming use article of the zoning code may prohibit or limit changes in buildings and lot uses that are nonconforming and provide in a variety of ways for the termination of nonconforming uses, such as limiting their expansion or enlargement; prohibiting the reconstruction of damaged structures; disallowing the reestablishment of nonconforming uses after they have been discontinued for a time; or simply terminating them after the passage of a stipulated amount of time.

PURPOSE

The policy of allowing nonconforming uses to continue originated in concerns that the application of zoning regulations to uses existing prior to the regulations' enactment might be construed as confiscatory and unconstitutional. It was assumed that, by limiting their enlargement and reconstruction, they would disappear over time. The allowance of nonconforming uses has been characterized by the courts as a "grudging tolerance" of them; the right of municipalities to adopt reasonable measures to eliminate them has been recognized. The ultimate goal of the zoning code is to achieve uniformity of property uses within each zoning district which can only be accomplished by the elimination of uses that do not conform to the specifications of district regulations.

WHEN

Normally, nonconforming use provisions are included in the zoning code when it is originally adopted. They are contained, typically, in a separate section, or article, of the code. Such provisions afford protection against judicial findings that, without them, the zoning ordinance might be deemed to be confiscatory as applied to existing development and as a method of obtaining popular support for zoning in general.

AUTHORITY

The state statutes that delegate to local governments the authority to adopt zoning regulations implicitly authorize local legislatures to adopt reasonable measures to protect the legitimate investment expectations of owners of developed land. There is no express reference, however, in these authorizing statutes to the authority of local legislatures to allow the continuation of nonconforming uses.

IMPLEMENTATION

There is obvious tension between protecting the investment of the owners of nonconforming uses and achieving uniformity of land use within zoning districts. To achieve this latter goal, a variety of provisions have been added to zoning codes to discourage the continuation of nonconforming uses over time. These include provisions that limit an owner's right to reconstruct such use after substantial damage, expand or enlarge the nonconforming use, change the property's use to a different nonconforming use, and may require the termination of the use after a specified period of time.

Reconstruction and Restoration

The local zoning ordinance may prohibit the restoration of a nonconforming structure that suffers significant physical damage and require that any reconstruction conform to the zoning ordinance. Significant physical damage is usually defined as damage that exceeds a certain percentage of the structure's value. Typical standards range from 25% to 50%. These provisions are premised on the theory that owners do not have a right to reconstruct a nonconforming building after it suffers significant damage because their property rights were destroyed by the disaster, rather than by the ordinance. The owner, therefore, is in a situation similar to the owner of a vacant lot and must comply with the applicable zoning restrictions.

Restrictions on reconstruction can raise interesting issues of interpretation. For example, if one of two separate apartment buildings that are operated as a single enterprise is damaged by fire, how would a local ordinance be applied that prohibits reconstruction if the nonconforming use is damaged by 50% or more. If the damage to one of the buildings exceeded the 50% standard, but the damage to the enterprise did not, could the locality prohibit the reconstruction of the heavily damaged building? New York courts tend to look at the economic and functional interdependence of the properties in such a case and have held that the locality must permit reconstruction, in this case because the enterprise was not damaged by 50% or more.

Enlargement, Alteration or Extension

Local ordinances often prohibit the enlargement, alteration or extension of a nonconforming use. To allow such activity would defeat the underlying policy of eliminating nonconforming uses. Normally, such prohibitions do not extend to structural maintenance and repair, or internal alterations that do not increase the degree of, or create any new, noncompliance with the locality's zoning regulations. In some cases, the restrictions do not extend to improvements needed to modernize a nonconforming business, even when the number of customers served will be increased.

Courts have upheld prohibitions on the construction of an awning over a courtyard outside a restaurant, on the theory that it would create additional space for patrons to congregate and, in this sense, increase the degree of the nonconforming use. Similarly, the prohibition of the conversion of seasonal bungalows to year-round

residences has been upheld as an acceptable method of preventing the enlargement of a nonconforming use.

Where nonconforming business operations are proposed to be expanded, the case law is somewhat less clear. Where roads and structures built on a parcel used as a gravel mining operation exhibited the owner's intention to use the entire parcel, the court held that expanding the mining operation to another location on the property was permitted. The addition of a body-toning operation to the premises containing a nonconforming beauty parlor, however, was considered a prohibited extension of the prior nonconforming use. The court's interest in protecting the owner's demonstrated investment in the gravel mining operation could explain the difference between these cases.

These provisions may vary considerably from one locality to another. A municipality, particularly intent on eliminating nonconforming uses may prohibit any physical expansion of a building; another may favor property use by allowing, for example, the construction of an additional story because it does not increase the footprint, or lot coverage, of the structure.

Changing to Another Nonconforming Use

The property owner's right to continue a nonconforming use does not allow the owner to change to a materially different use. The important question here is what constitutes a material change. The consequence of a finding that a material change in use has occurred is to deem the prior nonconforming use abandoned and, therefore, terminated. The property owner could argue that the change of a nonconforming use from one commercial use to another, for example, should not be prohibited by the zoning ordinance: to change a building's occupancy from a dairy plant to a business that rents machinery simply shifts the type of nonconformance from one commercial category to another. It has been held, however, that it is not only a change in the volume of business conducted but in the character of that business that determines whether one business use is a continuation of another. This is true despite the generic similarity between the old and new proposed use.

Occasionally, courts hold that changes from one use to another within the same category of use are permitted. In one case, for example, the owner was allowed to establish a storage business in a building that had been occupied as a nursery and florist enterprise. Determinations in these cases depend on the particular facts involved, the court's interpretation of how material the change will be, and the specific language of the local ordinance that regulates changes in nonconforming uses.

Abandonment

A property owner's right to continue a nonconforming use may be lost by abandonment. Local zoning ordinances frequently stipulate that any discontinuance of the nonconforming use for a specified period constitutes abandonment. Where the established period is reasonable, discontinuance of the use for that time amounts to an abandonment of the use. It has been held that local discontinuance periods apply even when the owner can prove that he did not actually intend to abandon the nonconforming use.

Amortization

Some local ordinances require certain nonconforming uses to be amortized over a specified period at the end of which they must be terminated. The term "amortization" is used to describe these provisions because they allow the owner some time during which to recoup his investment in the nonconforming use. The Court of Appeals has upheld such provisions "where the benefit to the public has been deemed of greater moment than the detriment to the property owner." The courts have said that the test for when an amortization period is reasonable is "a question that must be answered in the light of the facts of each particular case. Certainly, a

critical factor is the length of the amortization period in relation to the investment. The critical question, however, is whether the public gain achieved by the exercise of the police power outweighs the private loss suffered by the owners of the nonconforming uses."

Contexts in which amortization provisions are likely to be upheld are:

1. When the common law of nuisance would allow neighboring property owners to enjoin the continuation of a nonconforming use. For example, a gravel pit, auto wrecking operation, or junkyard, harmful to children in a developing residential area might be enjoined under a private nuisance action. Likewise, a zoning ordinance can legally require such a nonconforming use to be terminated in an appropriate case. If an amortization provision is challenged, the municipality can show that the owner's property interest is slight because of his vulnerability to a nuisance action. In this context, however, the label "amortization" is inappropriate. The grace period, if any, allowed by the local statute is gratuitous if, in fact, the owner's use may be enjoined as a nuisance.
2. When the nonconforming use is somewhat noxious and the owner has little investment in it. For example, a provision requiring the owner to cease raising pigeons on the roof or to remove an old outdoor sign will withstand challenge because of the minimal nature of the owner's investment and the significant harm done to the zoning scheme if the owner's activity is allowed to continue. Harder cases are presented when the owner has a larger investment in the use and the public interest in removing it is clear but where the threat to public health and safety is not imminent.

LIMITATIONS AND CONCERNS

Noncomplying Buildings

The local legislature, in adopting zoning regulations, is most concerned with the separation of incompatible uses among zoning districts. When a building that preexisted the zoning requirements is out of compliance with set-back, area, or height restrictions, it is not a nonconforming use in the technical sense; it is simply out of compliance with the dimensional requirements of zoning: a noncomplying building. Since noncomplying buildings do not offend the legislative policy of separation of incompatible uses, zoning provisions often do not constrain their enlargement or reconstruction as severely. A typical zoning provision may require, for example, that no enlargement or reconstruction of a noncomplying building can increase the degree of noncompliance or create any new noncompliance.

Awarding Use Variances

Some municipalities extend the life of nonconforming uses by awarding use variances thereby allowing the nonconforming use to be enlarged, expanded or reconstructed. This can occur when an owner is denied a building permit to enlarge or reconstruct a nonconforming use. The owner can apply to the zoning board of appeals for a use variance and, if the owner can show that the statutory criteria are satisfied, the board can award the requested variance. Although the board can impose reasonable conditions on the use of the property, the award of a use variance frees the property from the provisions of zoning that limit nonconforming uses. The effect of a variance is to declassify the use as nonconforming.

The property owner seeking a use variance must prove that the variance, if granted, will not alter the essential character of the neighborhood. The property owner must also show by competent financial evidence that he cannot realize a reasonable return by using the property under any use allowed in the district or by continuing

the nonconforming use in its unaltered condition. This financial requirement makes it very difficult for most owners of existing nonconforming uses to prove that they are entitled to a use variance.

Interpretations of Provisions

Another local practice that influences the continuation of nonconforming uses is the interpretation of the building inspector as to what types of building improvements are prohibited by the language of the local zoning code. Usually, the provisions permit the repair and maintenance of nonconforming uses, or improvements that do not "enlarge or expand" the nonconforming use. Some building inspectors take a broad view of what repair and maintenance is and have a limited view of what constitutes an expansion or enlargement of the nonconforming use. By awarding building permits to improve nonconforming uses, the building inspector indirectly encourages their continuation.

Although allowing the expansion and reconstruction of noncomplying buildings, granting variances to allow the expansion of nonconforming uses, and issuing building permits to improve nonconforming uses do not advance the policy of discontinuing nonconforming uses, they allow the municipality flexibility in accommodating the needs of nonconforming use property owners while mitigating and protecting the community.

CITATIONS

1. *Cave v. Zoning Bd. of Appeals of Village of Fredonia*, 49 A.D.2d 228, 373 N.Y.S.2d 932 (4th Dep't 1975), establishes that the purpose of zoning provisions limiting the expansion, alteration or restoration of a nonconforming use are intended to encourage the disappearance of nonconforming uses in zoning districts.
2. In *Darcy v. Zoning Board of Appeals of the City of Rochester*, 185 A.D.2d 624, 586 N.Y.S.2d 44 (4th Dep't 1992), the court upheld a local determination that a nonconforming use was abandoned when evidence showed discontinuance for at least 20 months, well beyond the six month period specified in the ordinance.
3. Two Court of Appeals cases that articulate the tests used to determine the purpose and validity of requiring the termination of nonconforming uses over time are: *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 559, 176 N.Y.S.2d 598, 600, 152 N.E.2d 42, 44 (1958) and *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255, 262 (1977).



PACE LAW SCHOOL
P A C E U N I V E R S I T Y

Bruce Ardelean called August 10, 2015 at 1:26 p.m. regarding the public hearing notice he received for 229 S. Cedar Street variance.

Does not have an issue with fence between buildings but is concerned about existing fence on the north side of the property. He owns a rental duplex at 713 Lynn Street and states the fence is "disgusting and unsafe." The fence, according to Mr. Ardelean, is held up by a bunch of wires attached to dumpsters so it doesn't collapse and says he the fence is extremely unsafe, especially for children living at the 713 Lynn Street property. Mr. Ardelean said he talked with someone last fall about repairing the fence and was told they would fix it as soon as nice weather came. Mr. Ardelean states that rather than putting up a new fence they should repair the one they have first.

APPLICATION FOR BUILDING PERMIT, PLAN EXAMINATION, ZONING PERMIT

CITY OF OWOSSO
301 W. MAIN STREET, OWOSSO, MI 48867
tx - 989-725-0535 fx 989-725-0546



AUTHORITY: PA 230 OF 1972, AS AMENDED
COMPLETION: MANDATORY TO OBTAIN PERMIT
PENALTY: PERMIT WILL NOT BE ISSUED

The Department will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, marital status, handicap or political beliefs.

NOTE: SEPARATE APPLICATIONS MUST BE COMPLETED FOR PLUMBING, MECHANICAL, AND ELECTRICAL WORK PERMITS.

Are you in the 100 year flood plain? (if you are in a flood plain, a flood plain permit is required. See Engineering - 725-0550)
Has this property been tested for asbestos? yes no

Description of project Construction of Fence 6' high between two blks (at front)
Address of project 301 S. Cedar IS THIS COMMERCIAL OR RESIDENTIAL?
(PLEASE CHECK ONE)

Are you excavating any soil? (yes/no) no Is this property within 500 feet of the Shiawassee River or Corlett Creek? (yes/no) no
If you answer yes to both questions, please contact Charles Rau, Building Department, at 989-725-0535.

Property owner Dice Box LLC Owner address 1160 Richardson Rd
City Owosso State MI Zip 48867 Telephone _____

Contractor Business Name _____
Contractor Name _____ Address _____

City _____ State _____ Zip _____ Telephone _____

State Lic # _____ Expires _____

Insurance _____ MESC _____

Applicant Name Scott J. Gould Address 117 W. Oliver St.
City Owosso State MI Zip 48867 Telephone 269 998 1030

I hereby certify that the proposed work is authorized by the owner of record and that I have been authorized by the owner to make this application as his/her authorized agent, and we agree to conform to all applicable laws of the state of Michigan. All information submitted on this application is accurate to the best of my knowledge.

Section 23a of the state construction code act of 1972, 1972 PA 230, MCA 125, 1523A, prohibits a person from conspiring to circumvent the licensing requirements of this state relating to persons who are to perform work on residential building or a residential structure. Violators of section 23a are subjected to civil fines.

Signature of applicant Scott J. Gould Date 6/30/15 7/24/15

Plan Review Fee \$ _____ Cost of Project (Include materials & labor) \$ 500 Permit Fee \$ _____

Approval Signature _____ Date _____

effective 7-1-02, rev. 03-06-2013
excel/bldg dept/bldg permit form

Not Approved CRau 7-24-15
Per Section 38-378 (f) (3) & (4)



2015-07-29 - FENCE VIOLATION