

# CLIENT ADVISORY:

## DISSECTING THE CAVEATS OF A LEGAL NON-CONFORMING USE

Essentially every municipality has adopted a zoning ordinance which, among other things, serves to regulate the development of real property and the types of uses to which such real property may be put within the boundaries of the municipality. Typically, a municipality is divided into zoning districts (i.e. residential, commercial, agricultural and industrial), each of which clearly delineates the permitted use or uses of real property located within each zoning district. Through the adoption and enforcement of a zoning ordinance, a municipality is able to regulate development

within a particular locality resulting, presumably, in the preservation of real property values.

At the time a zoning ordinance is adopted or amended, as the case may be, those structures legally in existence cannot be eliminated as a result of the adoption of, or amendment to, the zoning ordinance simply because such structure fails to conform to the newly enacted provisions of the zoning ordinance or amendment. This is clearly delineated in R.I. Gen. Laws § 45-24-39 (a) and (b) as follows:

“§ 45-24-39 General provisions – Nonconforming development. – (a) Any city or town adopting or amending a zoning ordinance under this chapter shall make provision for any use, activity, structure, building, or sign or other improvement, lawfully existing at the time of the adoption or amendment of the zoning ordinance, but which is nonconforming by use or nonconforming by dimension. The zoning ordinance may regulate development which is nonconforming by dimension differently than that which is nonconforming by use.

(b) The zoning ordinance shall permit the continuation of nonconforming development; however, this does not prohibit the regulation of nuisances.”

The term most commonly used to describe this particular scenario is that the use is “grandfathered”. A “grandfathered” use, once sanctioned, is deemed to be a legal non-conforming use under most every zoning ordinance. In Rhode Island, “nonconformance” is limited to either use or dimension. However, there are a number of caveats unique to this doctrine, which include destruction, abandonment and amortization, any one of which can result in the loss or termination of the legal non-conforming use status.

### **Destruction**

In a number of jurisdictions, the legal non-conforming use status will be lost if the structure benefitting from such right is destroyed beyond a certain percentage (typically 50%), including acts of God. In this situation, the zoning ordinance will prohibit the rebuilding of the structure, thereby subjecting the parcel to the strictures of the current zoning regulations. However, in other jurisdictions, notwithstanding the partial or even total destruction of a structure recognized as a legal non-conforming use, as long as the structure is rebuilt within a certain period of time, without deviation from its prior dimensions ( i.e. floor area, building height, parking, and property coverage), the legal non-conforming use may be preserved. Under §201.9 of the Providence Zoning Ordinance, “If more than fifty (50) percent of the gross floor area (GFA) of a building or structure nonconforming by use is involuntarily demolished, destroyed, or damaged, the Board may grant a special use permit, in accordance with section 902.4, to repair or rebuild the structure to the same size and dimension as previously existed.”

In the event of a partial or total destruction of a structure protected as a legal non-conforming use, it is imperative that the owner (i) carefully review (with the assistance of legal counsel, if necessary) the applicable provisions of the municipal zoning ordinance and building regulations governing the status and use of such structure, and (ii) meet with the local zoning and building officials before repairing or rebuilding same.



## Abandonment

If the legal non-conforming use of a structure or real property is discontinued, such discontinuance will typically result in a loss of the legal non-conforming use status under most zoning ordinances, as long as the owner has manifested an intent to abandon the use. However, a discontinuance of the use as a result of acts of God, acts of war, foreclosure or condemnation (among others), are generally not considered evidence of the owner's intent to abandon the legal non-conforming use status, as these occurrences are usually beyond the owner's control. The Rhode Island Supreme Court has repeatedly held that "... the mere discontinuance of a nonconforming use for a period of time does not constitute an abandonment of that use. There must also exist an intent to abandon." See *Town of Coventry v. Carl D. Glickman, et al*, 429 A.2d 440 (R.I. 1981). In *Richards v. Zoning Board of Review of Providence*, 213 A. 2d 814 (R.I. 1965), the Court found no intent to abandon a nonconforming bakery notwithstanding the fact that no baking operations were carried on by the owner of the premises during an eleven-year period. The Court noted that "... the bakery ovens were left in place, and no structural alterations were made which might have prevented the eventual reestablishment of the bakery. Proof of abandonment must be borne by the asserting party". The Court in *Richards* went on to state that "... the abandonment of a nonconforming use ordinarily depends upon a concurrence of two factors: (a) An intention to abandon; and (b) some overt act, or some failure to act, which carries the implication that the owner does not claim or retain any interest in the subject matter". The Court further emphasized its prior findings on the issue of abandonment in *Washington Arcade Associates v. Zoning Board of Review of the Town of North Providence*, 528 A. 2d 736 (R.I. 1987), by holding that "An involuntary interruption of a nonconforming use such as an economic depression or a fire does not establish the requisite intent to abandon because the

cessation of the use is not a voluntary act of the user."

In addition to the owner voluntarily discontinuing a legal non-conforming use, the owner may also evidence its intent by affirmatively changing or expanding the structure or purpose of the legal non-conforming use.

## Amortization

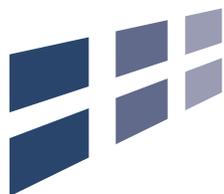
In some jurisdictions, the legal non-conforming use of a structure may be brought to an end based upon the structure's useful remaining economic life. In this scenario, a calculation of the present value of the legal non-conforming use is made over the course of a set period of time. Once the calculated value of the legal non-conforming use reaches zero, the legal non-conforming use status terminates. This caveat to the continuance of the legal non-conforming use status is typically applied to billboards and junkyards. As with destruction and abandonment of a legal non-conforming use, it is important to carefully review the provisions of the zoning ordinance or building regulations in the jurisdiction to determine the applicability of the caveat of amortization in connection with preserving the status of a structure as a legal non-conforming use.

*The foregoing discussion is not intended to be exhaustive; but, rather, is merely intended to raise potential issues associated with certain affirmative actions or occurrences that may result in the discontinuance or termination of the legal non-conforming use status of a structure or real property. It is always wise to consult a knowledgeable attorney when confronted with legal issues that may have serious or unintended consequences.*



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