

NONCONFORMING USES IN OHIO

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THE LAW OF NONCONFORMING USES

A. IDENTIFYING AND HANDLING NONCONFORMING USES

1. What is a Nonconforming Use or "Grandfathered" Use?

A use lawfully existing prior to enactment of a zoning ordinance and maintained after the effective date of the ordinance -- even though it does not comply with the zoning restrictions in the district in which it is located.

- a. "Use" also includes accessory uses [see Haffner's v. Kent BZA (Portage 1994), 93 Ohio App.3d 691] and may include nonconforming site conditions -- e.g., nonconforming building setbacks or lot sizes.
- b. "Nonconforming use" does not include a use permitted pursuant to a legally granted variance from a zoning restriction. Different legal analysis. Jones v. Petruska (Cuyahoga Cty. 1979), 13 Ohio Op.3d 111.
- c. Rationale for permitting nonconforming uses in zoning codes was to recognize property owner's right under the Federal and State Constitutions to use his/her property in a manner theretofore permitted but limit the right to change, expand, alter, repair, restore, or recommence the use. Assumed that physical decay and economic forces would put an end to nonconforming uses -- an assumption which does not always hold true.

2. Legal Parameters to Regulating Nonconforming Uses

a. State statutory law -- Ohio Revised Code §713.15 prohibits retroactive zoning ordinances.

(1) Requires municipal zoning ordinances to provide for nonconforming uses, but permits a municipality to prohibit by ordinance the reinstatement of a non-conforming use if it is voluntarily discontinued for a period of 6 months to 2 years.

(2) R.C. §713.15 also requires a municipality to provide in its zoning ordinance for the "completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon such reasonable terms" as are set forth in the ordinance. (Analogous provision for townships is at R.C. §519.19).

b. Local ordinances passed pursuant to home rule charter provisions. See Garcia v. Siffrin (1980), 63 Ohio St.2d 259. Cf. R.C. Chapter 504 re: "statutory home rule" of townships. (At least one court of appeals has held that the time periods for voluntary discontinuance and the voluntary nature of the abandonment of the nonconforming use cannot be altered by a home rule community since R.C. 713.15 embodies statewide constitutional due process concerns. Bell v. Rocky River BZA (1997 Cuyahoga), 122 Ohio App. 3d, 672,

(Removal of underground storage tanks at gas station deemed voluntary abandonment where property owner wished to substitute another nonconforming use.).

c. Common law

American courts since 1920's have unanimously upheld a municipality's right to permit the continuance of nonconforming uses when challenged on equal protection grounds by other landowners wanting to establish similar uses in a district contrary to new zoning restrictions.

3. Establishing Prior Legality of Nonconforming Use

- a. Use of property must be lawful at the time the use was established. Petti v. Richmond Heights (1983), 5 Ohio St.3d 129; Pschesang v. Terrace Park (1983), 5 Ohio St.3d 47; Martin v. City of Cleveland (Cuyahoga App.), 2000 WL 426546 (property owner failed to establish outdoor storage was legal at time it was instituted because it was not enclosed by a masonry wall as required by Code prior to outdoor storage being banned by zoning amendment); Castella v. Stepak (Wayne Cty. App.), 1997 WL 270550 (failure of junkyard to obtain a State license prior to zoning change).

Need to review outdated zoning codes and enabling ordinances. See Bd. of Trustees of Union Twp. v. Keith (Clermont Cty. 1994), 1994 Ohio

App. LEXIS 1328. (Court chastises zoning board for concealing old zoning resolution from property owner).

b. Burden of proof

(1) Most courts in U.S. place burden of proof on user to show legal nonconformity.

(2) Generally, in Ohio in **criminal** proceedings to prohibit the maintenance of a use without a permit, burden is upon the government to prove defendant violated the use provisions but the defendant user must establish as an affirmative defense that its use qualifies as a nonconforming use. See, State v. Teachout (Trumbull Cty.), 2005 Ohio App. LEXIS 4607 (court held burden shifts to defendant to establish a nonconforming use once the government proves a violation occurs). Nonconforming use may be asserted as an affirmative defense in a zoning violation prosecution. City of Hudson v. Patel (Summit App.), 1997 WL 803092; but see Mentor v. Brettrager (Lake Cty. 2002), 2002 Ohio App. LEXIS 1902.

(c) An illegal use cannot ripen into a nonconforming use through municipal acquiescence. Petti v. Richmond Heights (1983), 5 Ohio St.3d 129; Ghindia v. Monus

(Trumbull App. 1996), 1996 Ohio App. LEXIS 2465 (township acquiescence for 21 years to meat cutting and sales business).

- (d) Cannot be a legal nonconforming use even if the municipal official mistakenly issued a building permit. Williamsburg v. Milton (Clermont Cty. 1993), 85 Ohio App.3d 215; 12701 Shaker Boulevard Co. v. Cleveland (Cuyahoga Cty. 1972), 31 Ohio App.2d 199.
- (e) Use which constitutes a nuisance cannot be a legal nonconforming use. See, Stow v. Griggy (Summit Cty. 1983), 6 Ohio App.3d 65; Grove City v. Weethee (Franklin 1991), 71 Ohio App.3d 405; Interstate Independent Corporation v. BZA for Fayette County and Village of Octa (Fayette), 1997 Ohio App. LEXIS 4666 (adult video arcade previously declared a "nuisance" by Court); Compare, Dublin v. Finkes (Franklin Cty. 1992), 83 Ohio App.3d 687.
- (f) Procedures of local zoning boards:

- I. Place witnesses under oath at zoning board hearings.
- II. Require at the very least a sworn, notarized affidavit from those persons not present at hearing.
- III. Some municipalities keep records of all nonconforming uses.

4. Nature And Extent Of Use Required To Qualify As Nonconforming Use

- a. Must be a substantial/actual use -- not an intended use. Curtiss v. Cleveland (1957), 166 Ohio St. 509; Beth Jacob Congregation v. City of Huber Heights Bd. of Zoning Appeals (Montgomery App.), 1998 WL 125568 (bingo hall use approved by a court but never established as a use prior to zoning change). But see, Schreiner v. Russell Twp. Board of Trustees (1990 Geauga County), 60 Ohio App.3d 152; Jackson Twp. Bd. of Trustees v. Donrey Outdoor Advertising Co. (Franklin App.), 1999 WL731376 (foundation for a billboard and \$54,000 in lease payments for 12 years prior to zoning amendment which outlawed billboards was sufficient to establish nonconforming use). State v. Mauk (Allen County, 1995), 1995 Ohio App. LEXIS 1669. (Mobile homes never used).
- b. Submission of application for a building permit to which user is rightfully entitled prior to the effective date of the new zoning ordinance is sufficient to vest a right to nonconforming use status.

Union Oil Co. v. Worthington (1980), 62 Ohio St.2d 263; Gibson v. Oberlin (1960), 171 Ohio St. 1. (Ohio is a minority state in this regard). Zaremba Dev. Co. v. Fairview Park (Cuyahoga Cty. 1992), 84 Ohio App.3d 174; Bd. of Warren County Commissioners v. Nextel Communications (Warren App.) 1999 WL 247163; Levey & Company v. Willoughby Bd. of Zoning App. (Lake App.), 2000 WL 1371476. But not where the zoning permit has expired. Torok v. Jones (1983) 5 Ohio St.3d 31. But see, Wooster v. Entertainment One, Inc. (Wayne Cty. 2004), 158 Ohio App. 3d 161 (distinguishes establishment of a lawful building with a building permit from a lawful use of that building prior to the enactment of the use prohibition and held that the rule in Gibson, supra, did not apply).

- c. Preliminary approval of developer's plat not sufficient to institute nonconforming use. State, ex rel. Bugden Development Co. v. Kiefaber (1960 Montgomery County), 113 Ohio App. 523.
- d. Preliminary tests of the land for the proposed use is not sufficient. Smith v. Juillerat (1954), 161 Ohio St. 424 (preliminary tests for strip mining). Digging out of topsoil to begin strip mining operation deemed “substantial” prior use to establish nonconforming use. Swan Creek Twp. v. Wylie & Sons Landscaping (Fulton Cty.), 2006 Ohio App.LEXIS 534.
- e. Moratorium on building permits while new zoning ordinance pending may be lawful if valid health, safety and welfare purpose served and

proper notice and right to a hearing granted to building permit applicant. See, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (2002) 70 U.S.L.W. 4260; Franchise Developers, Inc. v. Cincinnati (1987), 30 Ohio St.3d 28, and November Properties, Inc. v. City of Mayfield Heights (Dec. 6, 1979), Cuyahoga App. No. 39626, unreported.

- f. A prior nonconforming accessory use cannot be used as a basis for bootstrapping a nonconforming principal use -- e.g., parking of commercial truck on residential lot cannot result in a legal nonconforming principal use of the lot for parking. However, an “ancillary” use such as equipment and product storage which was part of a prior legal nonconforming use may continue after the principal use is voluntarily discontinued. Bd. of Trustees of Washington Twp. v. Grogoza (Richland Cty.), 2001 OhioApp. LEXIS 595.
- g. Suggestion: Check time limits on all building permits within which to commence and/or complete construction.

5. Proper Limitations On Nonconforming Uses -- Change Or Substitution, Expansion Or Extension, Abandonment, Maintenance Or Repair, Amortization

The limitations placed upon nonconforming uses assume that the use will not withstand current economic conditions, physical decay or acts of God. The dilemma this creates is that it assures that old uses become less and less appealing since the user is limited in the maintenance and repair of the use.

Municipalities may regulate through more strict health and safety laws, as opposed to zoning laws, for nonconforming uses. Townships may do so if they have adopted the limited form of "home rule" under R.C. Chapter 504.

American courts generally recognize a municipality's substantial interest in eliminating nonconforming uses as soon as possible. Anderson, American Law of Zoning 3d (1986), § 6.35.

a. Change/substitution of use

- (1) In spite of Revised Code § 713.15 which requires municipalities to pass ordinances providing for reasonable substitution of nonconforming uses, where a prohibition of substitutions is based on a substantial relationship to the protection of the public health, safety, morals or general welfare, the prohibition will be upheld. See, Northern Ohio Sign Contractors Ass'n. v. Lakewood (1987), 32 Ohio St.3d 316; Gates Co. v. Housing Appeals Bd. (1967), 10 Ohio St.2d 48; Dublin v. Finkes, *supra*; Booghier v. Wolfe (Clark Cty. 1990), 67 Ohio App.3d 467; Mathews v. Pernell (Montgomery Cty. 1990), 64 Ohio App.3d 707; Bell v. Rocky River BZA (1997 Cuyahoga), 122 Ohio App.3d 672; but see Village of Kelley's Island v. Johnson (Erie App. 1996), 1996 WL 27997 (substitution of a new manufactured building permitted in spite of clear municipal prohibition).

The court itself may limit the ability to substitute like or similar uses. John O. Clay Exploration v. Lawrence Twp. Bd. of Zoning Appeals (1995 Stark), 108 Ohio App.3d 164 (court limited substitution of recreational/entertainment uses to those specifically listed in the 1960 zoning regulations).

- (2) Change in the value or intensity of the same use is not necessarily a change in the use. Hunziker v. Grande (1982 Cuyahoga County), 8 Ohio App.3d 87 (change from retail nursery business to one selling both wholesale and retail not prohibited); Bd. of Rootstown Twp. Trustees v. Epling (Portage App.) 1997 WL 750793 (obtaining a liquor permit at a party center not a change of use). Bainbridge Twp. v. Funtime, Inc. (1990), 55 Ohio St.3d 106 (township zoning authority under R.C. Chapter 519 does not include the power to regulate the expansion in hours of operation of a nonconforming use). But see, Carver v. Deerfield Twp. Bd. of Zoning Appeals (Portage App.) 1999 WL689748 (Change from selling 6 to 7 used tractors per year to a new tractor franchise with a larger building not permitted).
- (3) Change in ownership or tenancy makes no difference to the right to maintain a nonconforming use. Akron v. Klein (1960), 171 Ohio St. 207.

(4) Many ordinances permit changes to a more restrictive use or a higher classification of use. Stewart v. Pedigo (1965 Summit County), 2 Ohio App.2d 53 (outside display of garden tractors changed to automobiles); Plas v. Carlisle Township Bd. of Trustees (Lorain), 1997 Ohio App. LEXIS 3792 (gasoline station only changed to auto repair not permitted); Deerfield Twp. v. Kays (Portage App. 1990), 1990 Ohio App. Lexis 5842 (motorcycle racing changed to midget car racing).

b. Expansion or extension of nonconforming use

(1) Generally courts outside of Ohio have upheld prohibitions against expansions or extensions. Ohio permits total prohibitions against expansions or extensions of nonconforming uses. E.g., Bell v. Rocky River BZA (1997 Cuyahoga), 122 Ohio App.3d 672; Springfield Twp. v. Grable (Summit App.), 1998 WL 469871; Coy v. Clarksfield Twp. Bd. of Zoning Appeals (Huron App.), 1997 WL 221121 (addition to a legal nonconforming mobile home prohibited).

State, ex rel. Drive-In Theatre Corp. v. Butler Cty. Bd. of Zoning Appeals (prohibition of an additional screen and projection booths at nonconforming drive-ins upheld).
However, without an express prohibition of such extensions of nonconforming uses in a municipal zoning code, O.R.C.

713.15 may permit such extensions. Cvrk v. Aurora Bd. of Zoning Appeals (Portage Cty.) 2000 OhioApp. LEXIS 5000.

- (2) Reasonable regulation of expansions or extensions permitted.
A. DiCillo and Son, Inc. v. Chester Zoning Board of Appeals (C.P. 1951), 103 N.E.2d 44, App. dismissed, 158 Ohio St. 302 (limitation of expansion to certain percent of existing area upheld). The standards for an expansion in a zoning code need not be objective and precise in nature. Morrow v. Village of Monroeville (Huron App.), 2002 Ohio App. LEXIS 5278.
- (3) Enlargement, replacement or alteration of building.
 - (a) The enlargement or alteration of an existing building wherein a nonconforming use is located has been treated the same by the courts as an expansion of the use itself.
 - (b) Prohibitions against alterations usually confined to "structural alteration" involving supporting parts of the building and not "remodeling."
- (4) Expansion of new products or services in an existing nonconforming business may be proper depending upon the impact upon the neighborhood. For example, the addition of auto tellers at a bank has been upheld as a reasonable expansion, whereas the addition of a restaurant to a disco, a body repair shop to an automobile storage garage, and adding

truck rentals to a gasoline service station have not been upheld. See, e.g., City of Strongsville v. O'Donnell (Cuyahoga App.), 1996 WL 502147.

- (5) The growth of business volume, absent some type of physical change or change in services detrimental to the community, cannot be restricted.
- (6) Variance from the zoning code itself may be appropriate relief for the expansion/ substitution of a nonconforming use if *unnecessary hardship* standard is met.
- (7) Municipal regulation of an expansion of nonconforming site conditions associated with a nonconforming use may be more strict since the nonconforming use has been deemed to be an inappropriate use in a particular zoning district.

c. Maintenance, repair or restoration.

- (1) Routine repairs should be permitted. Limiting repairs to a percentage of the appraised value of the nonconforming structure is appropriate. State, ex rel. Brizes v. DePledge (1958 Lake County App.) 81 Ohio L.Abs. 463. Restrictions on restorations where damage exceeds 50 to 75 percent of the market value are generally lawful. American Law of Zoning, § 6.62, Red Garter, Inc. v. Cleveland BZA (Cuyahoga 1995), 100 Ohio App.3d 177 (50%). Consider the value of the entire

use along with the building -- not just the value of the building -- when determining percentage of market value.

But see Aseff v. Cleveland Bd. of Zoning Appeals (Cuyahoga App. 2001 OhioApp. LEXIS 1989, where the city found numerous code violations to a building housing a legal nonconforming adult cabaret use. Although the trial court found the repairs exceeded 50% of the building's value and the use could not be re-continued, the appellate court held the city's 50% value ordinance unconstitutionally vague because the ordinance referred to a nonexistent section of the code to determine the value.

- (2) Check for time limits in ordinances within which property owner must restore the nonconforming use.
- (3) Financing may depend upon the ability to restore a nonconforming use or site condition.

d. Abandonment of nonconforming use.

- (1) Ohio R.C. 713.15 provides for periods of voluntary abandonment of not less than 6 months but not more than 2 years. (R.C. 519.19 provides for a 2-year period in townships). The two-year statutory limit cannot be changed by a city's administrative fiat absent a specific and properly enacted ordinance. Lamar Outdoor Advertising v. Dayton Bd. of Zoning Appeals (Montgomery App.), 2002 Ohio App.

LEXIS 3199. Cf. Milton v. Williamsburg Township Bd. of Zoning App. (Clermont App.), 2004 Ohio App. LEXIS 1234 (Court stated that since owners voluntarily chose not to use their vacant and substandard -sized lots for more than 2 years after the enactment of the larger lot size requirement by the township, they could not use the smaller lots.)

- (2) Shorter time limits for abandonment are usually associated with accessory uses such as signage.
- (3) Standard for "voluntary abandonment":
 - (a) Intent to abandon, either express or implied, as evidenced by:
 - (b) An overt act or failure to act evidencing that user has discontinued nonconforming use -- e.g., removal of essential equipment to carry on the use or failure to renew a license to do business. But see, Williamsburg Twp. v. Kriemer (Clermont Cty. 1991), 72 Ohio App.3d 608 (the failure to renew a junkyard license where junk autos remained on premises was not an abandonment); Village of New Richmond v. Painter (Clermont Cty.) 2003 Ohio App. LEXIS 3490 (failure to repair home for 4 years after flood damage and non-use of the home over that period was not an intent to abandon use).

- (4) An economic depression causing a business to shut down does not constitute "voluntary abandonment". See, Cleveland Builders Supply Co. v. Garfield Heights (1956 Cuyahoga County), 102 Ohio App. 69.
- (5) Decreased use of a structure or occasional use is not abandonment. Malton v. Pierce Twp. Bd. of Zoning Appeals (Clermont Cty. 1994), 1994 Ohio App. LEXIS 1509. (Weekly visits of a dilapidated vacation home after tenant moved out entitled owner to build new home on substandard lot). But see; Twinsburg v. Palladino (Summit App.) 1999 WL 312363 (interruption in excavation of minerals at mining business for greater than two years but continued stockpiling is abandonment of mining operation); Risley v. Vance (Stark App. 1995), 1995 WL 768018 (continued storage of junk after business leaves premises is abandonment); but Aluminum Smelting & Refining Co., Inc. v. Denmark Twp. Zoning Bd. of Appeals (Ashtabula App. 2002) 2002 Ohio App. LEXIS 6462, the Court held that although no waste material had been disposed of at the site for 8 years, the owner's "captive" landfill use for ongoing storage of waste was a prior, legal nonconforming use but the site could not be used for new disposals.

- (6) Change in mode of business may not be an abandonment. Isler v. Samsa (Stark App. 1996), 1996 WL 132249 (fluctuations of solid waste disposal business modes of operation on property not deemed abandonment).
- (7) Burden of proof to show voluntary discontinuance usually placed on municipality. Mentor v. Brettrager (Lake App.), 2002 Ohio App. LEXIS 1902; Bd. of Trustees of Washington Twp. v. Groggoza, *supra*; Deerfield Twp. v. Kays, *supra*; Recreation Facilities, Inc. v. Hambden Twp. Bd. of Trustees (Geauga App. 1995), 1995 WL 411739.

e. Amortization

- (1) Requires termination of a nonconforming use at the end of a specific time period which should be related to the useful economic life of the particular nonconforming use. Amortization without a reasonable relationship to useful economic life of a particular use specifically set forth in ordinance may be invalid. *See, Akron v. Chapman* (1953), 160 Ohio St. 382 (elimination of nonconforming junk yard where "reasonable length of time" standard was applied was found to be an inadequate standard).
- (2) Concept began as early as 1929 in State, ex rel. Dema Realty Co. v. McDonald (1929), 168 La. 172 (cert. denied, 280 U.S.

566) (nonconforming business uses in residential districts required to be terminated within one year).

- (3) Declaration that certain nonconforming uses are nuisances in order to justify amortization ordinances. Northern Ohio Sign Contractors Ass'n. v. Lakewood (1987), 32 Ohio St.3d 316.
- (4) Outdoor advertising signs is one area in which amortization is commonly approved by courts. Relates to the "substantial investment" test set forth in People v. Miller (1952), 304 N.Y. 105.
- (5) Amortization by agreement.

In the situation where the property owner wants to expand or substitute a nonconforming use, he/she may voluntarily agree to the amortization of the use as a condition for the granting of the expansion or substitution. See, e.g., Edmonds v. County of Los Angeles (1953), 40 Cal.2d 642.

- (6) A factor to be considered in the appraisal for amortization purposes is that a nonconforming business use may constitute a monopoly in the district in which it is located and therefore have an economic advantage over other such businesses in the community. This justifies a shortened amortization schedule since the user is receiving an economic advantage as a result of the nonconforming use status.

B. DISTINGUISHING NONCONFORMING LOTS AND STRUCTURES

1. Similarities and Differences from Nonconforming Use.

a. Similarity is that lawfully existing structures and buildable lots established prior to enactment of a zoning regulation and maintained after the effective date of the regulation, even though they do not comply with the new zoning restrictions, are permitted to remain, or in the case of nonconforming vacant lots are permitted to be built upon. (See, R.C. §§ 713.15; 519.19).

b. Difference is that structures with nonconforming setbacks, heights, etc. and nonconforming lots are site conditions as opposed to uses of the property and may therefore be subject to more strict regulation of extension or enlargement of the nonconforming condition or requirements to merge nonconforming lots, if possible, prior to development.

(1) State, ex rel. Bugden v. Kiefaber (Montgomery Cty. 1960), 113 Ohio App. 523 (undeveloped land subdivided with earlier approval of planning commission is not a nonconforming use when minimum lot size is subsequently increased). Accord, State ex rel. Mar-Well v. Dodge (Summit Cty. 1960), 113 Ohio App. 118. But see, Negin v. Bd. of Bldg. and Zoning Appeals (1982), 69 Ohio St.2d 492 (plurality opinion equates a substandard lot with a nonconforming use, but concurring opinion of C.J. Celebrezze refutes this position).

- (2) Brown v. Cleveland (1981), 66 Ohio St.2d 93 (addition of a conforming grocery use to a legal nonconforming service station use not permitted because owner could not meet increased accessory parking requirements).

2. Applying Local Ordinances -- Expansion or Enlargement Matters.

- a. Most local zoning regulations do not permit the expansion or enlargement of nonconforming structures which increases the nonconformity or extends the nonconformity -- e.g., increasing the intrusion into a yard setback area or simply adding to a structure along the same nonconforming setback line. Eg., Portage Twp. Bd. of Trustees v. McNulty (Ottawa App. 1996), 1996 WL 339931.
- b. Local zoning regulations may provide for a special permit process to expand or enlarge a nonconforming structure and/or a variance procedure is usually provided for in local codes.

3. Eliminating Nonconforming Lots -- Mergers as an Option?

- a. The merger of contiguous vacant lots under the same ownership may be required by local governments in order to meet minimum lot area or frontage requirements. State, ex rel. Bugden v. Kiefaber (Montgomery Cty. 1960), 113 Ohio App. 523 (merger of vacant lots, subdivided by earlier permission of planning commission, required to meet minimum lot requirements); State, ex rel. Mar-Well, Inc. V. Dodge (Summit Cty. 1960), 113 Ohio App. 118; Woodmere v. Clark (Cuyahoga Cty. 1985), 28 Ohio App.3d 66; Auburn Glen Corp. v.

Auburn Twp. (Geauga Cty.), 1994 Ohio App. LEXIS 2093; Milton v. Williamsburg Twp. BZA; (Clermont Cty.) 2004 Ohio App. LEXIS 1234; Neforos v. Richfield Village BZA (Summit App. 1993), 1993 Ohio App. Lexis 3787.

- b. Owner not required to purchase additional contiguous property to meet minimum lot area and frontage requirements in order to develop nonconforming lot. See, Negin v. Bd. of Bldg. and Zoning Appeals (1982), 69 Ohio St.2d 491.
- c. Where some development of contiguous nonconforming lots has been accomplished -- e.g., streets and utility services -- and unique topographic and lot shapes exist, merger of lots to meet minimum lot area requirements may not be required. Schreiner v. Russell Twp. Bd. of Trustees (Geauga Cty. 1990), 60 Ohio App.3d 152.
- d. If merger of lots to meet new minimum lot area or frontage regulations is not required, property owner may still be required to meet new setback requirements, accessory parking requirements, etc. in a valid health, safety and welfare regulation in a code other than the zoning code. CDS, Inc. v. Village of Gates Mills (1986), 26 Ohio St.3d 166 (Restaurant proposed to be rebuilt after a fire required to meet Fire Code requirements of accessory parking and access which were enacted after original construction of restaurant but 23 years prior to the fire); Northampton Bldg. Co. v. Sharon Twp. Bd. of Zoning Appeals (1996 Medina), 109 Ohio App.3d 193 (new setback

requirement from oil and gas wellheads enforced on existing platted lot).

4. When the Structure Becomes Abandoned -- Voluntarily or Through Destruction.

- a. Voluntary abandonment of a nonconforming structure alone will not require its demolition unless it becomes a public nuisance -- a threat to the public health, safety, and welfare. See, Northern Ohio Sign Contractors Ass'n. v. Lakewood (1987), 32 Ohio St.3d 316; CDS, Inc. v. Gates Mills, *supra*; Akron v. Klein (1960), 171 Ohio St. 204. Ohio Rev. Code §§ 715.44(A) and 715.26, *et seq.*
- b. Denials of permits to restore nonconforming structures where destruction of or damage to the nonconforming structure exceeds anywhere from 50 to 100 percent of the market value of the structure have generally been held to be lawful. Anderson, *American Law of Zoning* 3d (1986), § 6.62.

5. When the Property Owner is Denied -- Seeking Relief Through Variance Appeals and Other Administrative Avenues.

- a. Appeals of Code interpretations on nonconforming uses or site conditions and, in the alternative, variance requests to local planning and zoning boards are available to obtain relief from denials of permits to expand or reconstruct nonconforming structures or to build upon nonconforming lots.

- (1) As stated above, prior nonconforming status and variances are two separate claims requiring separate legal analysis. Jones v. Petruska, supra; Positive Educ. Program v. Cleveland (Cuyahoga App. 1987), Case No. 53081 (unreported).
- (2) Caveat: The failure to raise the claim of nonconforming use before a board of zoning appeals when a variance is requested is res judicata to any assertion of nonconforming status after the variance is denied unless there are changed circumstances. Grava v. Parkman Twp (1995), 73 Ohio St.3d 379; Bohach v. Advery (Mahoning App.), 2002 Ohio App. LEXIS 3425; See, Sloe v. Russell Twp. Bd. of Zoning Appeals (Geauga App.), 2002 Ohio App. LEXIS 5191.
- (3) Variances for area, size and setback requirements are judged by a less stringent legal standard than for use variances -- i.e., "practical difficulty" in meeting code requirements is all that is required to be shown by property owner, not an "unnecessary hardship". Kisil v. Sandusky (1984), 12 Ohio St.3d 30.
- (4) The factors to be considered and weighed to determine whether a property owner has encountered practical difficulties are:
 - (a) Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance;

- (b) Whether the variance is substantial;
- (c) Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer substantial detriment as a result of the variance;
- (d) Whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage);
- (e) Whether the property owner purchased the property with knowledge of the zoning restrictions;
- (f) Whether the property owner's predicament feasibly can be obviated through some method other than a variance; and
- (g) Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting a variance.

Duncan v. Middlefield (1986) 23 Ohio St.3d 83. Applicable to townships in spite of "unnecessary hardship" standard in O.R.C. 519.14. Zangara v. Chester Twp. Trustees (Geauga Cty. 1991), 77 Ohio App.3d 56 and Peterson v. Washington Ct. Athletic Club (Medina Cty. 1986), 28 Ohio App.3d 90.

- (5) Develop a thorough and accurate record of proceedings before the local board through: appropriate legal representation, attendance of a court reporter or stenographer, testimony under oath, sworn affidavits, cross-examine witnesses, proffer of evidence into the record if admission of evidence into the record is denied by board, use of board's subpoena power.
- b. Legislative relief -- i.e., application for amendment of zoning regulations by local legislative body.
- c. Administrative - related appeals to court through Ohio Rev. Code § 2506.01, et seq.
- (1) 30 days to appeal final decision of local boards in Ohio.
R.C. §§ 2505.03 and 2505.04; Ohio App. Rule 4(A).