

RESOLVING NON-CONFORMING USES: A RESOURCE GUIDE FOR PLANNING AND ZONING OFFICIALS

I. INTRODUCTION

Municipalities routinely update zoning codes and land use regulations in order to align future development patterns with changing community needs, environmental concerns, and economic development objectives. A change in zoning code is inherently forward-looking. Eliminating certain uses or revising building requirements only applies to future construction. Existing uses may not be in alignment with changed land use controls, but they do not automatically become illegal simply because of a change in the zoning code. They are instead considered to be *non-conforming uses*: land uses which were legally established according to the applicable zoning code at the time but that are subject to a host of regulations affecting their continuity and expansion.

Local governments sometimes struggle with the right way to maintain the legality of non-conforming uses while simultaneously ensuring they are phased out over the long-term. Meanwhile, property owners and developers seek to exhaust the development potential of their sites under the rules applying to non-conforming uses while also contemplating other land use approval strategies, including variance applications and rezoning petitions. This resource guide has been prepared to help Dutchess County localities better understand the variety of regulations that can undergird non-conforming use regulations and also anticipate the potential types of conflicts and questions that may surface in the course of applying such regulations to non-conforming properties.

The guide was prepared by undertaking a comprehensive review of New York State land use regulations, law journal articles on the topic of non-conforming use, court decisions, and the non-conforming use statutes in effect in New York localities. These localities included City of Newburgh, Town of New Paltz, Village of Tarrytown, Village of Tivoli, Village of Castleton-on-Hudson, Town of Plattekill, Town of Kent, Village of Piermont, City of Yonkers, and City of Peekskill. The language used in the non-conforming use regulations of these localities was carefully studied and used in concert with other legal guidance documents to prepare the Non-Conforming Use Model Code, included as an appendix to this guide. As localities undertake the preparation of their own non-conforming use regulations, they are advised to modify the model code to reflect their community's unique land use concerns and review the codes of other similar cities.

II. NON-CONFORMING USE LAW

The legal rationale behind non-conforming use policy is that a retroactive invalidation of existing uses under changed zoning would constitute an unconstitutional taking of private property. In order to safeguard the rights of property owners to maintain the use and operation of their property, municipalities typically prepare a separate sub-section within their zoning code that specifically addresses the rules regarding non-conforming uses. New York State law does not address non-conforming uses, thereby leaving municipalities to establish their own standards for regulating their existence and continuity.

Non-conforming use law principally applies to zoning controls stipulating the land uses that are allowed on a certain property. For example, an industrial building may be governed by non-conforming use law if it is located in an area that has been rezoned from industrial to residential uses.

However, land use is not the only type of non-conformity in a development context. In addition to non-conforming *uses*, there are also non-conforming *buildings* in which a structure may support a permissible

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land use but nonetheless becomes non-complying with building regulations such as height restrictions, bulk requirements, or architectural specifications. Similarly, there may be non-conforming *lots* in which non-compliance occurs not because of land use or building dimensions but because of changes in site requirements such as minimum lot size, density restrictions, open space requirements, or on-site parking requirements.

III. REGULATIONS GOVERNING NON-CONFORMING USES

The non-conforming use article of the zoning code may prohibit or limit changes in uses on the property that are non-conforming. It may also provide for limiting their expansion or enlargement; prohibiting the reconstruction of damaged structures; disallowing the reestablishment of non-conforming uses after they have been discontinued for a period of time; or simply terminating them after the passage of a stipulated amount of time. Presented below are the various ways in which regulations govern non-conforming uses.

Abandonment of Use

Municipalities routinely define the amount of time that a non-conforming use can be suspended before the legality of that land use becomes permanently terminated. Typically, non-conforming land uses lose their legal status if they are discontinued for a particular time period; this may be as short as six months or as long as 18 months, depending on the municipality.

Amortization

Even though a core objective of non-conforming land use is to safeguard the constitutional rights of property owners, there are situations where the adverse community impacts of a non-conforming land use necessitate that it be allowed to continue only for a certain period. In these situations, the duration of a non-conforming use is governed by *amortization provisions* that allow for the continuity of the non-conforming land use for a period long enough for the property owner to recoup their investment in the use. The duration of these amortization periods varies. Courts adjudicate the reasonableness of amortization periods based upon the unique circumstances surrounding a particular non-conforming use and the relative public benefits achieved by its invalidation. Shorter durational periods may be upheld in situations where the non-conforming use would constitute a private nuisance, when the non-conforming use is detrimental to public health or safety, and when the owner has made little to no economic investment in the establishment.

Expansions

In general, zoning laws seek to limit the expansion of non-conforming uses. However, there is rather wide latitude in the way that municipalities could interpret an impermissible expansion. Many municipalities adopt a blanket restriction on any type of physical expansion. Conversely, some municipalities allow for an expansion up to a certain percentage of the total floor area, or the construction of an additional story as long as it does not increase the footprint of the building.

Also variable is the way that different municipalities interpret the expansion of a business operation. In general, the owner of a non-conforming use may not expand or diversify a business operation that would increase the footprint of that use on the property or the traffic of customers to the site. On the other hand, case law suggests that the property owner's intentionality at the time of establishing the use may also affect the interpretation of expansion. If, for example, the owner had purchased the property with

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the intention of using its full extent for a particular business operation, then the expansion of the operation may be deemed legal.

Repairs and Building Improvements

Unlike expansions, the repair and improvement of a building with non-conforming uses is typically not restricted by a locality's zoning law. However, the degree to which an owner is genuinely pursuing a repair or improvement rather than the expansion of a use is open to interpretation by the building department.

Disasters and Destruction

Most non-conforming use regulations mandate that a non-conforming use loses its legal status if it is destroyed by a natural disaster such as fire or flood. However, regulations vary in terms of what constitutes "destruction". Typically, destruction is measured in relation to the percentage of the structure's value. For example, if more than 25% or 50% of the building is destroyed, then the property owner may not rebuild the non-conforming use and is subject to the same zoning restrictions as though the lot was empty or had been abandoned.

Changes in Use

Most non-conforming use regulations do not allow for a material change in a particular business operation. For example, the operator of a dairy plant cannot switch to manufacturing widgets based on the premise that both business operations are commercial uses. If that landowner switches to another business operation that is not allowed under the current zoning code, the prior use has been abandoned and the new use would be deemed illegal. However, some localities do allow for a property owner to switch from one non-conforming use to another non-conforming use so long as the new non-conforming use generates fewer negative impacts than the previous non-conforming use, often referred to as being less non-conforming.

IV. OTHER TOOLS FOR RESOLVING NON-CONFORMING USES

Non-conforming use regulations are an imperfect approach to dealing with a variety of situations. In certain cases, other tools such as rezonings or variances may be a more appropriate way for resolving conflicts.

Variances

Some municipalities extend the life of non-conforming uses by granting either an area or a use variance. Under New York State law, a locality's zoning board of appeals may approve an "area variance" which authorizes the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations."¹ The board may alternatively approve a "use variance" that allows

¹ Under New York State law, the granting of an area variance is determined by the Zoning Board of Appeals balancing the benefit of the requested variance to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community by making such a grant. In making the determination, the Board considers (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created. See New York State Town Law §267-b(3); Village Law §7-712-b(3); General City Law §81-b(4).

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for land to be used for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations.²

The area variance can enable a property owner to physically enlarge the space on their property dedicated to a non-conforming use even if such enlargement is prohibited under non-conforming use theory. The use variance can enable a property owner to maintain a non-conforming use or expand its intensity of scope of operation even if the locality's non-conforming use regulations prohibit such continuance or expansion. One key requirement for a use variance is that the applicant must show that they cannot realize a reasonable financial return under any use allowed in the district or by continuing the non-conforming use in its unaltered condition. This financial requirement makes it very difficult for most owners of existing non-conforming uses to prove that they are entitled to a use variance.

Zoning Modifications

There are situations where changing the zoning of an entire area is a more appropriate method for permitting non-conforming uses. For example, a community may have downzoned a higher density residential area in order to ameliorate traffic concerns. As a result, multi-family buildings may have become a non-conforming use. Changing housing needs, however, suggest the need for a broad reversal in land use policy that would again allow for higher density housing in this area. Alternatively, an area initially designated for commercial or industrial development may have been changed to large lot residential development in order to curb the possibility of incompatible land uses. As a result, certain commercial buildings and manufacturing facilities may have become non-conforming uses. Shifting economic development priorities, however, suggest the need to attract new development in order to increase the tax base. In both of these scenarios, altering the zoning to reflect changing community needs would be a better strategy than relying upon a non-conforming use regulation to allow for the legal continuity of certain uses for fixed durations on qualified properties.

It is possible for a municipality to modify the zoning of a single parcel, cluster of adjoining parcels, or a selection of disconnected parcels dispersed across a larger area. Under New York State law, changing the zoning requirements for a discrete parcel solely for the personal benefit of a private landowner constitutes an impermissible act of spot zoning. However, it would not be considered spot zoning if the zoning modification is consistent with the municipality's comprehensive plan or other zoning trends in the area and also provides broader public benefits.

² Under New York State law, a use variance may only be granted when the applicant proves that the applicable zoning regulations have caused an unnecessary hardship. More specifically, the applicant must demonstrate four conditions that are in effect under the existing regulations: (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created. See: Town Law §267(1); Village Law §7-712(1); General City Law §81(b)(1)(a).

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V. SCENARIOS

Presented below are five different non-conforming use conflicts based upon real-world examples from municipalities in the Hudson Valley. For each scenario, the conflict is followed by the application of non-conforming use regulations, a variance, or zoning modifications as potential methods for resolving the conflict.

Scenario 1: Previously Built Racetracks

Conflict: Motorbike racing tracks were prohibited town-wide, but a track still existed within the Town limits.

Application of Non-Conforming Use Regulation: Within 90 days of the enactment of the prohibition, the owner of the motorbike racing track could apply to the Zoning Board of Appeals to be “grandfathered in” as a legal non-conforming use. Once approved by the Board as a legal non-conforming use, the track could continue operation for ten years before being amortized. This amortization period is considered a reasonable amount of time for the owner of a legal non-conforming use to recoup expenditures and make arrangements to discontinue the use and/or relocate it to another community. Once this ten-year period expires, the use must come to an end.

Application of Variance: The owner of a motorbike racing track could instead apply for a use variance from the new regulation. However, if the owner refuses to apply to be “grandfathered,” and does not receive a use variance, the Town could commence action to stop the use. Another option would be to wait until the end of the ten-year amortization period and then apply for a use variance.

Application of Zoning Modification: Alternatively, the Town’s Zoning Ordinance could be amended to allow the motorbike racing track use in certain zoning districts.

Optimal Resolution: The most prudent option is for the operator to request that the track be considered a “grandfathered legal non-conforming use” that must adhere to the amortization period. This approach allows the Town to achieve its zoning/planning goals, while also allowing the owner of the motorbike racing track to recoup costs.

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Scenario 2: Increased Intensity of Use?

Conflict: A restaurant with an indoor and outdoor seating area was operating in an area that was rezoned to prohibit dining establishments, making it a pre-existing, non-conforming use. A tent/canopy was erected over the restaurant's outdoor dining area, thereby allowing for the possibility of higher patronage levels during adverse weather conditions, or extended peak seasons for outdoor dining.

Application of Non-conforming Use Regulation: The Village's Code does not allow for the physical enlargement of a non-conforming use. However, an extension of such a use beyond standard seasonal/weather conditions is not prohibited under this locality's non-conforming use regulation. Moreover, the Zoning Board of Appeals found that the tent was not a permanent structure/building. As such, the tent would not be considered an expansion of the non-conforming use even though expanded patronage levels could be possible.

Application of Variance: If the restaurant owner wished to construct a new permanent building or structure on the site, or physically enlarge the footprint of the outdoor dining area, they would need to obtain an area variance.

Application of Zoning Modification: The Village's Zoning Code could be amended to allow these uses within the zoning district.

Optimal Resolution: Here, compliance with the Village's Zoning Code was sufficient to allow for the installation of a tent because the non-conforming use regulation only prohibited the physical enlargement of a non-conforming use.

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Scenario 3: Change in Commercial Business Operation

Conflict: Warehouse uses were not allowed in a residential zoning district. There had been a warehouse used for moving/storage purposes in this district (which was a legal non-conforming use) that was repurposed for lighting design and installation purposes.

Application of Non-Conforming Use: The Zoning Code does not allow a non-conforming use to be changed to any another kind of non-conforming use even if the new non-conforming use results in a lower impact than the prior use. The Zoning Board of Appeals was reasonably able to find that the use of a warehouse for moving and storage purposes was qualitatively different than the use of a warehouse for lighting design and installation. Therefore, the Zoning Board's determination that the new use was an illegal non-conforming use was reasonable.

Application of Variance: The owner of the warehouse should have applied for a use variance before the change in use, as they were introducing a new non-conforming use into the warehouse.

Application of Zoning Modification: Alternatively, the zoning for the site could have been changed in order to allow for the proposed use. However, changing the zoning of the property could be deemed an impermissible act of spot zoning if there was not also a broader public purpose served by the change.

Optimal Resolution: The owner of the warehouse should have applied for a use variance, as they were introducing a qualitatively new use. Alternatively, the locality might consider revising its non-conforming use regulations to allow for the possibility that a new non-conforming use could replace an existing one so long as it resulted in fewer negative impacts.

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Scenario 4: Improvement and Expansion of Two-Family House

Conflict: A two-family residential building was located in an area that had originally allowed for multi-family housing but later became a single-family district. The owner sought to renovate and enlarge the building while maintaining its use as a two-family residential building.

Application of Non-Conforming Use: This City's Zoning Ordinance authorizes the Zoning Board of Appeals to approve the expansion of a non-conforming use "to any portion of a building or lot designed for that non-conforming use." Consequently, the owner could have renovated the building, but could not physically enlarge its footprint.

Application of Variance: The owner could apply for an area variance in order to expand the footprint of the building. Alternatively, the owner could apply for a use variance in order to make the building subject to the standards for two-family homes instead of single-family homes. However, proving the unnecessary hardship required for a use variance would be difficult since the property could still be used as a single-family home and so would retain economic value.

Application of Zoning Modification: The text of the zoning district could be changed to allow for a two-family building in the district. Alternatively, the zoning district applied to the property could be changed to another zoning district that allowed for two-family buildings. However, changing the zoning of the property could be deemed an impermissible act of spot zoning if there was not also a broader public purpose served by the change.

Optimal Resolution: Adhering to the City's Zoning Code allowed the owner to renovate the house and maintain the two-family use throughout the original footprint of the building. However, a variance or zoning amendment would be more appropriate if the owner seeks to physically enlarge the building itself.

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Scenario 5: Perceived Abandonment

Conflict: A legal non-conforming two-family building was located in a single-family district. The owner sought to renovate but not enlarge the building while maintaining its use as a two-family residence. There was speculation that the building had not been utilized as a two-family residence within the past year.

Application of Non-Conforming Use Regulation: The City's Zoning Ordinance does not allow a non-conforming use to continue if it has been abandoned for over one year. However, abandonment means complete cessation. Relying on testimony from neighbors regarding the use of the property, along with evidence comprised of water and electric bills, and notes regarding an inspection related to the issuance of a certificate of occupancy, it was clear the property was still being utilized as a two-family building. Therefore, the legal non-conforming use could continue.

Application of Variance: A use variance would only be considered if the use of the property had ceased completely. Proving economic hardship in this case would be difficult since the building can continue to be used legally for residential purposes as a single-family home.

Application of Zoning Modification: The text of the zoning district could be changed to allow for a two-family building in the district. Alternatively, the zoning district applied to the property could be changed to another zoning district that allowed for two-family buildings. However, changing the zoning of the property could be deemed an impermissible act of spot zoning if there was not also a broader public purpose served by the change.

Optimal Resolution: Adhering to the City's Zoning Code, the owner was able to maintain the legal non-conforming use and complete the renovation. A variance or zoning modification would be more appropriate only if the owner had sought to expand the building itself.