Zoning Law Update:

Non-Conforming Properties in Tennessee

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1. Introduction

   a. Definition

      i. A person's lawful use of property existing before the enactment of a zoning ordinance is commonly referred to as a "nonconforming use." 1 Kenneth H. Young, *Anderson's American Law of Zoning* §§ 6.01 (4th ed. 1995) ("American Law of Zoning"). A nonconforming use is considered "grandfathered" when the use is specifically exempted from the ordinance's application on grounds that the property was being used that way when the ordinance took effect. *Town of Orono v. LaPointe,* 698 A.2d 1059, 1062 (Me.1997) and Bryan A. Garner, *A Dictionary of Modern Legal Usage* 390 (2nd ed.1995).

         Cited in Lafferty v. City of Winchester 46 S.W.3d 752, *754 (Tenn.Ct.App. 2000)

      ii. Note that the use must have been lawful before the adoption of the ordinance which renders it non-conforming in order for the property to be protected (usually).

         (1) For example, the Knoxville Zoning Ordinance provides:

            nothing herein shall be construed to authorize the continuation of any illegal or non-conforming use which was illegal prior to the adoption of this ordinance.

            Article 6, Non-Conforming Buildings, Structures and Uses of Land

         (2) Rives v. City of Clarksville, 618 SW 2d 502 (Tenn. Ct. App. April 23, 1981) is a good example; the property owner claimed his property was non-conforming, but the court ruled that it had been amortized and rendered illegal.

iii. Knoxville City Zoning Ordinance defines "non-conforming" to mean:

> A structure, building or use which was lawful prior to the adoption, revision or amendment of the zoning ordinance, but which fails by reason of such adoption, revision or amendment to conform to the present requirements of the zoning district.
>
> Article 2, Definitions.

iv. But a property may not only be non-conforming as to use, but also as to bulk regulations (setbacks, FAR, lot size and so on).

(1) In some communities this is known as a non-complying structure.

b. Policy:

i. NCFPs are not consistent with the overall plan that the local government may have for the development of the area in which it is located. As a result, the objective usually is to eliminate the NCFP as soon as possibly.

ii. However, the original draftors of the landmark zoning legislation believed that to prohibit the continued use of NCFPs would be unconstitutional (and given that Euclid was decided by only one vote, they were probably right).

iii. So, a policy of prohibiting expansion, or any significant change was employed to encourage property owners to move to a conforming zoning district.

c. Example

i. The proverbial gasoline station in the residential neighborhood: it stays but can't expand.

d. No mention of NCFP in TMZES

i. The draftor of the legislation (Alfred Bettman) believed it better not to even address this issue.

e. Local Counsel

i. Always discuss with your local attorney!! Small changes in the fact patterns can have a significant impact on the outcome of the case.

2. General Rules regarding Non-Conforming Properties

a. Usually expansion is not permitted except in special circumstances

i. For example, the Knoxville Zoning Ordinance provides:

The Board of Zoning Appeals may, in appropriate cases and after public notice and hearing, permit the extension of an existing building and the existing use thereof upon the lot occupied by such building or permit the erection of an additional building. The addition or extensions shall be subject to the following requirements:

a. Yard requirements shall not be permitted which are less than those required for the district in which the non-conforming use is located.
b. Percentage of lot covered by building shall not be greater than the maximum stated for the district.
c. The architectural style of any new building or additions permitted under this section shall be similar to that which exists in the area.
d. Off-street parking shall be provided and shall be screened from adjacent property by landscaping or a solid screening fence or wall not less than five or more than six feet in height.
e. Landscaping may be required where the Board deems it necessary.
f. Signs used in conjunction with the non-conforming use shall be governed by the regulations of the district in which it is located.
g. These requirements shall be binding on the property regardless of succession of ownership unless the use is changed to one generally permitted in the district or the zoning is changed to make the use conforming. Performance bonds or other sureties acceptable to the city may be required where appropriate to the circumstances of the case.
h. Applications shall be accompanied by site and building plans, and photographs of present conditions of the property and surrounding property.

Article 6, Section A.

b. Usually can't rebuild the property if significantly damaged or destroyed

A building which by reason of the passage of this ordinance has

become non-conforming, which has been damaged by fire, explosion, act of God or the public enemy to the extent of more than fifty percent of its value at the time of damage shall not be restored except in conformity with the regulations of the district in which it is located.

When damaged by less than fifty percent of its value, a non-conforming building may be repaired or reconstructed, and used as before the time of damage, ***provided such repairs or reconstruction are completed within one year of the date of such damage.***

Article 6, Section F.

i. Questions

(1) Can the city cut-off re-construction of a non-conforming building (at 50%) where the owner wishes to rebuild? Why?

(a) Is there some common sense basis for that?

(2) Can the city put a time limit on the repairs authorized under the 2nd paragraph?

c. Usually can't convert to another use (unless it is conforming)

i. Sometimes the zoning board can give permission

d. May be amortized

3. Tennessee Non-Conforming Property Act, TENN. CODE ANN. § 13-7-208

a. Text of the Act

Subsection (b) of the statute allows the NCFP to continue.

(b) In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, or where such land area is covered by zoning restrictions of a governmental agency of this state or its political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, ***then any industrial, commercial or business establishment in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to***

continue in operation and be permitted; provided, that no change in the use of the land is undertaken by such industry or business.

Subsection (c) allows the NCFP expand:

(c) Industrial, commercial or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto in effect immediately preceding a change in zoning ***shall be allowed to expand operations*** and construct additional facilities which involve an actual continuance and expansion of the activities of the industry or business which were permitted and being conducted prior to the change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners. No building permit or like permission for construction or landscaping shall be denied to an industry or business seeking to expand and continue activities conducted by that industry or business which were permitted prior to the change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners.

(d) Industrial, commercial, or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto immediately preceding a change in zoning ***shall be allowed to destroy present facilities and reconstruct new facilities necessary to the conduct of such industry or business subsequent to the zoning change***; provided, that no destruction and rebuilding shall occur which shall act to change the use classification of the land as classified under any zoning regulations or exceptions thereto in effect immediately prior to or subsequent to a change in the zoning of the land area on which such industry or business is located. No building permit or like permission for demolition, construction or landscaping shall be denied to an industry or business seeking to destroy and reconstruct facilities necessary to the continued conduct of the activities of that industry or business, where such conduct was permitted prior to a change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners.

b. Applicable to which local governments?

i. Municipal – TENN. CODE ANN. § 13-7-208 is in the municipal enabling zoning statutes, so it must apply to municipalities.

ii. County – Chadwell v. Knox County, 980 SW 2d 378 (Tenn. Ct. App., March 25, 1998)(applies to counties)

(1) "As can be seen, the above section [(b)] applies not only to municipalities but to any governmental agency of the state or its political subdivisions. Clearly a county is a political subdivision of the state of Tennessee and falls within the contemplation of the legislation."

iii. County – Fields v. White, 1989 WL 5456 (Tenn. Ct. App., January 27, 1989)(not applicable to counties)

iv. At this time, it may be too late to argue against application to county governments (but if I were arguing for the county, I would still try, especially if the case arose in Middle Tennessee).

c. What is an industrial, commercial or business establishment?

i. Clouse v. Cook, 1988 WL 34834 (Tenn. S. Ct. April 18, 1988)

(1) Owners of a 70 unit mobile home park sought to remove several homes and replace them with new ones, but the local zoning board would not approve the substitution.

(2) Owners argued that the mobile home park was a business, commercial in nature and that as a result, the TNCPA expressly permitted the construction on new units.

(3) The city took the position that the use was residential, and the TNCPA did not therefore apply.

(4) Both the trial court and the Court of Appeals upheld the city position (although Judge Cantrell dissented in the Court of Appeals).

(5) The Supreme Court reversed, agreeing with Judge Cantrell:

"No rational person would have referred to the units that plaintiffs demolished as "single family residences," or "residences" of any character. This record is silent with respect to the number of units that are occupied by transients, or longer term tenants, but the units in the Battlefield Trailer Court were referred to by the

building inspector, and others, as "mobile homes" and in the majority opinion of the Court of Appeals as "mobile homes or house trailers." The very nature of a trailer court or trailer park containing house trailers and mobile homes give rise to the assumption of transient occupancy as distinguished from residential occupancy. The bottom line is that the "occupants" of the units are more realistically classified as customers of a trailer court operation than occupants of "residences." Defendants admit, and it is beyond question, that plaintiffs are engaged in a "business" in the operation of the trailer park." 1988 WL 34834, *2.

ii. Ragan v. Hall, 1995 WL 769269 (Tenn. Ct. App. December 29, 1995).

(1) Building destroyed more than 75% by fire and building permit refused.

(2) Owner argued that the home was rented and as a result was a business.

(3) The Court of Appeals disagreed:

"Neither the pertinent provisions of the Tennessee Code Annotated nor the Zoning Resolution of Jackson, Tennessee Planning Region (hereinafter "Zoning Resolution") specifically define "residential use" or "business use." Testimony of both Jev Vaughan, Chairman of the Board of Zoning Appeals and Stan Pilant, Senior Planner for the Jackson Planning Commission, indicates that property is zoned according to the particular parcel's use. Additionally, our review of both the residential use and business use classifications set forth in the Zoning Resolution indicates that residential dwellings are prohibited in all property zoned "business." Based upon the foregoing, as well as Appellant's testimony that the property is used solely as a residential rental unit, we find that it is not an exempt business establishment as contemplated by T.C.A. § 13-7-208." Ragan v. Hall, at *2.

(4) The Court did not even mention the Clouse case.

(5) The owner argued also that the failure of the board to swear its witnesses was reversible, and that this was a compensable taking.

(6) As to the oath of witnesses:

"In addition, we find no authority . . . that would require the Board to put witnesses under oath at its hearings. Moreover, this Court is not impressed with

Appellant's argument that he was prejudiced by the Board's failure to put witnesses, including Appellant himself, under oath, where Appellant did not earnestly object to the Board's procedure at the time of the hearing." At *3.

iii. No taking was found either: the property could be used for business purposes.

iv. From my perspective, the Clouse case was wrongly decided. However, the tenancy assumed by the Supreme Court was a short one, and any rental property such as the home in Ragan which rents for long periods of time can be distinguished from the result in Clouse.

d. Allows use to continue (principal v accessory)

i. National Auto/Truck Stops v. Williamson County, 2001 WL 434860 (Tenn. Ct. App. April 30, 2001) (business accessory sign)

ii. Creative Displays v City of Pidgeon Forge, 576 SW 2d 356 (Tenn. Ct. App. 1978) (billboard)

(1) Two interesting issues brought up here:

(a) Is a billboard (advertising off-site goods and services) a commercial or business establishment such that it is entitled to protection under the statute?

(i) The Court said yes, without much analysis.

(ii) In the later case, Outdoor West v. City of Johnson City, 39 SW 3d 131 (Tenn. Ct. App. 2000), the court addressed this issue in more detail. An amicus brief argued that the signs were not business establishments.

We have reviewed the legislative history of the grandfather statute and find nothing which supports such an existential view. The goal of the legislature was to protect established businesses from later-enacted municipal zoning which would exclude them. The billboards in this case are the business establishments of Lamar just as a parcel of land with folding tables set out on it may be the business establishment of a flea market. The home office is not the only, or even the primary, income-producing "business establishment." Additionally, *138 Lamar's employees

are on site at the billboards from time to time working on and at the billboards. These employees are working in furtherance of Lamar's business at that site. [7] It is not for this Court to re-write the grandfather statute so as to exclude one type of business from its protection while affording the protection to others. It is an impermissible stretch for this Court to suppose that the legislature intended to protect business warehouses and other business buildings from later-enacted zoning while excluding business signs, as "[t]he most basic principle of statutory construction is to ascertain and give effect to the Legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." See Worley v. Weigels, Inc., 919 S.W.2d 589, 593 (Tenn.1996). Each billboard is one of Lamar's places of business. While Scenic America's argument on the issue raised by the City of Johnson City is well made, it is unsupported by the law of this State and unpersuasive.

Outdoor West of Tennessee, Inc. v. City of Johnson City 39 S.W.3d 131, *137 -138 (Tenn. Ct. App.,2000)

(b) Is a lessee entitled to protection of the statute?

(i) The Court again said yes. Notice that the statute itself does not speak in terms of owners, lessees, and so forth, except in the nuisance proviso.

e. Allows expansion

i. Outdoor West v. City of Johnson City, 39 SW 3d 131 (Tenn. Ct. App. June 26, 2000)

ii. But not over a property line: 421 Corp v Metro Government, 36 SW 3d 469 (Tenn. Ct. App. April 26, 2000)

f. Allows rebuilding

i. Outdoor West v. City of Johnson City – see above

g. May not be amortized (generally)

i. National Auto/Truck Stops v. Williamson County, 2001 WL 434860 (Tenn. Ct. App. April 30, 2001) (business accessory sign)

ii. Creative Displays v City of Pidgeon Forge, 576 SW 2d 356 (Tenn. Ct. App. 1978) (billboard)

h. But still can't convert to another non-conforming use

i. Non-Structural Activities in Required Yard

i. Open air sales clearly taking place before new zoning ordinance not protected.

(1) City of Gatlinburg v. Maples, 1989 WL 22727 (Tenn. Ct. App. 1989)

4. Abandonment vs. Discontinuation

a. The issue: must there be an intentional decision to quit the property? Or, can mere non-use remove the right to further use the non-conforming property?

b. Board of Mayor and Alderman of Town of Somerville v. Glover, 1989 WL 65634

i. Discontinuation clause (1 year) one factor to consider concerning intent

c. Boles v. City of Chattanooga, 892 SW 2d 416 (Tenn. Ct. App. 1994)

i. We believe that the term "discontinued" or words of similar import, as utilized in zoning ordinances with specific time limitations, should be construed to include an element of intent, combined with some act--or failure to act--indicative of abandonment. Landowners who have enjoyed a non-conforming use on their properties, often for many years, no doubt come to rely economically on those non-conforming uses. Moreover, discontinuances of non-conforming uses can occur for a wide variety of involuntary reasons, not all of which stem from alleged violations of the law and some of which may be laudable. To hold that a non-conforming use can be cut off automatically by time limits on discontinuance, regardless of the reason for that discontinuance, strikes us as intrinsically unfair. Such a holding also seems contrary to the underlying concern for private property rights expressed in *Rives,* 618 S.W.2d at 508. Accordingly, we hold that the term "discontinued" as found in

Article VII, Section 100 of the Chattanooga Zoning Ordinance does not apply if the discontinuance of the non-conforming use is purely involuntary in nature.

Boles v. City of Chattanooga 892 S.W.2d 416, *422 (Tenn. Ct. App.,1994) (citations omitted).

d. Toles v. City of Dyersburg 39 S.W.3d 138, (Tenn.Ct.App.,2000)

i. We read *Boles* to support the proposition that "intent" is only important where some force outside the control of the property owner prevents the continued use of the land in a particular manner. Since no such force prevented the Plaintiffs from operating the Avalon Club as a tavern, their intent is not important and the *Boles* decision is thus distinguishable from the present case. Therefore, since the building was not being operated as a business at the time of the re-zoning, there is nothing to grandfather into the new zoning classification. Accordingly, the City was within its rights to deny the Plaintiffs' application . . .

Toles v. City of Dyersburg 39 S.W.3d 138, *141 (Tenn. Ct. App. 2000)

ii. But is that correct? Boles seems a little broader to me.

5. Amortization

a. There is nothing per se illegal about amortization of a non-conforming property. Rives v City of Clarksville, 618 SW 2d 502 (Tenn. Ct. App. April 23, 1981)

i. Property was first zoned in 1964, with a 5 year amortization clause.

ii. As a result, in 1969, the zoning life of the use was exhausted.

iii. The statute, Tenn. Code Ann. § 13-7-208, did not pass until 4 years later, in 1973.

iv. As a result, when the statute passed in 1973, the salvage yard was already illegal and the statute does not offer it any protection.

v. The owner also contends that amortization is unconstitutional under both the federal and state provisions.

vi. The court notes that in the early days, NCFUs were thought not to have a significant impact. However, they now seem to stay as a result of the mini-monopoly status that they each achieve in their geographical areas.

vii. Court finds no constitutional problem.

b. However, the TNCPA basically makes it impossible to enforce because it allows non-conforming properties to continue, expand, or rebuild.

6. Exhaustion of Administrative Remedies

a. Must a property owner who believes his property is legally non-conforming appeal to the zoning board before going to court, or otherwise lose his right to defend based on the non-conforming nature of the property?

i. The Court of Appeals says no. Property owner always has the right where the government sues for enforcement to argue that the property is legally non-conforming.

(1) See Sanders v. Angie Properties, 834 SW 2d 332 (Tenn. Ct. App. 1992)

b. Best strategy for the local government is to convince property owner to go to the zoning board.

i. For the most part, the zoning board's decision is likely absolutely untouchable on appeal because whether the property was legally non-conforming at the time of the adoption of the zoning regulation is a question of fact, and the Court almost always accepts the factual findings of the board as accurate.

ii. The property owner, in the absence of some compelling reason to the contrary, should force the government to sue him in circuit or chancery court.

7. Conclusion