# Summary:
# Utah Law of Nonconforming Uses/ Noncomplying Structures

The Utah Land Use Institute

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Craig M Call, J.D.

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# Nonconforming Uses/Noncomplying Structures

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# Nonconforming Uses/Noncomplying Structures

By Craig M Call, J.D.[1]
The Utah Land Use Institute

## Introduction

"Nonconforming use" means a use of land that:

a. Legally existed before its current land use designation;

b. Has been maintained continuously since the time the land use ordinance governing the land changed; and

c. Because of one or more subsequent land use ordinance changes, does not conform to the regulations that now govern the use of the land.[2]

Nonconforming use principles apply to pre-existing legal uses which do not now comply with current land use regulations. These legal rules do not necessarily apply to business licensing regulations, health rules, animal restrictions or other local ordinances.[3]

"Noncomplying Structure" means a structure that:

a. Legally existed before its current land use designation; and

b. Because of one or more subsequent land use ordinance changes, does not conform to the setback, height restrictions, or other regulations, excluding those regulations that govern the use of land.[4]

Generally speaking, the provisions in the law relating to nonconforming uses also relate to noncomplying structures. Where provisions differ for either, they are noted below.

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[2] Utah Code Ann. §10-9a-103(33) (Municipalities), §17-27a-103(38) (Counties).

[3] Salkin, Patricia E., American Law of Zoning, 5th Ed. §12:4.

[4] Utah Code Ann. §10-9a-103(32) (Municipalities), §17-27a-103(37) (Counties).

**Standard of Review for Nonconforming Use Issues**

While the normal bias in applying land use ordinances is to resolve ambiguities in favor of the use of property, this is not so with nonconforming uses. There is a well-accepted premise in land use law that nonconformities should be eliminated over time.[5] While normally land use regulations are construed in favor of the use of property, the ordinances allowing nonconforming uses and restricting them are strictly construed against the nonconforming use.[6]

The burden of proof is on person whose use is not legal under the current ordinances to prove by a preponderance of the evidence the legal existence of a pre-existing non-conforming use.[7] However, once the non-conforming use is established, the burden of proof is reversed. It is then on the local government entity to prove that the property use violates the zoning ordinance by exceeding the established non-conforming use.[8]

**Establishment of a Nonconforming Use.**

Just as critical as defining what constitutes a nonconforming use is to clearly understand what is not a nonconforming use. A use that was never legal is not a nonconforming use.[9] A nonconforming use was once legal, but would not be allowed under the current land use regulations.

The establishment of a nonconforming use is a question of law, once the facts are known.[10] As such, there is no deference to local decision makers when reviewing whether or not the use is established. The appeal authority and perhaps the court are to review the record of the facts and decide if the use is established or not.[11]

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[5] *Rogers v. West Valley City*, 2006 UT 302 f.6. Nonconforming uses should be restricted or eliminated because they "detract from the effectiveness of comprehensive land use regulation, often resulting in lower property values and blight." *City of Glendale v. Aldabbagh*, 939 P.2d 418, 421; accord Toys "R" Us v. Silva, 676 N.E.2d 862, 867 (N.Y. 1996); see also *Rock Manor Trust v. State Rd. Comm'n*, 550 P.2d 205, 206 (Utah 1976). ("We are in accord with the State's thesis that there is a trend increasingly looking with disfavor upon nonconforming uses.").

[6] Salkin, §12:7. Doubts are resolved against the nonconforming use "within the limits of fairness and justice." Jones v. County of Coconino, 201 Ariz. 368, 35 P.3d 422 (Ct. App. Div. 1, 2001). Biases in favor of property owners do not apply to nonconforming uses.

[7] *Fillmore City v. Reeve*, 571 P.2d 1316 (Utah 1977); *State Road Comm'n. v. Holts Estate*, 381 P.2d 724 (Utah 1963).

[8] *Reeve*.

[9] *Town of Alta v. Ben Hame Corp.* 836 P.2d 797 (Utah Ct. App. 1992).

[10] *Vial v. Provo City*, 2009 UT App 122 ¶9.

[11] *Vial, ¶9, citing Hugoe.*

Only the original legality creates a nonconforming use. An illegal use does not become a legal nonconforming use over time, except where the original illegality was not apparent to the current users, it has existed for a long period of time, and fairness and justice require its continuance.[12]

Following every detail in getting an approved use, such as obtaining site plan approval, is not needed to establish a legal nonconforming use if there is no statute or ordinance stating otherwise.[13] Normally a building permit or lack thereof is not a definitive means to establish a use.[14] Lack of records by the municipality limits its ability to challenge other evidence provided by property owner.[15] Ambiguity in the facts shown by municipal records is construed against the municipality.[16] Where documents are lost or not maintained, the lack of such imposes a burden on the local government entity to otherwise prove what the document would show.[17]

The determination of the existence of a nonconforming use is not related to whether some of the land involved in the use is within one municipality and some in another.[18]

A variety of evidence may establish a use, including the intent of the property owner.[19] The testimony of neighbors is relevant and admissible.[20]

Proof that local officials allowed a use to continue, even as a pattern of conducted for other similar uses in similar situations was not sufficient to establish the use as legal and nonconforming where the ordinance never allowed the use.[21]

**Zoning Estoppel**

Commonly, some who argue that an illegal use must be allowed to continue as a nonconforming use are making the wrong argument. Instead, they are really asserting a claim of "zoning estoppel". This is indeed a viable legal doctrine, but separate and distinct from the law related to nonconforming uses. Zoning estoppel can be claimed when a person innocently relies upon

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[12] *Daines v. Logan City,* 2012 UT App 108. Decades of use does not constitute proof that the use was "legally established" as required by ordinance. However, see extended discussion in Salkin at §12:9 regarding conditions justifying equitable remedies where the property owner and municipality had both assumed the existence of a legal use or legal nonconforming use for an extended period of time before discovering a flaw in the origin of the lot or use.

[13] *Hugoe v. Woods Cross City*, 1999 UT App 281.

[14] *Thompson v. Logan City*, 2009 UT App 335.

[15] *Thompson.*

[16] *Vial.* ¶18.

[17] Salkin, §12:5.

[18] *Woods Cross v. Smith,* 2002 UT App 81.

[19] *Thompson.* ¶20. Case involved basement apartment. Evidence showed details of the construction consistent with establishment of the use when the house was built in 1960. Two utility meters, testimony of owners,

[20] *Vial.* ¶22. Salkin, 12:6.

[21] *Town of Alta v. Ben Hame Corp.* 836 P.2d 797 (Utah Ct. App. 1992). Overnight rentals which were allowed illegally in the county, were required to end when the property was annexed into a municipality where they were, as in the county, illegal. See also *Provo City v. Hansen*, 585 P.2d 461 (Utah 1978) – student housing.

official, affirmative acts by local government entities who wrongly approve a use or structure. The individual, based on that reliance, makes substantial changes in financial position. When those local government actions are later discovered to be mistaken or otherwise illegal, zoning estoppel protects a person who, again, innocently relied upon the error. In limited cases, a use commenced or a structure erected under such circumstances may be legally continued despite its lack of consistency with the relevant rules. Zoning estoppel is an equitable remedy to avoid manifest injustice, but is disfavored by the courts and rarely triggered. A detailed analysis of this doctrine is beyond the scope of our current discussion.[22]

**Burden of Proof on Establishment.**

The property owner or person claiming that a non-conforming use exists normally has the burden to demonstrate, by substantial evidence, that the use was legal once even though it no longer is.[23] This is provided for in state law, but the statute does allow local government to provide otherwise.[24]

**A Nonconforming Use May Continue**

The right to continue a nonconforming use is a protected property right, subject to constitutional protections against taking without the payment of just compensation if the use is not allowed to continue in a manner prohibited by the law.[25]

A nonconforming use is related to the property, and not to the owner or tenant who conducts the use. It can be sold or leased just as other similar property interests may.[26]

In order to continue a nonconforming use, all activities associated with the use need not be conducted on the property where the use is nonconforming. Continued use of land to park, store and stage large trucks, for example, preserves a transfer company use even when the office of the business was not located on the property.[27]

Although a nonconforming use was originally to pasture steers, use of the land for milk cows was held to preserve the use. The same species of animals, in this case, was sufficient.[28] The

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[22] See, for example: *Salt Lake County v. Kartchner,* 552 P.2d 136 (Utah 1976) and *Utah County v. Young*, 615 P.2d 1265 (Utah 1980), as well as subsequent cases citing these cases. See also the excellent discussion at Salkin, 12:9.
[23] *Daines v. Logan City*, 2012 UT App 108. Failure by owner to establish that a use was legal under the ordinance at some time is fatal to a nonconforming use claim.
[24] Utah Code Ann. §10-9a-511(4)(a) (municipalities); §17-27a-510(4)(a) (counties).
[25] *Rock Manor Trust v. State Road Comm'n.* 550 P.2d 205 (Utah 1976). *Gibbons and Reed v. North Salt Lake City*, 431 P.2d 559 (Utah 1967).
[26] Utah Code Ann. §10-9a-511(1)(a) (municipalities) §17-27a-510(1)(a) (counties). *Gibbons and Reed.*
[27] *Hugoe*.
[28] *Carlson v. Bd of Adj of Smithfield,* 2012 UT App 260. ¶18

nonconforming use can be limited to the number of animals.[29] To attempt to require a reduction in the number of animals from past levels would be an illegal limitation on the use, however.[30]

**Destruction by Casualty**

Local governments may not prohibit the reconstruction or restoration of a noncomplying structure or terminate the nonconforming use of a structure that is involuntarily destroyed in whole or part due to fire or other calamity unless the structure or use has been abandoned.[31]

**Voluntary Demolition by Owner**

If the property owner voluntarily demolishes a majority of a noncomplying structure or the building that houses the nonconforming use, without written agreement with the local government entity regarding an extension of the use, then the right to continue the nonconforming use and use of the noncomplying building is lost.[32]

**Deterioration of Structure**

Notwithstanding the above, the right to continue the use of a noncomplying structure may be lost if the structure is allowed to deteriorate to a condition that it is uninhabitable and is not repaired or restored within six months after written notice to the property owner that the structure is uninhabitable and that the noncomplying structure or nonconforming use will be lost if the structure is not repaired or restored within six months.[33]

In a recent case, the right to preserve a nonconforming sign was lost when owner did not respond to notice that the barn upon which the sign was placed must be restored or demolished. Securing and vacating the barn not sufficient to preserve the use when owners did not respond to specific demands of ordinance to restore or demolish.[34]

**Expansion of a Nonconforming Use**

Generally, an existing nonconforming use is not allowed to expand.[35]

However, the eventual use of all the land that was integral to the use when it was established is not an expansion.[36] To increase the activity involved in the use beyond that which was legally

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[29] *Carlson.* ¶16.
[30] *Clinton City v. Patterson,* 433 P.2d 7 (Utah 1967).
[31] Utah Code Ann. §10-9a-511(3)(a) (municipalities); §17-27a-510(3)(a) (counties).
[32] Utah Code Ann. §§10-9a-511(3)(b)(ii); 4(c)(i) (municipalities); §§17-27a-510(b)(ii); 4(c)(i) (counties).
[33] Utah Code Ann. §10-9a-511(3)(b) (municipalities); §17-27a-510(3)(b) (counties).
[34] *Hodgson v. Farmington City*, 2014 UT App 188.
[35] *Harper v. Summit County*, 2001 UT 10. P45. *Bastian v. City of Twin Falls,* 658 P.2d 978 (Idaho App. 1983).
[36] *Gibbons and Reed.* Sand and gravel operation could continue through entire property incidental to the original use, including abutting parcels.

allowed when the use was created is an illegal expansion.[37] A nonconforming use may be extended through the same building, provided no structural alteration of the building is proposed or made for the purpose of the extension.[38]

No expansion has occurred where substantial evidence shows that it has not.[39]

Where two nonconforming uses existed side-by-side, the commercial use was not allowed to expand to the residential use on the same premises.[40]

**Regulation of Nonconforming Uses**

The Idaho Supreme Court famously stated that "nonconforming status is not a talisman from which all zoning controls must retreat. Rather, the public policy embodied in zoning laws 'dictates the firm regulation of nonconforming uses with a view to their eventual elimination.'"[41]

The local city council or county council or commission may provide for the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set forth in the land use ordinance.[42]

Generally, when modifications are made to a nonconforming use or noncomplying structure, those modifications must comply with the regulations in place at the time of the modifications.[43] This is assuming, of course, that the regulations do not unduly burden the nonconforming use.[44]

A 2015 amendment to the statutes bars local government from imposing regulations by ordinance that require physical changes in nonconforming rental dwelling units except for specific life safety issues: smoke detectors, ground fault circuit interrupter protected electrical outlets, street addressing, egress windows, upgrades to a non-functioning or unsafe electrical or

[37] *Benjamin v. Lietz*, 211 P.2d 449 (Utah 1949). Planing mill expanded beyond maximum horsepower allowed under old ordinance which once allowed it. Former hours of operation also enforced.
[38] Utah Code Ann. §10-9a-511(1)(b) (municipalities); §17-27a-510(1)(b) (counties). The code specifically provides that the addition of a solar energy device to a building is not a structural alteration. §10-9a-511(1)(c); §17-27a-510(1)(c) (counties).
[39] *Haran v. Escalante City*, 2010 UT App 372. Neighbors appeal was denied in this case at all levels of appeal. The relevant ordinance allowed three years' abandonment before the use would be lost.
[40] *Utah County v. Baxter*, 635 P.2d 61 (Utah 1981).
[41] 1 R. Anderson, American Law of Zoning (Second) (1976), § 6.07, at 371; see *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 561 n. 3, 468 P.2d 290, 293 n. 3 (1970).
[42] Utah Code Ann. §10-9a-511(2)(a) (municipalities); §17-27a-510(2)(a) (counties).
[43] *Bastian*. When floor space was expanded under the pre-existing eaves of a shopping center, the then- applicable landscape and parking regulations were triggered.
[44] *Gibbons and Reed.*

plumbing system,[45] hand or guard rails, or code-required occupancy separation doors. Other upgrades may not be required.[46]

The 2015 revisions also limit the ability of local government to require physical changes to an egress or emergency escape window in any one to four family detached dwelling or three-story townhome if the window or egress complied with the code at the time the bedroom was finished; is smaller than that which would be currently required and the change would compromise the structural integrity of the structure or could not be completed in accordance with current codes, including set-back and window well requirements.[47]

Local governments can regulate the style of windows in bedrooms, require that a bedroom window be fully openable, and prohibit the reduction in size of windows that are already smaller than required by current codes.[48]

Unreasonable and overly harsh regulations can result in a "taking" of protected property rights in violation of both the state and federal constitutions.[49] Regulation of a nonconforming use must take into account the realities of business.[50]

**Nonconforming Billboards**

Even if the land use ordinances prohibit them, a municipality may permit a billboard owner to relocate the billboard within the municipality's boundaries to a location that is mutually acceptable to the municipality and the billboard owners.[51]

If a relocation is required, and no mutual location can be negotiated, then the municipality will be subject to a statute with specific penalties, including the payment of just compensation to the billboard owner in an amount calculated by a formula included in the statute.[52]

Other extensive regulations related to local regulation of billboards are beyond the scope of this summary, but can be found at Utah Code Ann. §10-9a-513 (municipalities) or §17-27a-512 (counties). The intent and result of these regulations is to make the regulation of nonconforming outdoor advertising very difficult.

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[45] As determined by an independent state-lcensed electrical or plumbing professional, not by the local building official. Utah Code Ann. §10-9a-511.5(2)(a)(i)(E); §17-27a-510.5(2)(a)(i)(E) (counties).
[46] Utah Code Ann. §10-9a-511.5(2) (municipalities); §17-27a-510.5(2) (counties).
[47] Utah Code Ann. §10-9a-511.5(3) (municipalities); §17-27a-510.5(3) (counties).
[48] Utah Code Ann. §10-9a-511.5(4) (municipalities); §17-27a-510.5(4) (counties).
[49] *Gibbons and Reed.*
[50] *Gibbons and Reed*. At 563-564.
[51] Utah Code Ann. §10-9a-511(3)(c) (municipalities); §17-27a-510(3)(c) (counties).
[52] Utah Code Ann. §10-9a-513 (municipalities); §17-27a-511 (counties).

**Substandard Lots**

If a lot is legally created, it remains a buildable lot for the uses allowed in the current land use regulations.[53] This does not mean that it may be further subdivided in a manner that does not comply with the current ordinances.[54] Local ordinances may provide that a substandard lot must have "single and separate" ownership or face "mandatory merger" with other abutting lots owned by the same property owner. If provided by code, the owner of abutting substandard lots may be required to combine them into a larger lot, perhaps one that conforms to the current requirements of lot size, if possible.[55]

The rules that apply to the use of a substandard lot are those in effect when the building permit is applied for, not when the lot was created.[56]

**Termination**

There are four ways to end a nonconforming use: 1) most commonly, when the use is abandoned for a period of one year or more; or 2) when the owner voluntarily contracts to give up the use; or 3) when the use is made subject of an amortization program by the municipality and phased out over time as explained below; or 4) the use is "taken" and just compensation is paid to the holder of the use for the loss of his or her property interest.

**Termination – Abandonment**

Under the common law, nonuse would result in the abandonment of the use and its lapsing into illegal status.[57] Under Utah law, the city council or county council or commission may adopt land use regulations governing the abandonment of nonconforming uses, but these must not attempt to go farther than the state land use statutes allow.

The state law provides that any party claiming that a nonconforming use has been abandoned bears the burden to establish the abandonment.[58] Abandonment may be presumed to have occurred 1) if the use has been discontinued for a minimum of one year; or 2) if the primary structure associated with the nonconforming use remains vacant for a year or 3) if the primary

[53] *Hatch v. Kane County Bd. of Adj.* 2013 UT App 119 P.12.
[54] *Hatch.*
[55] Salkin, §12:12. If this issue is of interest, please read the extended discussion, which points out the nuances of such ordinances and inconsistent interpretations that vary from state to state. We know of no Utah law directly on point, so bear in mind the courts in Utah may come to a different conclusion than the majority of other states.
[56] *Stucker v. Summit County*, 870 P.2d 283 (Utah App. 1994).
[57] *Judkins v. Fronk*, 234 P.2d 849 (Utah 1939).
[58] Utah Code Ann. §10-9a-511(4)(b) (municipalities); §17-27a-510(4)(b) (counties).

structure associated with the use has been voluntarily demolished without prior written agreement with the local government entity regarding extension of the nonconforming use.[59]

A presumption is rebuttable, and can be rebutted by proof of facts to the contrary. Where the abandonment has occurred, however, and where there is no showing of facts to disprove the abandonment, the use is terminated and no action or intent by the owner of the use is needed for that automatic termination. Since the statute does not refer to intent, but only facts, intention of the owner or the local government is irrelevant to whether abandonment has occurred or not.[60]

If abandonment is alleged, the property owner may rebut the presumption of abandonment. If one claiming abandonment meets his or her burden to establish the abandonment, the property owner has the burden to show that the abandonment has not in fact occurred.[61]

Abandonment only occurs, however, when the nonconforming use, as defined in the ordinance, has lapsed for a year. For example, where there were several activities defined as constituting the nonconforming auto salvage use, and where the ordinance described the activities as being "either/or" once activity or another, then continuing one of the activities preserved the right to reinitiate all of the activities listed as included in the use.[62]

In order to continue a nonconforming use, all activities associated with the use need not be conducted on the property where the use is nonconforming. Continued use of land to park, store and stage large trucks, for example, preserves a transfer company use even when the office of the business was not located on the property.[63]

Although a nonconforming use was originally to pasture steers, use of the land for milk cows was held to preserve the use. The same species of animals, in this case, was sufficient.[64] The nonconforming use can be limited to the number of animals.[65]

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[59] Utah Code Ann. §10-9a-511(4)(c) (municipalities); §17-27a-510(4)(c) (counties). The one year rule does not apply to schools and charter schools, apparently. Local government entities may set a different period of time for the abandonment of schools. Utah Code Ann. §10-9a-511(5) (municipalities); §17-27a-510(5) (counties).

[60] *Rogers v. West Valley City*, 2006 UT App 302. Property owner did not intend to abandon pasture use. Horses were relocated because a third party removed the fencing required to maintain the use. The use was abandoned because the facts result in the abandonment, not the intent of the parties involved. See also *Collins v. Sandy City Bd. of Adj.* 2000 UT App 371, where a nonconforming use of homes for overnight rentals was rejected by the Board of Adjustment. Where owner intended to restore use once a similar case before the courts proved it to have been legal, and where the similar use was held to be legal and nonconforming, Collins still lost their use because they were not parties to the litigation and quit the use. Intent was not relevant. If they wished to preserve the use, they needed to appeal the Board decision to court and preserve their rights.

[61] Utah Code Ann. §10-9a-511(4)(d) (municipalities); §17-27a-510(4)(d) (counties).

[62] *Caster v. West Valley City,* 2001 UT App. 220.

[63] *Hugoe*.

[64] *Carlson v. Bd of Adj of Smithfield*, 2012 UT App 260. ¶18

[65] *Carlson.* ¶16.

Changing a nonconforming use to another use which is sufficiently dissimilar to the original use terminates the nonconforming use after a year. In a specific case, a land use for the manufacture of burial vaults and septic tanks was changed to ice production. Even though the city allowed the change, and the property owner made significant investment in the ice business, a neighbor successfully challenged the decision and the nonconforming use was lost.[66]

The abandonment of a nonconforming use takes effect even if the property continues to be assessed based on continuation of the use on the property tax rolls.[67] Failure to obtain a business license has not been deemed to constitute abandonment.[68]

Once abandonment has occurred, continued use of the property must be in harmony with the current zoning regulations.[69]

**Termination – Agreement of Owner**

A property owner may, by contract, give up the right to continue a nonconforming use. If a property owner enters into a contract that does not specifically provide for for the right to continue a nonconforming use in a new development plan, the use is not preserved.[70]

**Termination - Amortization**

The local city council or the county council or commission may provide for the termination of all nonconforming uses, except billboards, by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of his investment in the nonconforming use, if any.[71]

In a Provo case, amortization of student housing in single family residential area was upheld.[72] In that situation, it was unreasonable for a property owner to demand an infinite amortization period where the property owner intentionally rented the units at a less than market rents.[73]

[66] *Harris v. Springville City*, 712 P.2d 188, 188-189 (Utah 1984).
[67] *Morrison v. Horne,* 363 P.2d 1113 (Utah 1961).
[68] Salkin, §12:4.
[69] *Caster,* ¶5.
[70] *Coventry Cove and Wilkinson v. Morgan County Bd. of Adj*. 2007 UT App 253.
[71] Utah Code Ann. §10-9a-511(2)(b) (municipalities); §17-27a-510(2)(b) (counties).
[72] *M&S Cox Inv. v. Provo City*, 2007 UT App 315. ¶26.
[73] *M&S Cox Inv*. ¶32.

**Who May Challenge a Nonconforming Use.**

Clearly, local government entities may regulate land uses within their jurisdictions and bring action to enforce the rules related to nonconforming uses. The courts have also held that nearby neighbors also have standing to challenge nonconforming uses.[74]

Some courts have held that while neighbors have standing to challenge the alleged existence, abandonment, and expansion of nonconforming uses, competitors of the use do not.[75]

**Conclusion**

Those involved in enacting, administering, and conducting the business of life under our land use regulations should use wisdom and a balanced perspective with regard to nonconforming uses and noncomplying structures. We should hesitate before declaring any large number of buildings or uses as nonconforming, realizing that regulatory overburden involved in both using and administering those uses in the future will be dramatically increased by doing so. But where significant issues of public concern compel us to do so, a well-considered and fair process for the management of nonconformities can benefit all concerned.

[74] *Harris v. Springville City*, 713 P.2d 188 (Utah 1984). It is to be noted, however, that local remedies must be exhausted before legal action is commenced. Utah Code Ann. 10-9a-801 (Municipalities); 17-27a-801 (Counties).
[75] Salkin, §12:8.

# Amortizing Nonconforming Uses

**The Utah Land Use Institute**
**June 9, 2015**

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## Concept

- Technique for removing a nonconforming use after its value has been recovered – amortized – over a period of time
- No compensation payable since use value has been recovered

## Amortization

- Controversial, not widely used
- Employed by anti-billboard advocates in 1960s and 1970s
  - 1978 – Government prohibited from amortizing billboards on federally funded highways
- Few state law rules, mostly based on common law
  - Hadachek v. Sabastian, 239 U.S. 395 (1915)
    - City could eliminate brickyard without paying compensation
  - Owners must be given enough time to realize reasonable return on investment
  - Must balance value to public against private harm
- Little consensus on implementation methodology

## LUDMA Authorization

- UCA §§ 10-9a-511 and 17-27a
  - A. . . .
    (2) The legislative body may provide for:
    . . . (b) the termination of all nonconforming uses, except billboards, by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of his investment in the nonconforming use, if any; . . .
  - LUDMA based on investment recovery, not balancing of interests
- Unclear whether LUDMA authorizes amortization of noncomplying structures

## Amortization - Two Principal Steps

- Establish costs to be amortized
- Establish amortization period

## Establishing Costs to be Amortized

- Use value can be established by:
  - Fair market value (comparable sales)
  - Owner's investment
  - Replacement cost
- These methods may yield very different values for the same use

## Establishing Costs to be Amortized
### *Fair Market Value Method*

| | |
|---|---|
| FMV of use | $200,000 |
| Minus land value | (50,000) |
| Minus salvage value | (30,000) |
| Cost to be amortized | $120,000 |

## Establishing Costs to be Amortized
### *Owner's Investment Method*

| | |
|---|---|
| Owner's investment in building | $100,000 |
| Minus land value | (50,000) |
| Minus salvage value | (30,000) |
| Cost to be amortized | 20,000 |

## Establishing Costs to be Amortized
### *Replacement Cost Method*

| | |
|---|---|
| Land at new location | $50,000 |
| Construction cost | 100,000 |
| Minus salvage value | (30,000) |
| Minus land resale value | (50,000) |
| Cost to be amortized | 70,000 |

## Determining Owner's Investment

- Purchase price
- Capital improvement costs incurred after purchase but before use became nonconforming
- Capital improvement costs after use became nonconforming
- Depreciation
- Profits/losses realized

## Factors Affecting Determination of Owner's Investment

- Nature of the use
- Age and condition of structures
- Salvage value
- Land value
- Tax depreciation
- Nuisance value
- Environmental compliance costs
- Moving costs
- Ongoing lease obligations
- Average annual income/losses from the use
- Investment rate of return

## Establishing an Amortization Period

- Fixed period
- Case by case
- Formula

## Provo's Amortization Ordinance

- Starting in 1959, zoning allowed boarders in single family dwellings
- Overlay zone created to allow accessory apartments
- Neighborhood character began to change from predominately owner occupied dwellings to landlord owned "duplexes"
- Overlay zone amended to require owner occupancy in order to have an accessory apartment
  - "Owner" strictly defined
  - Exception for temporary absence

## Provo's Amortization Ordinance

- Ordinance required immediate compliance for about 650 properties
- 3 year extension allowed for legally established occupancies if the owner:
  - Filed notice of intent to apply for extension within 4 months after ordinance adoption
  - Filed extension request within 12 months after ordinance adoption showing more time needed to recover investment

## Provo's Amortization Ordinance

- Formula calculated before and after property value
- Difference in value divided by average net monthly rental income
- Quotient is number of months needed to recover investment

## Subsequent Litigation

### *Anderson v. Provo,* 2005 UT 5

- Challenged ordinance, but not amortization formula
- Claims
  - Ordinance unlawfully regulated ownership rather than land use
  - Equal protection violation
  - Illegal restraint on alienation
  - Right to travel violation
- Ordinance upheld

## Subsequent Litigation

### *Anderson v. Provo,* 2005 UT 5

- Did not prevent owners from renting; merely prevented "supplemental activity" of renting accessory dwellings
- Treating occupying and non-occupying owners differently justified by city's objective in accommodating student housing while preserving neighborhoods
- Any restraint on alienation is indirect and not unreasonable
- Ordinance did not affect citizen movement from one state to another

## Subsequent Litigation

### *M&S Cox Investments,* 2007 UT App 315

- Property purchased shortly before ordinance adopted
  - $500,000 of improvements made
- Amortization formula challenged
  - Owner charged below market rent to relatives resulting in a negative value allowing infinite time for compliance
  - City used fair market rent in calculation
  - 22 years to amortize
- Use of fair market value appropriate
  - Intent of ordinance to amortize in a reasonable time
  - No intent to never amortize

## Subsequent Litigation

***Thomas,*** UT 4th Dist., No. 080404263

- Challenged application of formula
  - Initial decision: 4.9 years to amortize
  - After owner provided more facts: 19.7 years
  - Neighborhood appealed (without paying a fee) and showed calculation incorrect
  - Final calculation: 4.2 years
- Board of Adjustment affirmed city decision
- Upheld by district court
  - Decision supported by substantial evidence in the record
  - Neighborhood failure to pay fee did not prejudice outcome
  - Board had jurisdiction despite owner's claim that correspondence with city constituted a settlement agreement

## Observations

- It worked
- Strong citizen support
- Only a few property owners pursued litigation
  - All had to amortize eventually
- Construct a formula that allows time to recover investment based on individual facts
- Define terms in formula
- Don't make math miscalculations

**14.30.080. Nonconforming Uses.**

(1) After April 4, 2000, except as provided in subparagraph (2) of this section, every dwelling unit in the (S) Overlay zone shall conform to the requirements of this Chapter.

(2) Notwithstanding the provisions of Chapter 14.36 of this Title, a one-family dwelling with an accessory dwelling unit which on April 4, 2000 is not owner occupied and which was legally established shall not be required to conform to the owner occupancy and other development standards of this Chapter until April 4, 2003. An owner of property affected by this subsection may apply for an extension of time to comply with such occupancy and development standards subject to the provisions of Section 14.30.090 of this Chapter.

**14.30.090. Termination of Nonconforming Uses - Recovery of Investment.**

(1) The Community Development Director or his designee shall grant an owner of property affected by Subsection 14.30.080(2) of this Chapter an extension of the time required to conform with such section if:

(a) the owner:

(i) by August 4, 2000 files a notice of intent to apply for a time extension as provided in this section; and

(ii) by April 4, 2001 files a complete application for an extension of time as provided in this section.

(b) the owner's application for an extension of time demonstrates by a preponderance of evidence that:

(i) the nonconforming use which is the subject of the application was legally established; and

(ii) subject to the formula in Subsection (2) of this section, the owner is unable to recover prior to April 4, 2003 the amount of the owner's investment in the property.

(2) (a) The time period during which an owner may recover the amount of his investment in property affected by Section 14.30.080(2) of this Chapter shall be determined by dividing the residual value of the property by the average monthly net rental income from the property. The resulting figure is the number of months which the owner shall have to recover his investment in the property.

(b) For the purposes of this subsection the following definitions shall apply:

(i) "Amount of the owner's investment" means the adjusted present value of a property as of April 4, 2000.

(ii) "Adjusted present value" means a property's original purchase price plus any capital improvements and less depreciation and net income from the property, all as adjusted for inflation to April 4, 2000.

(iii) "Compliance value" means the appraised value of the property on April 4, 2000 based on compliance with the requirements of this Chapter.

(iv) "Residual value" means the difference between a property's adjusted present value and its compliance value as of April 4, 2000.

(c) The time period determined under subsection (a) of this section shall apply to the property for which the owner made an application for extension and to the owner's successors, if any, until such time period has run.

(3) Any person aggrieved by a decision of the Community Development Director or his designee applying this section may appeal such decision to the Board of Adjustment as provided in Chapter 14.05 of this Title.

(4) The Community Development Director may adopt reasonable regulations to carry out the purpose of this section.

Ogden Case Studies for nonconforming use panel

**Case 1- Revocation of Nonconforming use 457 Canyon Road.**

Property at 457 Canyon Road is zoned for single family (R-1-6). The home built in 1913 had been converted to a 6 plex prior to the 1951 zoning code and therefore had a nonconforming right as a six plex even though it did not meet the zoning use allowed by the present zoning.

The owner of the building in 2010 defaulted on the loan which was secured by the property. On August 6, 2010 Wells Fargo purchased the property at a trustee's sale on August 6, 2010. They evaluated the property and found it needed substantial repairs and improvements and though they deemed it habitable "it was in no condition to rent out to tenants". The water to the facility had been turned off on in June of 2010 due to nonpayment.

Various neighbors complained about the condition of the building and its neglect. The bank was marketing the building and claimed they had been making upgrades to the building though there were no building permits to back up the claim nor was the water turned back on to maintain the exterior of the property.

On February 9, 2012 the City wrote a letter to the bank stating the nonconforming right to use the property as a sixplex had been revoked based on vacancy of the building for over one year time frame. The bank appealed the decision to the Board of Zoning Adjustments and the Board reviewed the appeal on March 28, 2012.THE board denied the banks appeal based on;

1. As property owner, the bank is treated the same as any other property owner and has the same opportunity to assure action is taken to assume a nonconforming right is not abandoned according to the City's Code;

2. The property had no tenants for over a one year time limit;

3. There has been no water service to the property for over a year.

4. No building permits have been applied for to allow repairs or plumbing upgrades during that time period; and

5. The building is in a state of disrepair based on the Board's personal observation and the property owners have taken no action to maintain the property.

The bank appealed the Boards action to the Second District Court on April 27, 2012 stating the Board and City's actions were arbitrary and capricious because it was based on a single factor of time to determine abandonment. Other factors need to be considered such as intent as it ws never the banks intent to lose the six plex since the loan value was based on a six plex and they marketed the building as a six plex which clearly prove they did not intend to abandoned the use.

The court upheld the Boards action on September 21, 2012 noting that, "Even if Wells Fargo did not fail to marshal the evidence, this Court would find that the Board's determination to revoke Wells Fargo's nonconforming use certificate was supported by substantial evidence in the record."

**Case 2- Revocation of nonconforming use for animals- 1720 East 4700 South**

A home was built on property in 1969 and was in unincorporated Weber County and zoned A-1. Property annexed into Ogden City in 1978 and zoned R-1-8. Ogden City does not allow animals except household pets. Prior to annexation an old barn was taken down and a new one built on property. The original owner of the home had horses on the property. Property went through many hands over the years until a family "bought the land in 2000 because it had animal rights". In 2008 and 2009 complaints came from neighbors about the smell coming from the property and the illegal animals that were on the property of pigs, goats, chickens and rabbits. Code enforcement gave warning to remove animals and property owner applied for a nonconforming use permit. A request for a nonconforming use permit was made and a permit was issued on October 28, 2009 to allow 4 goats, 20 chickens and 4 rabbits based on information applicant provided from lifelong property owner near the area and county requirements prior to annexation for animals.

Neighbors complained a few months later and provided information that what had been submitted to establish the permit was not factual and presented evidence that there had been gaps of occupancy of the property and the existence of animals. The City reopened the consideration of the nonconforming use certificate that had been issued based on an ordinance provision that allows the director to reconsider the certificate if it is shown it was issued in due to mistakes, misrepresentation or new evidence that shows the rights did not exist. Nearly a year went by trying to get contact with every property owner, asking questions of the current property owner to get better clarification on points and waiting for responses, given indication of facts against the rights of use and allowing the owner to defend that the rights and not been lost.

The city finally issued a letter on November 4, 2011 revoking the conditional use for several reason including a portion of the present property was actually bought from the city and had no animal rights with it as it was part of a park, gaps of ownership on several occasions that extended for up to three years, lack of response from past owners on specifics and the only defense is that you do not know that animals may have been on this property once during a year's period of time.

This decision was then appealed to the board of zoning adjustment s who acted upon the appeal on February 2012 and denied the appeal of revoking the nonconforming certificate.

**Case 3- Expansion of a nonconforming use at 251 17th Street.**

Nonconforming markets are found throughout many older neighborhoods even though they are zoned residential. This market located on the corner of 17th and Childs is a small market on a small parcel of land. In 1985 the then owner of the property applied for an expansion of the use to allow a drive-up window to be installed. At that time the Board of Zoning Adjustments reviewed expansions of nonconforming uses. The request was denied based on the tightness of the site, the closeness of a drive approach to an intersection and the Boards determination that the use would create more nonconformities.

Several years later a drive window appeared in the building and cars would drive off the curb in leaving the window. It wasn't for another few years that the Planning office noticed the window and wondered how if had happened. Code enforcement was asked to follow up and the owner was given a notice of the illegal addition. The owner then applied to the Planning Commission for approval of the expansion of the nonconforming use to allow a drive- up window.

The staff in their report had recommended against the request as there were still ordinance concerns of new nonconformities being created. The Commission however after hearing from neighbors and working on site improvements such as landscaping and door entrance locations to reduce conflicts approved the expansion feeling the new improvements offset the impact of the drive window.