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Zoning and Land Use Planning

*Patricia E. Salkin**

Abandonment, Discontinuance and Amortization of Nonconforming Uses: Lessons for Drafters of Zoning Regulations

I. Introduction

Observing that a disproportionate number of reported cases highlighted on the Law of the Land blog (www.lawoftheland.wordpress.com) are opinions addressing the subject of nonconforming uses, this column attempts to unravel some of the legal issues that stem from poor drafting of these provisions in zoning regulations, and demonstrates options for practitioners and drafters to better regulate for the eventual disappearance of nonconformities.

Early drafters of zoning legislation believed that some uses of land were incompatible with others and that more efficient employment of land resources would be achieved if such incompatible uses were cleanly separated. The drafters respected the “natural” patterns of development evidenced by existing uses, and use districts established by law unavoidably included land devoted to uses proscribed by the new zoning regulations.¹ However, for legal and political reasons, the drafters avoided direct attacks on these incompatible or nonconforming uses and instead permitted existing uses to continue, albeit taking steps to gradually eliminate them over time.² The early drafters took steps to reduce the life expectancy of these nonconforming uses by limiting their right to change, expand, alter, repair, restore, or recommence after the use stopped for a specified period of time.³ With such restrictions, the theory was that market forces would eventually force operators and owners to eliminate these nonconforming uses.⁴ This expectation, however,

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has not been realized, and today the problems associated with the regulation and desire to eliminate nonconforming uses make up a significant portion of land use related litigation. The American Planning Association's Legislative Guidebook on Smart Growth explains that in deciding how to treat nonconforming uses, local governments must address two competing principles: achieving ultimate conformity balanced with fairness in requiring termination of a use or demolition of a structure that was constructed or commenced in compliance with the law when the owner, relying on the legality of the land use or structure at the time, incurred time and money in maintaining the structure or continuing the use.⁵ More recently, attention has been focused on the legal nonconformities of development standards.⁶

The authority of a municipality to deal with nonconforming uses may be broadened or narrowed by the enabling acts which are the source of its zoning power.⁷ However, most states do not address the subject of nonconforming uses in these statutes.⁸ Therefore, the regulation of nonconforming uses is left largely to municipalities and the unique approaches and language they may individually choose to employ with respect to these uses. While there are many aspects of a full discussion of the regulation of nonconforming uses, this column is focused on the narrow issue of how local governments seek to use their authority to eventually eliminate nonconforming uses through regulatory determinations of passive abandonment and/or discontinuance of the use, and well as through the more active method of amortization.

II. Abandonment or Discontinuance

Municipal legislatures have included in their zoning ordinances specific provisions for the termination of nonconforming uses based on the theory of discontinuance of use or abandonment. Some ordinances terminate nonconforming uses after a specified period of "abandonment" while other regulations are drafted in terms of "discontinuance" of use, or allowing a nonconforming structure to remain vacant.⁹ The periods of vacancy, discontinuance, or abandonment that may trigger a permanent cessation of use can range from 30 days to two years.¹⁰

Many jurisdictions have established a two-pronged subjective test to determine if a property owner has abandoned a nonconforming use.¹¹ This test typically requires "(1) an intention to abandon, and (2) some overt act or failure to act

which carries a sufficient implication that the owner neither claims nor retains any interest in the subject matter of the abandonment.”¹² The owner has the burden of proof by a preponderance of evidence to show “the use is a continuing and definite intention.”¹³ Other municipalities instead choose to remove the element of intent. In these situations, discontinuance provisions specifically state that they operate to prevent and prohibit resumption of a nonconforming use after a specified period of time has lapsed, regardless of intent.¹⁴ This type of provision has been construed as establishing a rule of evidence and operates even where there is no intent to abandon or even where there was an intent *not* to abandon.¹⁵ While the courts have agreed that municipalities have power to impose such a restriction, they are not in agreement as to whether it is alone sufficient to prevent resuming the nonconforming use.¹⁶ A number of courts still construe discontinuance as abandonment and require proof of discontinuance for the specified period of time to be supplemented by some proof of an overt act, or failure to act, which would justify a finding that there had been an intent to abandon the rights inherent in the nonconforming use.¹⁷

III. Drafting and Interpreting Ordinance Language for Abandonment and Discontinuance

Absent statutory guidance, exactly what constitutes abandonment or discontinuance of a nonconforming use is up to the municipality in the first instance. Much of the litigation can be avoided if municipal drafters were more careful in wording. What follows are examples of the common approaches to drafting that demonstrate the variety of choices municipalities must make. It is critically important for municipal attorneys to review the applicable zoning ordinance/law when it comes to the subject of nonconforming uses to guide the municipality in a discussion for purposes of ensuring that the ordinance, as written, will accomplish the desired outcome. Furthermore, a preemptive examination of the nonconforming use section of the zoning regulation can help municipal attorneys and planners to identify vague provisions and standards that can be clarified prior to applicants, property owners and neighbors invoking a poorly drafted regulation that is then left to the courts to interpret.

For example, consider the following issues:

1. What is the desired length of time for a nonconforming use to have ceased for the municipality to consider it abandoned and no longer legally recognized?

There is no “right” length of time for a municipality to allow a nonconforming property owner to cease or suspend operation of the use before future use must conform to the zoning regulation. This is a decision that each municipality must make for itself. The common drafting problem is the ordinances can be poorly written with vague and ambiguous terms. Below are examples of both clear and unclear ordinance provisions, as well as provisions that show a range of time from 30 days to two years before abandoned or discontinued nonconforming uses lose their preferred status as such. These illustrative examples are then followed by examples of recent litigation where the issue before the court centered on the language of the zoning ordinance with respect to time.

Examples from zoning ordinances:

- a. **“If such nonconforming use of land ceases for any reason for a period of more than 30 days**, any subsequent use of such land shall conform to the regulations specified by this chapter for the district in which such land is located.” City of Grand Ledge, MI, Charter, Part II, General Legislation, Chapter 220 Zoning, Article XX: Nonconforming Lots, Structures and Uses, § 220-93 Nonconforming uses of land (C).
- b. **“If any such nonconforming use of land ceases for any reason for a period of more than 30 days**, any subsequent use of such land shall conform to the regulations specified by this chapter for the district in which such land is located.” City of El Reno, OK, Charter, The Code, Part II, General Legislation, Chapter 361 Zoning, Article V: Nonconformities, § 361-30 Nonconforming Uses of Land (C).
- c. “Except as herein provided, no nonconforming use may be reestablished after it has been *discontinued or vacated for a period of 180 days or more.*” City of Albany, NY, Chapter 375 Zoning, Article XIII, Sec. 375-90(A).
- d. “When a nonconforming use of land, structure and premises in combination **is discontinued or abandoned for six consecutive months or for 18 months during any three-year period (except when government action impedes access to the**

premises) the land, structure or structure and premises in combination shall not thereafter be used except in conformity with the regulations of the district in which it is located.” Borough of Gibbsboro, NJ, Part II, General Legislation, Chapter, 400 Zoning, Article X: Nonconforming Uses, § 400-77 Abandonment. [Amended 2-15-1983 by Ord. No. 83-1].

- e. **“If any nonconforming use of land ceases for any reason for a period of one hundred eighty consecutive days or more**, any subsequent use of said land shall conform to the regulations for the zoning district in which the land is located.” Code of the City of Evanston, WY, Chapter 24 Zoning, Article X Nonconforming Uses, Structures And Lots, § 24-98 Nonconforming use of land (C).
- f. “If a nonconforming use of a building, structure or lot is ***abandoned for a continuous period of one year***, subsequent use of such building, structure or lot shall conform with provisions of this chapter. For purposes of this chapter, abandonment shall commence when the nonconforming use ceases.” Township of Doylestown, PA, Article XXI Zoning, sec. 175-112 (D).
- g. “Shall not be reestablished if such use has for any reason been discontinued for ***a period of over one year*** . . .” Village of Bronxville, NY, Chapter 310 Zoning, Article V, sec. 310-25(A)(3).
- h. **“Whenever a nonconforming use has been discontinued or in a non-operative status for a period of one year or more**, such use shall not thereafter be reestablished, regardless of change of ownership, and any future use shall be in conformity with the provisions of this Code. The casual, intermittent temporary or illegal use of land or buildings shall not be sufficient to establish the existence of a nonconforming use, and the existence of a nonconforming use on a part of a lot or tract shall not be construed to establish a nonconforming use on the entire lot or tract. Town of Bethany Beach, DE, Chapter 245: ZONING, ARTICLE V Nonconforming Uses and Structures, § 245-32. Abandonment. [Amended 12-16-1983 by Ord. No. 123].
- i. **“When a nonconforming use of land ceases for any reason for a period of more than one year, its legal, nonconforming status is terminated.”** Town of Bridgeville, DE, Charter, The Code, Part II: General Legislation, Chapter 234: Land Use and

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Development, Article V: Nonconforming Situations, § 234-28: Nonconforming Uses (C) Termination of nonconforming status.

- j. “Without just cause, no building or portion thereof used in whole or in part for a nonconforming use in a Residential or Commercial District **which remains idle or unused for a continuous period of 12 months, whether or not the equipment or fixtures are removed**, shall again be used except in conformity with the regulations of the district in which such building or land is located.” Town of Fenwick Island, DE, Charter, Part II, General Legislation; Chapter 160 Zoning, § 160-6: General regulations; exceptions. (D) Nonconforming uses. (2) Discontinuance of nonconforming uses.
- k. “**If any nonconforming use of land or of a structure housing a nonconforming use ceases or is discontinued for any reason for a period of 12 or more consecutive months**, any subsequent use of such land or structure shall conform to the requirements of this chapter in all respects.” Town of Bar Harbor, ME, Charter, The Code, Chapter 125 Land Use, Article IV Nonconformity, § 125-54 Nonconforming uses of land or structures. (E) [Amended 11-4-2003].
- l. “(A) **If a nonconforming use of a building or land is discontinued, razed, removed or abandoned for 365 consecutive days**, subsequent use of such building or land shall conform with the regulations of the district in which it is located. (B) **Abandonment shall commence on the date when customary efforts to continue the use cease.**” Code of the Borough of Quakertown, PA (Bucks County), Chapter 27 Zoning, Part 4 General Regulations, § 406. Nonconformities. (Ord. 983, 3/4/1992; § 4.6; as amended by Ord. 1053, 9/1/1999, § II) 5. Abandonment.
- m. “Abandonment: If any nonconforming use of land or a building is **discontinued for a period of two years or more** such land or building shall thereafter be used or developed only in accordance with the terms of the Abington Zoning Bylaw for the zoning district(s) in which such property is located.” Abington, MA—Art. XI Nonconforming Uses, Structures and Lots, sec. 175-70 (A).
- n. “If a nonconforming use is **discontinued for a period**

of 24 consecutive months, further use of the property *shall conform to this chapter or be subject to review by the Zoning Board of Appeals.*" Town of Lake George, NY, Chapter 175 Zoning, Article VII, sec. 175-65.

2. Does it make a difference whether the property owner intended to abandon the use?

Typically zoning ordinances remove the element of intent from an abandonment analysis, making it easier to prove that the use had ceased for the applicable period of time. Where intent is an element to be considered, evidentiary issues can become problematic. What follows are examples of provisions for zoning ordinances that illustrate various approaches to addressing the issue of intent, and then some recent cases where intent was an issue.

Examples from zoning ordinances:

- a. "A nonconforming use, if is discontinued for a continuous period of six months, shall be deemed terminated *unless the property owner can demonstrate to the reasonable satisfaction of the Planning and Zoning Commission his or her intent to maintain and continue such use.*" Bethel, CT (Fairfield County), sec. 118-40(D).
- b. "Abandonment of a nonconforming use shall consist of some act, or failure to act, which *evidences the owner's lack of intent to continue* the nonconforming use *and is not refuted by any demonstration on the part of the owner of an intent not to abandon the use*; provided however, that any involuntary interruption caused by catastrophe, if any nonconforming use ceases for a period of one year, the owner will be presumed to have abandoned the nonconforming use unless such *presumption is rebutted by substantial evidence of intent not to abandon* the use. Town of Westerly, RI, Chapter 260 Zoning, Article VII, sec. 260-32(B)(3).
- c. "*Intent to resume a nonconforming use shall not confer the right to do so.*" Village of Bronxville, NY, Chapter 310 Zoning, Article V, sec. 310-25(A)(3).
- d. "**If such nonconforming use of land ceases for any reason** for a period of more than 30 days, any subsequent use of such land shall conform to the regulations specified by this chapter for the district in which such land is located." City of Grand Ledge, MI, Charter, Part

- II, General Legislation, Chapter 220 Zoning, Article XX: Nonconforming Lots, Structures and Uses, § 220-93 Nonconforming uses of land (C).
- e. **“If a nonconforming use of a building or land is voluntarily abandoned and ceases for a continuous period of one year or more,** subsequent use of such building or land shall be in conformity with the provisions of this chapter.” Borough of Shippensburg, PA, Part II General Legislation, Chapter 150 Zoning, Article X Supplementary Regulations, § 150-48 Nonconforming structures and uses, (E) Abandonment.
 - f. **“(C) Continuity of nonconforming uses. No nonconforming use may be reestablished after it has been discontinued for 12 consecutive months. The vacating of premises or structures or the non-operative status of such premises or structures shall be conclusive evidence of discontinued use . . .”** Township of Brecknock, PA, Part II: General Legislation Chapter 110 Zoning, Article III Nonconforming Lots, Uses and Structures, § 110-10 Nonconforming uses and structures.
 - g. **“(D) A nonconforming building or a building in which a nonconforming use is conducted that is damaged or destroyed by any casualty to any extent may be restored within two years after such destruction or damage** but shall not be enlarged except as provided in § 170-73 above. (E) **If any nonconforming use ceases for any reason for a continuous period of two years or more, other than for reasons beyond the control of the owner of the property,** except as provided in Subsection D above, or is changed to or replaced by a conforming use, the land and building thereupon shall be subject to all the regulations as to the use for the zoning district in which such land and building are located as if such nonconforming use had never existed.” Rappahannock County, VA, Part II, General Legislation Chapter 170 Zoning, Article VIII Nonconforming Uses § 170-74 General Regulations.

Recent Litigation:

In two recent cases involving the nonconforming use of a single family home as a rental property, the courts in New Jersey and Utah came to different determinations on whether abandonment had occurred based on two very similar fact patterns.¹⁸

Some courts have not looked past the presumption of abandonment created by a nonconforming use's statutorily proscribed time period of inactivity. In those courts a showing of intent to abandon a nonconforming use is not required when the statutory time period of abandonment is reasonable and specifically stated in the ordinance.¹⁹ Other courts have ruled that intent is only important where some force outside the control of the property owner prevents the continuous use of the land in a particular manner. When there is nothing involuntary about the cessation of the nonconforming use, the showing of a landowner's intent to abandon is not required.²⁰

Courts which follow this two-pronged approach requiring a showing of intent and an overt act or failure to act, have ruled that mere non-use is not sufficient to establish the fact of abandonment absent other evidence tending to prove the intent to abandon.²¹ According to such reasoning, although the passage of time can create an inference of abandonment there must be the additional showing of an intent to abandon the nonconforming use before the nonconforming use is deemed abandoned.²² The longer the time of cessation the greater the weight is attributable to that factor, but it can be overcome with evidence of the owner's intent to resume operation and factors which have prevented him/her from continuing operation.²³

A zoning ordinance requiring a proof that a nonconforming use was "voluntarily discontinued" for abandonment to occur required proof of a manifest intention to abandon the use coupled with acts or omissions implementing that intent.²⁴ Proof of a previous landowner's decision to dissolve a corporation considered a pre-existing nonconforming use and his choice to cease doing business sufficiently met this burden, and when coupled with nonuse for a statutorily sufficient time period equated to abandonment of the nonconforming use.²⁵ Attempts to sell a property for uses other than nonconforming uses, statements of the owner not to return to the site in question, and removal of equipment integral to the nonconforming use are all acts that have been found equating to the abandonment of a nonconforming use.²⁶

Some courts have ruled that the actions and intent of the current or prior landowner are crucial in determining abandonment of a nonconforming use, while the actions and intent of a lessee or future owner are irrelevant.²⁷

3. Can the Period of Abandonment/Discontinuance be Extended?

Remembering that the goal of zoning is to ultimately bring

all parcels into compliance with the allowable uses in the zoning district, it might seem peculiar to discuss whether a municipality can extend the time of abandonment or discontinuance of a nonconforming use beyond the time initially set in the local regulation. However, some municipalities, perhaps as a result of negotiation and compromise in the drafting of new zoning regulations, do allow for this possibility. These ordinance provisions should set forth the specific circumstances that must exist for this to occur, as well as describe the process that must be followed for the requesting and granting of this extension. What follows are examples.

Example from a zoning ordinance:

- a. *“The Zoning Board of Adjustment may, for good cause shown, extend the period of permitted discontinuance up to three additional years, provided that application in writing is made to the Board at least 60 days before the commencement date of such three-year additional period.”* City of Nashua, NH, Chapter 190, Article XII, sec. 190-122.

Recent Litigation:

Where the zoning ordinance is very strict regarding the extension of the abandonment period, large scale operations will be affected much more than small ones. Where an injunction prevented the operation of a nonconforming use landfill, after the injunction was lifted the landfill was not able to become operational quickly enough not to be deemed abandoned under the applicable ordinance. The controlling statute contained no exception for a complex business such as a landfill, which required considerable startup and development time for it to be functioning after the injunction was lifted.²⁸

4. Can an abandoned nonconforming use be re-established?

Although municipalities are typically strict in their quest to eliminate nonconforming uses, some jurisdictions provide a mechanism for the re-establishment of the nonconforming uses. The first example below seems to indicate that the nonconforming uses shall be allowed to continue by special permit. Where there are no conditions on the length of time a special use permit is granted, and since such permit runs with the land, this may in essence convert the nonconforming use closer to a more permanent use. Further, should municipalities desire to allow the nonconformity to continue,

it might be better to either consider granting a use variance if the subject property can meet the statutory test for such, or consider rezoning to allow the use if it is no longer considered offensive.

Examples from zoning ordinances:

- a. "Any nonconforming structure use which has been abandoned or not sued for a period of two years, or more shall not be re-established, *except by the granting of a special permit from the Zoning Board of Appeals* in accordance with provisions of this ordinance." Town of Pittsfield, MA, Town Code Article 23-8 Non-conformities, Sec. 8.4 Abandonment and Non-Use.
- b. "**In the event that a nonconforming use of any building or place is discontinued for a period of six months**, the use of the same shall thereafter conform to the use permitted in the district in which it is located; **provided, however, that the Board of Commissioners may permit a continuation of such nonconforming building or premises.**" Town of Redington Shores, FL, Charter, Part II, General Legislation Chapter 90 Land Development Regulations Part 5 Zoning, Article XXV District Use Regulations, § 90-114 Nonconforming Uses. (C) Discontinuance of a nonconforming use.

Recent Litigation:

Where a zoning ordinance stated that once a nonconforming use is abandoned, it cannot be reestablished, the operation of a nonconforming use on property pursuant to a special exception was deemed by a court to be abandonment of the nonconforming use.²⁹ Once the special use permit is granted, it becomes the operative document regarding the permitted uses of the property, and the use of the property is no longer considered a nonconforming use or the time period required for abandonment begins.³⁰ However, the intent to discontinue a nonconforming use cannot be proven where a municipality forces a property owner to apply for a special use permit for an activity substantially similar to the nonconforming use and where the property owner has no intent to end the nonconforming use.³¹

5. Does use of the entire building need to be abandoned to eliminate the nonconformity?

Another area that has been the subject of litigation surrounds the question of exactly what constitutes a discontinuance of use. For example, is it use of the building/structure

for any reason in whole, or just in part? Sometimes municipalities choose to use the phrase “substantial discontinuance” or discontinuance of “substantially all” of the use. The immediate problem is that the ordinances fail to define the term “substantial,” providing a field day for negotiation between landowners and the municipality, and ultimately often requiring court intervention due to poor drafting.

Examples:

- a. “Any nonconforming use *or portion thereof* which becomes unoccupied, unused or discontinued and remains unoccupied, unused or discontinued during any continuous period of twelve (12) months shall be deemed an abandonment of the nonconforming use . . .” City of Harrisburg, PA, Zoning Code 7-302.2 Reversion of Nonconforming Structures, Buildings and Uses.
- b. “The *substantial discontinuance* of any nonconforming use for a period of one year or more terminates such nonconforming use of a structure or premises, and thereafter said structure shall not be used, except in conformity with provisions of this ordinance.” Town of Islip, NY, Chapter 68 Zoning, Article III, sec. 68-15(B).

Recent litigation:

In interpreting the Zoning Resolution of the City of New York to determine the appropriate legal standard to determine whether a nonconforming use has been discontinued, the New York Court of Appeals overturned both the trial court and Appellate Division, concluding that substantial—rather than complete—discontinuance of the active, nonconforming activity forfeits the nonconforming use, and that the good faith of the owner is irrelevant to that determination.³² Here, Section 52-61 of the Zoning Resolution prohibited continuation of a nonconforming use if, during a two-year period, “*the active operation of substantially all* the nonconforming uses * * * is discontinued” (emphasis added). The Board of Standards and Appeals found minimal warehouse activity following the complete stoppage of operations for 20 months, and held that this cessation failed to preserve the nonconforming use status. As a result, the Board revoked the building permit that had allowed the petitioner to maintain a nonconforming use on the premises. The Court upheld the Board’s determination finding that it was supported by substantial evidence.

6. Are there exceptions to the period of abandonment?

Most zoning ordinance provisions desire to eliminate

nonconformities, and therefore leave no opportunity for discontinuance after the use is abandoned, unintentionally or even involuntarily (e.g., due to an act of god). Occasionally, however, a municipality chooses to overlook, or not count, the period of time that a use was discontinued as a result of certain intervening actions that are not within the control of the property owner.

Example from a zoning ordinance:

- a. ***“If any portion of the twelve month period of discontinuance is due solely to fire, other casualty, act of God, or action by a governmental jurisdiction, including, inter alia, a proposal submitted to City officials for consideration of either a reuse of or a continuation of the same use of the structure, then such portion of time shall not be counted in the aforesaid twelve month period following which nonconforming use shall be deemed abandoned.”*** City of Harrisburg, PA, Planning and Zoning Code, 7-703.2(c)(2).

Recent litigation:

Where a zoning ordinance contained a provision allowing a nonconforming use fraternity to continue so long as the fraternity’s privileges were not revoked by the university for more than a year, the revocation of privileges for more than a year immediately expired the nonconforming use. The subsequent lease of the property for use by another fraternity within one year did not function to preserve the nonconforming use.³³

7. What constitutes evidence of abandonment?

Some zoning regulations provide examples of what evidence will be considered to assess whether the use has been abandoned.

Examples from zoning ordinances:

- a. “A nonconforming use shall be presumed abandoned and its right as a nonconforming use extinguished when any of the following has occurred:
“(A) **If a nonconforming use of a building or land is discontinued, razed, removed or abandoned for 365 consecutive days**, subsequent use of such building or land shall conform with the regulations of the district in which it is located. (B) **Abandonment shall commence on the date when customary efforts to continue the use cease.**” Code of the Borough of Quakertown, PA (Bucks County), Chapter 27 Zoning,

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Part 4 General Regulations, § 406. Nonconformities. (Ord. 983, 3/4/1992; § 4.6; as amended by Ord. 1053, 9/1/1999, § II) 5. Abandonment.

- b. “(C) Continuity of nonconforming uses. No nonconforming use may be reestablished after it has been discontinued for 12 consecutive months. **The vacating of premises or structures or the non-operative status of such premises or structures shall be conclusive evidence of discontinued use.**(F) Restoration and repair. (1) Restoration (c) **The reconstruction shall start within one year from the time of damage to the structure.**” Township of Brecknock, PA, Part II: General Legislation Chapter 110 Zoning, Article III Nonconforming Lots, Uses and Structures, § 110-10 Nonconforming uses and structures.

Recent Litigation:

As abandonment of a nonconforming use is often a question of fact, many cases involve landowners arguing the zoning board had incorrectly ruled that their nonconforming use was abandoned. Landowners have been able to rebut the presumption of the abandonment of a nonconforming use through the use of affidavits and by casting doubt on contrary evidence.³⁴ Half-hearted efforts of complying with chronological requirements have not been sufficient to rebut the presumption of abandonment.³⁵

In *Zall v. Zoning Board of Appeals of Salisbury*,³⁶ the owner of property adjacent to a nonconforming use brought an action seeking to annul a special permit granted to the nonconforming use property owner (defendant) by the zoning board (co-defendant). The special permit authorized the defendant to change a prior nonconforming use of its beachfront property from a nightclub to a restaurant. The trial court vacated the board’s decision to grant the special permit concluding the defendant had abandoned the nonconforming use. The defendant appealed. The applicable zoning ordinance stated that nonconforming uses cease to exist after two years of non-use. Aware that the two-year period set forth in the by-law was about to expire, the defendant made what the judge viewed as a weak effort to open for business in August, 2001. The defendant obtained a temporary ten-day permit to serve “prepackaged food with milk.” However, he did not purchase new goods for sale, and the only food available was several years old. The defendant was on the premises several hours each day during the ten-day period, with the lights on and the door unlocked, but did not make

any sales. The defendant did not advertise the business or do anything that would put the public on notice that a food establishment had opened. A month later, the defendant threw the items out. The Court did not find the defendant's actions to be a sufficient showing of operation of his business to reverse the trial court's determination that the nonconforming use was abandoned. As a result, the lower court's decision to vacate the zoning board's decision to grant a special permit to NEBC was affirmed.³⁷

8. Can an abandoned use be converted to a less intensive nonconforming use?

Typically zoning ordinances provide that abandoned uses may resume or be converted to a less intensive nonconforming use. Courts prohibit the conversion back to the more intensive use.³⁸ Likewise, courts have not allowed the reversion to a previously abandoned more expansive nonconforming use once it has been abandoned.³⁹ Where the owner of a prior nonconforming use billboard improperly added lights to the sign, he did not abandon the original nonconforming use. The court ruled that an improper expansion of a nonconforming use does not equate to an overt act of abandonment as the original use was not abandoned.⁴⁰ On the other hand, where a nonconforming use deli was converted into a take-out Chinese restaurant which operated beyond the authorization the zoning board granted to the deli, the original nonconforming use was deemed abandoned.⁴¹ The subsequent reversion of the property to a deli use was not possible as the court ruled the nonconforming use was abandoned by the prolonged improper use as a Chinese restaurant.⁴² The sale of alcohol by a restaurant has been considered an accessory use and not an expansion nor a separate and distinct use to a nonconforming restaurant.⁴³ As such the decision of a previous owner of a nonconforming use to stop serving alcohol for several years did not affect the restaurant's ability to serve alcohol in a restaurant setting.⁴⁴

IV. Amortization

A more active or aggressive method of eliminating nonconforming uses is amortization. This concept has its roots in the early 1915 case of *Hadacheck v Sebastian*, 239 U.S. 395 where the Court confirmed that the City could eliminate the brickyard use on the property in question without such action necessitating compensation. Amortization has always been a controversial tool, gaining most notoriety perhaps in

the 1960s and 1970s as advocates attempted to use this method to force the removal of billboards along highways. By 1978, governments were prohibited from using amortization to remove these signs on federally funded highways absent compensation. While few states have specific statutory guidance on amortization, the general rule from common law is that the property owner/user must be given enough time to realize a reasonable return on their investment. Although courts approach amortization issues on a case-by-case basis, a balancing test is typically employed to weigh the value to the public in eliminating the use and the harm or private loss suffered as a result of the amortization.

What follows are examples from local zoning laws and ordinances demonstrating various approaches to implementing amortization efforts. Readers must keep in mind, however, the need for appropriate balancing.

1. Time for the Nonconforming Use to Conform

- a. "Any adult arcade, adult bookstore, adult cabaret, adult entertainment establishment, adult motel, or adult motion picture theater, as defined in this Ordinance, in existence at the time of adoption of this Ordinance which violates or does not conform to the provisions hereof (hereafter, a "pre-existing, non-conforming business") **shall conform to the provisions of this Ordinance within a period of three (3) years from said adoption of this Ordinance.**" City of Jackson, MS, Article XIII, § 1303.03-A. Amortization of Non-conforming Use.
- b. "Any nonconforming open use of land or any nonconforming billboard or advertising structure not attached to a building, but which lawfully existed at the time that this Ordinance became effective, **shall be discontinued within five (5) years from the date of its passage.**" Howard County, IN, Ch. 6, § 6.1. Amortization of Nonconforming Uses or Buildings.
- c. "The lawful use of buildings or land existing at the effective date of this Ordinance which does not conform to the provisions of this Ordinance shall be discontinued within a reasonable period of amortization of the building; uses of buildings and land which become nonconforming by reasons of a change in this Ordinance shall also be discontinued within a reasonable period of amortization of the building. A reasonable period of amortization shall be construed to being **after the date of adoption of this Ordinance and shall be consid-**

ered to be thirty (30) years for buildings of ordinary wood construction, forty (40) years for buildings of wood and masonry construction, and fifty (50) years for buildings of fireproof construction.”

County of Redwood, MN, § 21(1). Non-conforming Uses.

- d. “The Board, under authorization of State statute, may provide for the timely modification or removal of a nonconforming structure or use of land. **A maximum of a five (5) year period may be granted in which the nonconforming use shall be modified or removed** in order to comply with the General Plan and Zoning Ordinance. The Board may provide for a shorter time period by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of any investment in the nonconforming use or structure, if any.” Layton City, UT, Ch. 19.15.080. Amortization of nonconforming uses.
- e. “If, after holding public hearings, the Planning Commission determines that the continuance of a nonconforming use is detrimental to the health, safety or welfare of a neighborhood, the nonconforming use shall be completely removed or converted to a conforming use within an amortization period prescribed by the City Council. The Planning Commission shall establish conditions for the operation of the nonconforming use during the amortization period **(not less than 5 years nor more than 40 years, depending upon the impact the nonconforming use has on the surrounding neighborhood).**” City of Florence, OR, Title 10, § 10-8-8. Removal of Nonconforming Uses.
- f. “The board may require the removal or discontinuance of a nonconforming use in any residential district which does not meet the allowable use standards for the zone in which it is contained. The removal of nonconforming uses may be accomplished only in the following 2 ways:
 - A. Nonconforming signs, temporary structures, open air storage facilities, or parking facilities shall be required to be removed **5 years from the date of this ordinance**, when, after a hearing as provided in section 150.023, the commission finds the uses to be inconsistent or incompatible with surrounding land uses.
 - B. Nonconforming use in a permanent structure, except as described in section 150.144(D), may only be required to be removed when, after a hearing as provided in section 150.023, the commission finds that the nonconforming use is inconsistent or incompatible with

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surrounding land uses, and the nonconforming use is not necessary to the surrounding residential areas in that location. If the commission recommends the use be discontinued, the board is required to give the owner notice and serve notice to subsequent owners that the use of the land or structure is to be amortized. The amortization period shall relate to the market value of the property. **Any structure having a market value less than \$5,000.00 shall be given an amortization period of 2 to 5 years. Any structure with a market value over \$5,000.00 shall be given an amortization period of not less than 5 years or more than 25 years from the date of the hearing. If the nonconforming structure or use is not removed or discontinued within 6 months of the end of the amortization period, the owner shall be subject to a fine of not more than \$500.00 per day or other court action which the village deems necessary.**⁴⁵

2. Extension of the Nonconforming Use to Conform

a. **“The City Planning Board may grant an extension of time for continued operation after the conclusion of this grace period if the owner of the pre-existing, non-conforming business proves that he is unable to recoup his investment in such enterprise by that date. In order to secure an extension of time, the owner must submit to the City Planning Board a written request for such extension at least sixty (60) days prior to the expiration of the three (3) year grace period. No application for extension received by the City Planning Board after such time shall be considered. This information shall be supported by relevant documentary evidence such as financial statements and tax records. Copies of such documentary evidence must be attached to the request for extension, and refusal or failure to provide this information as required shall constitute a waiver of the right to seek an extension of time in which to operate. Such written request shall set forth the following information:**

a. The amount of the owner’s investment in the pre-existing, non-conforming business through the effective date of this Ordinance;

b. The amount of such investment that has been or will have been realized at the conclusion of the three-year grace period;

c. The life expectancy of the existing enterprise;

d. The existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such lease.

The City Planning Board shall notify an applicant for an extension of time of the time and place of a hearing to be held on such request before the City Planning Board. After such hearing, the City Planning Board shall issue a written order on the request for extension. If the owner desires to appeal the City Planning Board's order, said appeal may be taken by following the procedures for appeal to the City Council pursuant to the provisions of the Zoning Ordinance of Jackson, Mississippi, as amended. Extensions that are granted shall specify a date certain for closure, and shall not be valid for operation at any other location." City of Jackson, MS, Article XIII, § 1303.03-A. Amortization of Non-conforming Use.

b. **"The owner or operator of a nonconforming use may apply to the City Council for an extension of time within which to terminate the nonconforming use. An extension shall be for a reasonable period of time commensurate with the investment involved and shall be approved if the City Council makes all of the following findings or such other findings as are required by law:**

(1) The applicant has made a substantial investment (including but not limited to lease obligations) in the property or structure on or in which the nonconforming use is conducted; such property or structure cannot be readily converted to another use; and such investment was made prior to September 27, 2005.

(2) The applicant will be unable to recoup said investment as of November 24, 2006.

(3) The applicant has made good faith efforts to recoup the investment and to relocate the use to a location to meet the requirements of this Chapter." Santa Monica, CA, Ch. 9.44.040. Amortization of nonconforming uses.

c. **"A nonconforming use due to be terminated pursuant to this section may be extended upon application for a special approval for such extension from the Board of Appeals.** Such approval shall not be granted unless the applicant establishes and the Board of Appeals finds that, notwithstanding the fifteen year period for amortizing a nonconforming use created by the 1991 amendment referred to above, termination

of the nonconforming use would cause serious financial harm to the property owner not balanced or justified by the advantage to the public in terms of more complete and effective zoning accruing from the cessation of such use. In making this determination the Board shall consider, among other factors (including the factors set forth elsewhere in this chapter relating to the issuance of special permits or approvals), i) the nature of the nonconforming use; ii) the cost of converting to a conforming use; iii) the amount of investment that existed in the property on March 1, 1991, or if the zoning change creating the nonconformity was adopted after March 1, 1991, the amount of such investment on the date of such later zoning change; iv) the detriment caused by the nonconforming use; v) the character of the neighborhood; vi) the ability of the landowner to have amortized the cost of the landowner's investment over the period between March 1, 1991 (or such later zoning change date) and the required termination of such use; and vii) whether an additional reasonable amount of time is needed by the owner to amortize the owner's investment. In making its determination the Board shall disregard, as irrelevant, any costs for purchase of a nonconforming building or property or costs to repair, maintain, improve or enlarge a nonconforming property, incurred after March 1, 1991, or, if the nonconformity was created by a subsequent zoning change, any such costs incurred after such change. If the extension is granted, the Board of Appeals shall set a fixed additional period for the extension of time before the nonconforming use must be terminated." Town of Ithaca, NY, § 270-214. Amortization of certain nonconforming uses related to pre-1991 residential occupancies.

3. Rebuilding of Damaged Nonconforming Use

- a. "No structure damaged by fire or other causes to the extent of more than triple its assessed value shall be repaired or rebuilt except in conformity with the provisions of this Ordinance, provided, however, that this requirement shall not apply with respect to any structure used exclusively for residential purposes." Howard County, IN, Ch. 6, § 6.1. Amortization of Nonconforming Uses or Buildings.
- b. "No buildings damaged by fire or other causes excluding residences and farm buildings, to the extent that their restoration will cost more than sixty (60) percent of

their fair cash value shall be repaired or rebuilt except to conform to the provisions of this ordinance.” Logan County, IL, § 9.4. Amortization of Nonconforming Uses or Buildings.

- c. “Structures incurring damage of less than 50 percent (50%) of fair market value above the foundation may be restored, reconstructed and used as before, provided that such restoration is commenced within six (6) calendar months from the date damages were incurred. If reconstruction is not commenced within six (6) months, the use of said land or structure shall thereafter conform with the provisions of this Ordinance. Fair market value shall be determined by reference to current statutory provisions pertaining to real estate assessment and the records of the county assessor.” City of Snellville, GA, Article V, § 5.7. Amortization and Discontinuance.

V. Conclusion

A substantial portion of the litigation surrounding nonconforming uses could be avoided with better drafting of zoning ordinance provisions. Areas that have attracted a significant amount of nonconforming use litigation involve abandonment or discontinuance of use and amortization. Property owners are typically not anxious to give up the property interest that accrues from nonconforming use status. Sometimes property owners are not aware of the specific regulations governing their nonconforming use, other times, the use may have inadvertently ceased for the requisite period of time. Still, often disagreements result from ambiguities in the regulations themselves. Attorneys who find themselves in a position to assist municipalities with the drafting of nonconforming use provisions should be mindful of the pitfalls in failing to specify exact desires of the municipal client in dealing with such uses. Practitioners whose clients desire to challenge vague and ambiguously worded provisions may be pleasantly surprised at the body of caselaw that has developed that may support these positions, as well as the wealth of examples available from other jurisdictions that could be used to demonstrate more specific and clearer language for addressing municipal desires.

NOTES:

¹Patricia E. Salkin, *American Law of Zoning*, vol. 2, sec. 12-7

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(Thomson Reuters/West 5th ed. 2009).

²Patricia E. Salkin, *American Law of Zoning*, vol. 2, sec. 12-7 (Thomson Reuters/West 5th ed. 2009).

³Patricia E. Salkin, *American Law of Zoning*, vol. 2, sec. 12-7 (Thomson Reuters/West 5th ed. 2009).

⁴Patricia E. Salkin, *American Law of Zoning*, vol. 2, sec. 12-7 (Thomson Reuters/West 5th ed. 2009).

⁵Stuart Meck, *Growing Smart Legislative Guidebook* vol. 2, sec. 8-111 (American Planning Association 2002 ed. Jan. 2002).

⁶See, V. Gail Easley and David A. Theriaque, “Distinguishing Between Detrimental and Benign Nonconformities,” *Zoning Practice* (American Planning Association, November 2009).

⁷Patricia E. Salkin, *American Law of Zoning*, vol. 2, sec. 12-10 (Thomson Reuters/West 5th ed. 2009).

⁸Patricia E. Salkin, *American Law of Zoning*, vol. 2, sec. 12-10 (Thomson Reuters/West 5th ed. 2009).

⁹Patricia E. Salkin, *American Law of Zoning*, vol. 2, 12-233 to 12-235 (Thomson Reuters/West 5th ed. 2009).

¹⁰Patricia E. Salkin, *American Law of Zoning*, vol. 2, 12-233 to 12-235 (Thomson Reuters/West 5th ed. 2009).

¹¹*Karas v. Foss*, 2008 WL 859504 (N.J. Super. A.D., 2008) (citing *S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford*, 373 *N.J. Super.* 603, 613 (App. Div. 2004)) citing *Borough of Saddle River v. Bobinski*, 108 *N.J. Super.* 6, 16–17 (Ch. Div. 1969).

¹²*Karas v. Foss*, 2008 WL 859504 (N.J. Super. A.D., 2008) (citing *S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford*, 373 *N.J. Super.* 603, 613 (App. Div. 2004) citing *Borough of Saddle River v. Bobinski*, 108 *N.J. Super.* 6, 16–17 (Ch. Div. 1969).

¹³*Karas v. Foss*, 2008 WL 859504 (N.J. Super. A.D., 2008) (citing *S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment for Borough of Stratford*, 373 *N.J. Super.* 603, 613 (App. Div. 2004) (citing *Villari v. Zoning Bd. of Adj. of Deptford*, 277 *N.J. Super.* 130, 137 (App. Div. 1994)).

¹⁴Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning*, 4 RLZPN § 74:3 (2009).

¹⁵Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning*, 4 RLZPN § 74:3 (2009).

¹⁶Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning*, 4 RLZPN § 74:3 (2009).

¹⁷Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning*, 4 RLZPN § 74:3 (2009).

¹⁸*Euneva v. Keansburg Planning Board of Adjustment*, (PDF COPY of opinion), Superior Court of New Jersey, Monmouth County, (Decided: November 5, 2008 & Approved for Publication: May 26, 2009), and *Vial v. Provo City*, 2009 UT App 122 (Utah Ct. App. 2009).

¹⁹*McKenzie v. Town of Eaton Zoning Board of Adjustment*, 154 N.H. 773 (N.H. 2007), and *Village of Waterford v. Amna Enterprises, Inc.*, 27 A.D. 3d 1044 (N.Y. App. Div. 2006), and *Sun Oil Co. of PA v. Board of*

Zoning Appeals of the Town of Harrison, 57 A.D.2d 627 (N.Y. App. Div. 1977).

²⁰City of Red Bank v. Phillips, 2007 WL 4460223 (Tenn. Ct. App. 2007).

²¹Ghindia v. Buckeye Land Development, LLC., 2007 Ohio App. LEXIS 694, **12 (Ohio Ct. App., 2007).

²²Karas v. Foss, 2008 WL 859504 (N.J. Super. A.D., April 2, 2008).

²³S&S Auto Sales, Inc. v. Zoning Board of Adjustment for the Borough of Stratford, 373 N.J. Super. 603, 624. (N.J. Super. Ct. App. Div. 2004).

²⁴Ghindia v. Buckeye Land Development, LLC., 2007 Ohio App. LEXIS 694, **12 (Ohio Ct. App., 2007).

²⁵Ghindia v. Buckeye Land Development, LLC., 2007 Ohio App. LEXIS 694, **12 (Ohio Ct. App., 2007).

²⁶Pezzullo v. Ure, 2008 R.I. Super. LEXIS 167, *18 (R.I. 2008).

²⁷Face Value, LLC v. Zoning Board of Appeals of Town of East Hartford, 2008 Conn. Super. LEXIS 2931 (Conn. Super. Ct. 2008), Karas v. Foss, 2008 WL 859504 (N.J. Super. A.D., April 2, 2008), Gem City Metal Spinning Co. v. City of Dayton Board of Zoning Appeals, 2008 WL 185535 (Ohio Ct. App. 2008), Palmieri Cove Associates v. City of New Haven Board of Zoning Appeals, 2006 Conn. Super. LEXIS 848 (Conn. Super. Ct. 2006).

²⁸Custom Land Development, Inc. v. Coopertown Board of Zoning Appeals, 168 S.W.3d 764, 775 (Tenn. Ct. App. 2004).

²⁹Purich v. Draper Properties, Inc., 395 Md. 694 (2006).

³⁰Smith Bros. Woodland Management, LLC v. Zoning Board of Appeal of Town of Brookfield, 108 Conn. App. 621 (Conn. App. Ct. 2008), Purich v. Draper Properties, Inc., 395 Md. 694 (2006).

³¹Greer v. Washougal Motorcross, LLC., 2007 Wash. App. LEXIS 497, *11 (Wash. Ct. App. 2007).

³²Toys R Us v. Silva, 89 N.Y.2d 411, 676 N.E.2d 862, 654 N.Y.S.2d 100 (1996).

³³Schweizer v. Board of Adjustment of City of Newark, 2009 WL 597630 (Del. 2009).

³⁴Bialik v. Stambaugh Township, 2008 WL 1885772 (Mich. Ct. App. 2008), and Finn v. Zoning Hearing Board of Beaver Borough, 869 A.2d 1124 (Pa. Commw. Ct. 2005).

³⁵Zall v. Zoning Board of Appeals of Salisbury, 73 Mass. App. Ct. 1103 (Mass. App. Ct. 2008).

³⁶Zall v. Zoning Board of Appeals of Salisbury, 73 Mass. App. Ct. 1103 (Mass. App. Ct. 2008).

³⁷Zall v. Zoning Board of Appeals of Salisbury, 73 Mass. App. Ct. 1103 (Mass. App. Ct. 2008).

³⁸Taylor v. Zoning Board of Appeals of City of Evanston, 375 Ill. App. 3d 585 (Ill. App. Ct. 2007).

³⁹Town of Orange v. Shay, 68 Mass. App. Ct. 358 (Mass. App. Ct. 2007).

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⁴⁰Pallco Enterprises, Inc. v. Denton Beam, 132 Cal. App. 4th 1482, 1498 (Cal. App. Dep't Super. Ct. 2005).

⁴¹Gorgone v. District of Columbia Board of Zoning Adjustment, 2009 D.C. App. Lexis 179 (2009).

⁴²Gorgone v. District of Columbia Board of Zoning Adjustment, 2009 D.C. App. Lexis 179 (2009).

⁴³City of Okoboji v. Okoboji Barz, Inc., 746 N.W.2d 56 (Iowa 2008).

⁴⁴City of Okoboji v. Okoboji Barz, Inc., 746 N.W.2d 56 (Iowa 2008).

⁴⁵Mt. Zion Code sec. 150.146 (1999).