

# Questions and Answers About Nonconforming Uses Under Pennsylvania Zoning Law

## Real Estate Alert

### WRITTEN BY

David J. Tshudy

---

A nonconforming use may continue, and a nonconforming structure may stand, despite their current status of being in violation of a zoning ordinance.

### What is a nonconforming use?

A nonconforming use is a land use or structure that was legal prior to the adoption of a zoning ordinance that renders the use or structure illegal. Examples include:

- A gas station established prior to a municipality's adoption of any zoning ordinance, but, as a result of the enactment of a zoning ordinance, the gas station property is located in a zoning district (such as a residential district) that does not permit gas stations.
- An office building legally established under the then-applicable zoning ordinance, but, as a result of a comprehensive rezoning and adoption of an amended zoning ordinance, the office building use is no longer permitted at its location.
- A junk yard legally established in a commercial district prior to a text amendment to a zoning ordinance removing junk yards as a permitted use in a commercial district.
- A building erected within 10 feet of its front boundary line before the enactment of a zoning ordinance in the municipality requiring a 50-foot front yard setback.

### May I continue a nonconforming use legally?

Yes. A nonconforming use may continue, and a nonconforming structure may stand, despite their current status of being in violation of a zoning ordinance. This is justified by constitutional principles. Zoning regulations are, in effect, takings of private property, and, although governments have broad powers to take private property for a public purpose, individual property owners must be compensated for the property taken. Additionally, to be

enforceable without the payment of compensation, a municipality's zoning power must be exercised in a reasonable and proper manner. Accordingly, a zoning restriction that requires a landowner to discontinue a previously legal use of his or her land or remove from the property a nonconforming building or other structure without compensation would be of dubious constitutionality. Based on these principles, a survey of Pennsylvania case law over the last half-century demonstrates that courts have exhibited a sympathetic attitude toward nonconforming uses and structures.

### **May I expand a nonconforming use on my property?**

Generally, yes. Pennsylvania appellate courts have adopted a "doctrine of natural expansion" with respect to a landowner's right to expand a nonconforming use on his or her own property. As stated by the Pennsylvania Supreme Court:

a nonconforming use cannot be limited by a zoning ordinance to the precise magnitude thereof which existed at the date of the ordinance; it may be increased in extent by natural expansion and growth of trade, neither is it essential that its exercise at the time the ordinance was enacted should have utilized the entire tract upon which the business was being conducted.

*Peirce Appeal*, 119 A.2d 506, 509 (Pa. 1956).

A classic example of the doctrine of natural expansion of a nonconforming use is a manufacturing facility, the establishment of which predates zoning and which is currently located in a district where such a use is not permitted. As the manufacturing industry and related technologies evolve since the establishment of the facility, additional space and buildings must be erected on the property to house new equipment for the owner or lessee of the facility to remain competitive. Under Pennsylvania law, the property owner will be allowed to expand the use on the property to install the necessary equipment to stay economically viable.

Many zoning ordinances permit by right, special exception or conditional use the expansion of a nonconforming use up to a percentage limit (usually 25 percent or 50 percent). Although these ordinance provisions have generally been upheld, courts have at times allowed greater expansion than otherwise permitted under the ordinance by virtue of the doctrine of natural expansion.

Note, however, that any expansion must be in compliance with the current zoning ordinance's dimensional regulations applicable to the property (e.g., setbacks, building coverage, parking, signage), and there is no similar right to expand a nonconforming structure that would exacerbate the structure's dimensional nonconformity.

**May I change the use of my property from a nonconforming use to another nonconforming use or add a nonconforming use to the property?**

Generally, no. Although Pennsylvania law protects a property owner's right to continue using a property for a use established prior to the use's prohibition by ordinance and to naturally expand that use, no protection is provided to the property owner who desires to use the property for an additional or different nonconforming use. An additional use or change of use that is not otherwise permitted in the property's respective zoning district would require a use variance granted by the zoning hearing board before its establishment.

That said, in determining whether a desired use is a change in use or an additional use, or merely just a continuation of the existing nonconforming use, Pennsylvania appellate courts have ruled that a new activity may be a permitted continuation of a nonconforming use if it is similar to the existing use. The proposed use need not be identical to the existing nonconforming use; rather, similarity is all that is required. For example, a pizza restaurant with seating was found to be similar to an existing use as a sandwich shop that had limited seating and sold primarily take-out food. Likewise, a proposed day camp and swim club were found to be similar to an existing use as an amusement park. However, a use centered on entertainment by dancers was not sufficiently similar to a restaurant to be deemed a continuation of the restaurant's legal nonconforming use.

Further, many municipalities permit by special exception or conditional use a use change on a property from one nonconforming use to another nonconforming use. Such permission is specific to the municipality and subject to the specific criteria for the grant of such special exception or conditional use set forth in the zoning ordinance.

**If the building housing my nonconforming use burns down, may I reconstruct and continue the use?**

This depends on the applicable zoning ordinance. Although normal repairs and maintenance to buildings and equipment are intrinsic in the continuation of a nonconforming use, many municipalities' zoning ordinances

prohibit the restoration of a nonconforming use or building that has been entirely or nearly entirely damaged or destroyed by fire or casualty. For example, if a nonconforming factory located in a residential district is entirely or mostly destroyed by fire, the zoning ordinance may prohibit the reconstruction of the factory building, in effect terminating the nonconforming use. However, ordinance provisions that do not allow for the reconstruction of nonconforming uses where less than a majority of the building has been destroyed have been ruled constitutionally invalid by Pennsylvania courts.

In addition, where the zoning ordinance is silent on the topic of reconstruction of nonconforming uses, courts have generally sided with property owners who desire to continue the nonconforming use so long as such use has not been abandoned.

### **When is a nonconforming use abandoned by the property owner?**

A use entitled to the legal recognition and protection as a nonconforming use does not lose such status unless the use is “abandoned.” The concept of abandonment is best illustrated through the facts of the seminal Pennsylvania Supreme Court case on the topic, *Latrobe Speedway, Inc. v. Zoning Hearing Board of Unity Township*, 686 A.2d 888 (Pa. 1996).

From 1977 to 1982, the subject property was used as an automobile race track. In 1982, the race track operations ended, but the structures were not dismantled; however, they did fall into disrepair, and the property was overgrown with weeds. In 1991, the zoning map was amended to place the property in an agricultural district, which did not permit the race track operations. In 1994, the property was leased for use as a race track, but the use was challenged by the township. Following proceedings before the township’s zoning hearing board, the Court of Common Pleas and the Pennsylvania Commonwealth Court, the Pennsylvania Supreme Court ultimately ruled that the race track use could continue as a nonconforming use, despite its dormant state at the time of the ordinance adoption. Instead, the nonconforming use continues until abandonment, which requires proof of (1) an intent to abandon and (2) actual abandonment. The property owner in Latrobe did not intend to abandon the use because he allowed for and paid taxes based on the property being assessed as a race track and continuously negotiated for the sale or lease of the property as a race track.

Many municipalities have adopted zoning ordinances with provisions that deem a discontinued use to be abandoned after a set period of time (typically one year). Courts have ruled, however, that those ordinance sections do not independently determine abandonment. Instead, they are to be interpreted as creating a presumption that the use has been abandoned, which may be rebutted by a property owner with evidence that he

or she did not intend to abandon the use.

### **How can I be sure that a use is a nonconforming use permitted to continue?**

Potential buyers and lenders, during their due diligence, often desire comfort that the current use of a property is recognized by the municipality as a nonconforming use permitted to continue. To facilitate such requests, many, but not all, municipalities keep registries of legal nonconforming uses. A property owner — upon recognizing that his or her use is not permitted under the current zoning ordinance, but is allowed to continue as a nonconforming use — may register such a use. The registration, once confirmed by the zoning officer, is then used as evidence of the use's legal nonconforming status.

Although many such ordinances require property owners to register their nonconformities, Pennsylvania courts have recently ruled that the failure of a property owner to register a nonconforming use does not affect the nonconforming use's protection to continue.

*The material in this publication was created as of the date set forth above and is based on laws, court decisions, administrative rulings and congressional materials that existed at that time, and should not be construed as legal advice or legal opinions on specific facts. The information in this publication is not intended to create, and the transmission and receipt of it does not constitute, a lawyer-client relationship.*

*Content contributed by attorneys of Troutman Sanders LLP and Pepper Hamilton LLP prior to April 1, 2020, is included here, together with content contributed by attorneys of Troutman Pepper (the combined entity) after the merger date.*

### **RELATED INDUSTRIES + PRACTICES**

- [Real Estate](#)