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UPDATE ON PLANNING, LAND USE, AND EMINENT DOMAIN DECISIONS

COMPREHENSIVE PLANNING

NON-CONFORMING USES

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I. Comprehensive Planning

1. *Delta Prop. Co., v. Lane Cnty*., 271 Or App 612, 2015 Ore. App. Lexis 734 (June 10, 2015)

This case deals with a regionally adopted comprehensive plan, co-adopted by multiple jurisdictions, governing specific areas of a metropolitan region. Areas not covered by the regional comprehensive plan are covered by the individual participating government's own comprehensive plan. The key question before the court was determining whether, in deciding permit applications on land governed by the Metro Plan, the interpreting jurisdiction receives any deference in its interpretation of the Metro Plan or whether the reviewing court decides whether the interpretation is correct. One of the arguments against affording such deference was that conceivably each jurisdiction could interpret the same plan provision differently, leading to inconsistent results.

The Eugene-Springfield Metropolitan Area General Plan (Metro Plan) is a joint regional plan between Lane County, the City of Eugene and the City of Springfield. The challenged decision was the county governing body's denial of Delta Properties' application to expand an aggregate mine to include land zoned Exclusive Farm use (EFU) located within the area governed by the Metro Plan. The denial was based on the County governing body's decision that the mine was not inventoried as a significant site in the Metro Plan. This was an important decision because as a matter of state law, only aggregate mines listed on a Comprehensive Plan inventory as a significant site may expand. It was not clear whether the mine was on the Metro Plan inventory. The mine was indisputably not on the inventory of significant sites on the county's own comprehensive plan, but that a county specific plan did not apply because the land at issue was in the Metro Plan area. The Oregon Land Use Board of Appeals (LUBA) decided that the county was not entitled to deference in its interpretation of the Metro Plan's significant aggregate sites inventory and thus decided the county was wrong in its interpretation of that inventory.

The Oregon court of appeals reversed. The court of appeals tee'd up the dispute, as follows:

> "LUBA concluded that, based on a line of Oregon Supreme Court cases dealing with deference to a single local government's interpretation of its own land use regulation, no such deference is owned when a single local government interprets a comprehensive plan that was concurrently adopted by other governments, such as the Metro Plan."

The court of appeals disagreed, reversing LUBA and ordering that deference be afforded to the county governing body's interpretation of the Metro Plan. The court of appeals explained that the law says that the appellate courts are required to defer to a governing body's interpretation of its comprehensive plan. There was no dispute that the decision was by the county governing body. The court decided that because the county is a co-adopting body for the Metro Plan, that the Metro Plan is a comprehensive plan of a local government namely the county and other governments. The court explained:

> "The board of county commissioners is a legislative body responsible for enacting the Metro Plan and so may be assumed to have a better understanding than LUBA or the courts of the intended meaning of the Metro Plan."

2. *RDNT v. City of Bloomington,* 861 N.W.2d 71 (Minn., March 18, 2015)

RDNT applied for a conditional use permit to expand an assisted living center. The city planning commission denied the application based on determinations that the CUP was contrary to the comprehensive plan. The city council affirmed the denial on the basis of the same comprehensive plan provisions that the planning commission found persuasive, but also added a denial basis centered on the "conditional use permit ordinance", which required that the "proposed use will not be injurious to the surrounding neighborhood or otherwise harm the public health, safety and welfare."

RDNT filed a complaint in the trial court challenging the denial. On summary judgment the district court reversed, on the basis that the city "misapplied certain standards, misrepresented the impact of certain studies, and appeared to ignore the evidence to the contrary." On appeal, the court of appeals reversed the trial court sustaining the denial. The state Supreme Court granted review, but limited its consideration to only whether the denial that was based on the conditional use permit ordinance was sufficient.

The state Supreme Court began its analysis by explaining: "We will reverse a governing body's decision regarding a conditional use permit application if the governing body acted unreasonably, arbitrarily, or capriciously." The court stated to decide this it must determine whether the city's reasons given for denial are legally sufficient, and whether such reasons have an adequate factual base in the record.

The court decided first that general standards such as those in the city's conditional use permit ordinance are adequate. The court also determined that the evidentiary foundation for denial were adequate and that the city was not obliged to approve the proposal based on the applicant's mitigation measures. Importantly, the court was persuaded by decisional findings that even under the applicant's proposed mitigation "minimization of the trip volume by the proposed Traffic Demand Management Plan is insufficient to avoid injury to the public health, welfareand safety of the residential neighborhood."

The interesting thing about this decision is the concurrence. Concurring Justice Anderson expressed the following concern:

> "I write separately, however, to address an alarming argument advanced by the City that the majority, properly, does not reach in affirming the courtof appeals. That argument is that the City may properly deny a conditional use permit when the proposed use is in conflict with its comprehensive plan. My concurring opinion is prompted by significant uncertainty in our statutory framework and confusion in our case law concerning the role of comprehensive plans. Although not addressed by the parties here, there are also constitutional implications lurking behind the insistence of the City that a conditional use permit may be denied for any comprehensive plan violation."

Justice Anderson explained the "traditional approach, and in my view, the better approach" is that comprehensive plans are "advisory documents that cannot guide specific land-use decisions."

Citing a 1975 Oregon Supreme Court case, Justice Anderson noted a "modern trend" to "give greater legal effect to the comprehensive plan." He cited Washington State Supreme Court precedent distinguishing planning from zoning and warning of the dangers of reliance on comprehensive plans for individual permit decision making:

> "The Washington Supreme Court explains this distinction in *Shelton v. City of Bellevue*, 73 Wn.2d 28, 435 P.2d 949, 953 (Wash. 1968):
>
> "Municipal 'zoning' * * * is, in effect, a part of and an end result or product of effective municipal 'planning, for it is through the medium of enacted and enforceable zoning regulations that the aims and objectives of the land-use-classification facet of over-all municipal 'planning' may be carried to fruition. Because an ad hoc, piecemeal approach to municipal 'zoning' lends itself more readily to arbitrary, capricious, unreasonable, or spot zoning situations, it follows that there must be a direct and tangible link between over-all municipal "planning" and over-all municipal 'zoning.'"

He went on to explain that:

> "Using the comprehensive plan as a tool for specific zoning decisions invites, rather than minimizes, arbitrary and discriminatory municipal practices. Thus, the history of American municipal planning provides little support, and properly so, for use of the comprehensive plan as a vehicle for denying conditional use applications."

He stated:

> "Additionally, a conditional use ordinance does not create a 'standard' by requiring compliance with the entire comprehensive plan as a prerequisite to obtaining a permit, because a comprehensive plan does not provide sufficiently specific standards to measure compliance.
>
> "* * * * *
>
> "What is difficult to envision is how any applicant could comply with the entire comprehensive plan. The effect of relying on comprehensive plans to deny conditional use permits, and to control individual development, is to empower arbitrary and capricious decision-making by cities and to increase the likelihood that developers that enjoy political favor will be successful and those out of favor will not. The traditional deferential standard of review compounds this problem.
>
> "* * * * *
>
> "By requiring a conditional use applicant to comply with the entire comprehensive plan, a municipality can deny the application for countless reasons, which effectively eviscerates the lower burden that should be afforded to such applicants. This creates a presumptive prohibition on conditional uses and essentially puts a conditional use on the same level as a variance.

"* * * * *

> "Property rights enjoy protection under both the federal and state constitutions. The effect, if not the purpose, of modern-day municipal, regional, and state land-use regulation is to prohibit property owners from using their property as they wish and to do so without compensating the owner for the lost use. Of course, given that the constitutionality of zoning, for good or ill, is no longer in dispute, some regulation, and some lost use, is permissible. But I write separately to highlight the challenges, and dangers, presented by use of comprehensive planning as a prohibitory tool and to specifically reject the approach taken by the City here."

3. *Comm. Of the Petitioners v. City of Norfolk*, 2015 Va Cir Lexis 11 (Feb 6, 2015).

The city had an existing plan and land use regulations that designated the subject property "institutional" and zoned it single family residential. The city wished to change the zoning for that particular property on which a certain historically significant "Talbot Hall" was situated. The rezone would allowed the development of 14 homes on the site. A group dedicated to the preservation of Talbot Hall organized a referendum petition to refer the rezoning to the voters.

The owner of Talbot Hall (Episcopal Diocese of Southeastern Virginia), wrote to the city after the referendum was filed and informed the city that if the referendum was successful, that it would demolish Talbot Hall "as an albatross around any sale of the property."

The circuit court decision resulted from a proceeding determining whether the referendum is valid. The court determined the referendum was valid. The court explained that the majority of jurisdictions allow referendum of zoning ordinances and stated "whether direct democracy interferes with the comprehensive plan of a city must be determined by the courts and turn on the facts of each case. Here, the referendum seeks to repeal a rezoning ordinance that changed the properly from institutional to residential. The repeal of the ordinance merely returns the property to its original state, thus, eliminating fears of spot zoning or piecemeal alterations to the City's comprehensive plan."

4. *Love's Travel Stopes & Country Stores, Inc. v. DiOrio*, 2014 R.I. Super Lexis 41 (2014)

This case holds that where a comprehensive plan cannot be harmonized with the applicable zoning district, the applicable zoning district controls. Here, the applicant Loves applied to establish a travel stop for passenger vehicles and trucks in a manufacturing use district in the Town of Hopkinton, Rhode Island. The land is designated on the comprehensive plan as "Mixed Use Village Zone". The land is bounded by I-95, State Route 3 and a state "park-and-ride" facility. The proposed use is consistent with the manufacturing zone but the Town found it was inconsistent with the comprehensive plan "Mixed Use Village" provisions. The Town decided that the comprehensive plan controlled. The court held that the first order of business is to attempt to harmonize the plan and zone. If, as the court found in this case, they cannot be harmonized (the court stating that in this case they are "irreconcilably inconsistent"), the applicable manufacturing use zone controlled. The court held:

> "The Platting Board's decision was also affected by error of law and was characterized by an abuse of discretion. Specifically, the Platting Board's decision erroneously

> upheld an erroneous application of the Comprehensive Plan and an erroneous application of § 45-23-40. Substantial rights of the Appellants have been prejudiced as a result."

This case also contains an interesting discussion of the requirement in many jurisdictions that land use applications be approved or denied within a specific time period – here 120 days. The court decided that an applicant has no obligation to grant an extension to allow time for opposing testimony and that when a jurisdiction nears the end of the applicable processing period it is obliged to make a timely final decision even if that means scheduling a special meeting.

5. *Golden Sands Dairy, LLC v. Fuehrer*, 855 N.W.2nd 491 (Wisc., July 24, 2014) (Unpublished)

This case deals with situations presented in states lacking statutory standards vesting the applicable legal standards to those in effect at the time the application is submitted. It deals with the question of whether an applicant has a vested right to issuance of a permit based on standard in effect when the application is submitted even though the applicant is aware that new regulations are probably on their way.

The applicant, Golden Sands, applied to the Town of Saratoga for a building permit to build 7 agricultural buildings for a new dairy operation on land it owned in the Town. The operation would span 7,000 acres and accommodate 5,300 animals in a CAFO. Golden Sands bought the subject land for $2 mm and spent some $200,000 on the building permit plans and papers after being advised by its legal team that its proposed agricultural operation on the subject property was allowed.

The applicable zoning ordinance belongs to, and was established by, Wood County. The applicable Wood County zone was "Unrestricted." This means that any use otherwise allowed by law is permitted outright. A CAFO is allowed by law.

The Town was the authority charged with issuing building permits within the Town's boundaries. The applicable building permit laws that the Town administered were the state building code which exempted agricultural buildings from building permit requirements. At the time the building permit was submitted, the Town had no zoning ordinance. Rather, the Town's zoning ordinance went into effect 3 months after Golden Sands submitted its building permit application.

However, the Town had adopted a comprehensive plan in 2007, several years before the building permit application was submitted. The Town's comprehensive plan showed the particular area where the proposed agricultural operation and proposed 7 agricultural buildings were proposed, as a "Future Land Use" area which in turn would be a "Rural Preservation" area in which "large agricultural uses" would be prohibited. The Comprehensive Plan contained statements that the projected land use areas are "not zoning districts" and "do not set performance criteria for land uses." Rather the Comprehensive Plan called for the Town's adoption of implementing land use regulations within 5 years of the Plan's adoption.

The issue was whether the Town could deny the application for the building permit on essentially one of two bases: (1) on an interpretation of the Towns authority under the building code to apply single family dwelling and state DOT access standards and decide that the application was incomplete, and (2) on the basis of its Comprehensive Plan Future Land Use plan designation for

the property which prohibited the proposed large agricultural use and the Town's argument that the applicant knew the Town was in the process of adopting an implementing zoning ordinance.

On the incompleteness issue, the Town claimed the application was incomplete because it lacked specifications related to single family dwellings and DOT access requirements.

On the Comprehensive Plan issue the Town argued that the proposed building permits were inconsistent with the Comprehensive Plan and that the applicant knew the Town was in the process of adopting an implementing zoning ordinance. In support of its position, the Town cited *Town of Cross Plains v. Kitt's Field of Dreams Corner, Inc.*, 775 N.W.2d 283 (2009), which involved an applicant who sought a permit for an adult entertainment use 7 days before an ordinance prohibiting the same went into effect. The *Kitt's* court decided that in those circumstances, the applicant did not "reasonably rely" on the permissive ordinances in effect at the time the application was submitted and had no vested right to issuance of relevant approvals under the rules in effect at the time of the submittal of the application. Accordingly, the Town denied the building permit.

Golden State filed for a writ of mandamus to force the Town to issue the building permit. The trial court agreed with Golden State and issued the writ.

On review, the appellate court held that the state building code made agricultural buildings exempt and the Town's interpretation that it could apply single family dwelling requirements erroneous. Therefore, the court decided that the application for the building permit was not incomplete. The court further held that the Town could not rely on its Comprehensive Plan and prospective implementing ordinances, to deny the building permit. The court distinguished the *Kitt's* case because (1) the plan "was only that, a plan containing goals", (2) the "Town had not yet drafted any sections relevant to the land on which Golden Sands proposed to build at the time Golden Sands submitted its permit application", and (3) as of the date that Golden Sands submitted its building permit application, the Town had not been granted the authority by its town meeting or electors necessary to adopt a new zoning ordinance." a new zoning ordinance. The court emphasized: "To repeat, the only draft of the zoning ordinance available at the time Golden Sands submitted its permit application did not contain any language regarding prohibited uses for areas zoned as rural preservation, such as the land at issue here. For this reason, the Town fails to explain why we should read *Kitt's* as containing a broad exception that would cover the very different facts of this case." The court held that the applicant had a "vested right in the issuance of the permit" and ordered the Town to issue them.

6. *Durant v. D.C. Zoning Comm'n*, 99 A.3d 258 (D.C. Court of Appeals, September 11, 2014)

The District of Columbia Zoning Commission (Zoning Commission) approved "901 Monroe Street LLC's" application for a PUD characterizing the project as a "moderate density" use. Some neighbors within 200 feet of the proposal (so called the "200-Footers") objected and appealed the approval. This case was the second appeal after an initial remand. The initial appellate remand required the Zoning Commission to address:

> "(1) whether the project would be consistent with the Comprehensive Plan as a whole in light of the FLUM [Future Land Use Map]; (2) whether the project would be consistent with certain specific Comprehensive Plan policies; and (3) whether the

> project would be consistent with the Comprehensive Plan in light of the GPM's [General Plan Map] designation of the parcel as a Neighborhood Conservation Area."

The proposal is for 205-220 residential units in a 61 foot high (6 story) building. The ground floor was to be leased to 6-8 commercial tenants. The existing development on the property was to be demolished.

The subject property has multiple plan designations, as the court explained:

> "The FLUM [Future Land Use Map] designates part of the parcel for low-density mixed use, part of the parcel for moderate-density mixed use, and more than half of the parcel for low-density residential use. The GPM [General Policy Map] designates the parcel as a Neighborhood Conservation Area, a category used for primarily residential areas in which development is "[l]imited . . . [and] small in scale." * * * The Land Use Element encourages the preservation and protection of low-density neighborhoods and discourages the replacement of homes in good condition with larger new homes or apartment buildings." (Code citations omitted).

The subject property was zoned in part R-2 (single family "semi-detached dwellings") and in part C-1 commercial use described by the court as "neighborhood shopping."

At the time the application was submitted the property was developed with "several detached residential houses and a two-story commercial building." The uses along the street on which the proposal was located as well as east side of the street were "low-scale residential" uses.

A key issue was whether the project was properly characterized as a moderate density project or a medium density project. "The FLUM defines moderate-density residential use as applying to:

> "the District's row house neighborhoods, as well as its low-rise garden apartment complexes. The designation also applies to areas characterized by a mix of single family homes, 2-4 unit buildings, row houses, and low-rise apartment buildings.
>
> "Although moderate-density residential neighborhoods may include 'existing multi-story apartments,' such structures were typically 'built decades ago when the areas were zoned for more dense uses (or were not zoned at all).' In contrast, the FLUM defines medium-density residential use as applying to "neighborhoods or areas where mid-rise (4-7 stories) apartment buildings are the predominant use." Under these definitions, the project would appear to be a medium-density residential use, because it would stand six stories high and offer over two hundred apartment units." (Citations to local code omitted.)

The court decided that whether the proposal was for a moderate or medium density project had not been adequately explained and remanded:

> "for the Commission to address the arguments of the parties concerning whether the project should properly be understood as a moderate-density use; to decide that question and explain the basis for its conclusion; and to address the implications of that conclusion for the questions whether the project would be consistent with the

> Comprehensive Plan -- including the FLUM, the Upper Northeast Area Element, and the GPM -- and whether the project should be approved."

The developer argued the FLUM definitions of moderate and medium density uses were not binding on the Zoning Commission. Interestingly, the court refused to decide that question in the first instance holding that was an issue for the Zoning Commission to decide and for the court to review. Since the court found the Commission had made no decision in this regard, it found remand was appropriate.

Further, the D.C. Comprehensive Plan contained an "Upper Northeast Area Element," which in turn included a plan provision stating that "special care should be taken to protect the existing low-scale residential uses along and east of 10th Street NE." The court explained that while this provision does not prohibit the proposal, the decision must explain how the proposal would be consistent with the DC comprehensive plan *as a whole* in light of this standard.

An interesting aside about this case is a strong concurring opinion objecting to the common practice that was employed in this case of the developer writing the decisional findings for the case.

II. Nonconforming uses

1. *Verrillo v. Zoning Board of Appeals of Branford*, 111 A.3d 473 (Conn., March 15, 2015)

The property owner owned a substandard sized lot composed of 1605 square feet, that was 60 ft long and 26 feet wide and was occupied by a small 1000 square foot dwelling composed of 4 bedrooms and two bathrooms located in the Town of Bradford. The Town of Bradford is a coastal town "comprised of mostly small cottage type homes on small parcels". The lot and dwelling were legally nonconforming, as the lot did not meet the minimum 4000 sq. ft. minimum lot size and the dwelling did not meet applicable lot coverage requirements or setbacks. The applicant sought variances to improve and enlarge the dwelling. One of the local variance standards require a showing that the hardship affecting the property was unique. Among other things the proposed variance sought to add a story to the dwelling – taking it from 2 to 3 stories and reduce the existing substandard setbacks, one in particular to reduce the front yard setback from 15 feet to 0.2 ft.

After a public hearing the Town Zoning Board of Appeals (ZBA) approved the requested 8 variances to enable the dwelling to be improved.

Two neighboring property owners offered their support for the proposal.

An adjacent property owner objected to the variance approval and appealed it.

On appeal, the court began by noting at the outset that the ZBA provided no written decision and that the minutes and transcript offered no explanation of the reason why the ZBA determined the application met variance criteria. Amazingly, the court decided the case anyway explaining an apparently unique aspect of Connecticut law:

> "Conspicuously absent from both the transcript of the March 20, 2012 proceeding and the minutes thereof is any stated basis or rationale for the board's implicit finding that the hardship affecting this property was unusual, and not one generally affecting the

district in which it is located. *As a result, we are obligated to search the entire record to ascertain whether the evidence reveals any proper basis for the board's decision to grant the variances in the present case*." (Emphasis supplied.)

The court explained the law respecting variances in terms that are fairly widespread among the several states:

> "The requirement that an applicant seeking a variance must establish the existence of a hardship peculiarly affecting its property 'is a fundamental one in zoning law . . . .' *Ward v. Zoning Board of Appeals*, 153 Conn. 141, 143, 215 A.2d 104 (1965); *see also Hyatt v. Zoning Board of Appeals*, 163 Conn. 379, 382, 311 A.2d 77 (1972) (§ 8-6 'clearly directs the board to consider only conditions, difficulty or unusual hardship peculiar to the parcel of land which is the subject of the application for a variance'); *Plumb v. Board of Zoning Appeals*, 141 Conn. 595, 600, 108 A.2d 899 (1954) ('[t]he hardship must be one different in kind from that imposed upon properties in general by the ordinance'). An applicant's burden with respect to the hardship requirement, therefore, is twofold, as it must establish both the existence of a 'sufficient hardship' and that 'the claimed hardship is . . . unique . . . .' *Francini v. Zoning Board of Appeals*, 228 Conn. 785, 787, 639 A.2d 519 (1994). We consider each in turn."

In its analysis, the court acknowledged that nonconforming uses reflect property rights to use land that are constitutionally protected.

The court explained that, however, a nonconforming use does not "a fortiori entitle a property owner to a variance to expand those nonconformities." The court explained that a nonconforming use request to alter or modernize a building to satisfy the preferences of the landowner (as opposed to create any use consistent with the zoning district or to be consistent with building or fire codes), is not an unusual or unique circumstance effecting property that justifies a variance. On this, the court distinguished situations that could present such a situation where a nonconforming use could justify a variance – development on a vacant nonconforming lot or remodeling the interior of a nonconforming use. However, the court held that that the basis for the requested variance, that the applicant wanted to enlarge and modernize the existing dwelling, could not alone justify the variance because they were personal issues not ones unique to the property:

> "Put simply, the existence of a legally existing nonconformity cannot, in itself, justify the granting of variances to expand that nonconformity.
>
> "* * * * *
>
> "[I]t is also well established that self-inflicted hardship which arises because of individual actions by the applicant will not provide a zoning board of appeals with sufficient reason to grant a variance. . . . Hardships in such instances as these do not arise from the application of zoning regulations, per se, but from zoning requirements coupled with an individual's personal needs, preferences and circumstances. Personal hardships, regardless of how compelling or how far beyond the control of the individual applicant, do not provide sufficient grounds for the granting of a variance.' For that reason, '[t]he situation of any particular owner is irrelevant" to the determination of whether a hardship exists.'" (Citations omitted.)

The court decided that "the hardship claimed is in no sense particular to the applicant's property" repeating and affirming the findings of the lower court:

> "'[a] careful review of a map of the neighborhood contained in the record confirms [that] [m]any properties . . . are as small as, or even smaller, than the [applicants'] property.' Our review of the zoning map likewise confirmsthat several properties in the R-2 district are of a comparable size and suffer similar limitations in terms of buildable area."

Accordingly, the court reversed the approval of the variances.

2. *Leddy v. Bd. Of Adjustment,* ([March 25, 2015] 2015 Iowa App. Lexis 246) (unpublished)

The subject property is a warehouse in Iowa City. It was first used as a DeSoto dealership in 1933. Thereafter it was used for a variety of purposes ranging from automobile repair to artists studios and storage. The applicants acquired the property in 2010 to use it for their electrical business. At the time of their purchase the warehouse was empty.

The applicants applied for a "special exception" to use the property for the electrical business purpose. A special exception is a type of land use approval that allows an existing nonconforming use to be changed from one type of nonconforming use to another type.

The city approved the special exception subject to several conditions regarding parking, hours of operation, indoor storage, lighting and aesthetics. A group of 6 neighbors appealed.

The two primary issue on appeal were (1) the neighbors contention that there could be no nonconforming use where the warehouse was vacant for more than a year, and (2) the city did not conform to an approval standard requiring: "The proposed use is of the same or lesser level of intensity than the existing use, considering the relative factors such as traffic generation, parking demand, hours of operation, residential occupancy, noise, dust and customer and/or resident activity."

The court affirmed the approval of the special exception. The court determined that the code expressly authorized approval of a special exception where the nonconforming use has been discontinued for more than a year. The court also determined that the city made an appropriate comparison consistent with the standard regarding the "intensity of the existing use," by comparing the proposed use to the types of uses that had been made of the warehouse in its history, including the 1932 DeSoto dealership and the fact that the warehouse has been constructed as an automotive showroom and "is not designed for, or readily adaptable to, a use currently allowed in the zone", and the intervening automobile repair businesses.

3. *Alami Lexington-Fayette Urban Cnty. Gov't Bd. Of Adjustment,* ([June 19, 2015] 2015 Ky. App Unpub Lexis 443) (Unpublished)

The issue in this case is whether the use of one of two existing drive through windows was an expansion of a lawful nonconforming use. The subject property is the "Subcity Market" in Lexington and has been used for a variety of purposes in its history. One of those purposes was as a restaurant, hence the two drive through windows.

When the Alami's began operating the store in 2002, customers could use a drive up window on the west side of the building to drive or walk to the window to purchase items. However, as the result of an attempted armed robbery in 2006, the Alami's only allowed purchases through the west drive up window. At some point, traffic backups cause the Alami's to use the east drive up instead of the western one they had traditionally used. In 2012, as a result of code enforcement action, the Alami's applied for permission to continue to operate the drive through window. The Board denied approval claiming use of the drive up window was an unlawful expansion of a nonconforming use.

It was important to the appellate court's resolution of this case, that the Board did not seek enforcement or to limit the use of the property until property owners in the area complained about the use citing with approval authority that:

> "[t]he courts have historically cautioned against such reactive local legislation." (Citations omitted.)

On appeal the court reversed the Board and ordered the approval of the drive through window. The court explained that whether changes are an expansion of a nonconforming use is a question of law. The court held:

> "Based upon our review of this case and the applicable authorities, we must agree with the Alamis that, as a matter of law, the use of the existing drive-through on the east side of the building did not expand or enlarge the non-conforming use. The use of the property remained the same throughout the time the Alamis ran the store and owned the property. The fundamental purpose of the establishment did not change; it remained a neighborhood retail store where customers could purchase groceries and alcohol. The use of the drive-through window, rather than permitting customers to enter the store to make their purchases, does not work to change the fundamental purpose of the property or the scope of its operation. It merely changes the method of completing the transaction. Any discussion of traffic issues or that the store was being operated as a legal non-conforming use are irrelevant to whether the use of the drive-through constituted an expansion of the nonconforming use. There is no evidence to establish that the store was being used any differently than it had been for several years; it at all times remained a retail establishment. As the Alamis stated in their brief, "the drive-through sales in this case do not enlarge the Owners' building, add additional facilities, increase their capacity or volume, or change their customer base. And the drive-through does not increase or change the number, variety, or type of products sold at the store." Article 4-3 provides that "[a] non-conforming use shall be permitted to continue as long as it remains otherwise lawful" and is not enlarged or expanded, which is not the case here. Therefore, we must hold that the Board was arbitrary in its denial of the Alamis' petition and that the circuit court erred as a matter of law in upholding that decision."

4. *Total Outdoor Corp. v. City of Seattle Dept of Planning & Dev*, 348 P.3d 766 (March 16, 2015)

In this case, the owner of a nonconforming sign structure that was situated atop a building, demolished the sign and rebuilt it to dimensions that the city believed were larger than the original sign and the city code prohibits all rooftop signs. Both the demolition and reconstruction were done without required permits and the reconstruction was done in violation of a city issued stop work order. The city did not know the size of the structure before it was demolished. The only evidence about the size of the structure was from the owner, and the city was not convinced.

The court decided that changes made to a nonconforming structure that do not change the use made of the structure may nevertheless be an unlawful alteration of the nonconforming structure.

The court determined that it was not error for the city to rely for size of the lawful nonconforming structure, on the size of the sign as it was last reflected in a 1981 city permit to determine whether the rebuilt sign was the equivalent of the lawful nonconforming structure. The court explained:

> "Because the work completed under the 1981 permit received a final inspection and approval, the Department is allowed the reasonable inference that the work would not have been approved unless it complied with the dimensions depicted in the 1981 permit and sketch—a total height of 30 feet above the roofline including the 4.5 foot tall sign base. Photos taken during the recent construction may suggest that a completed section of the new frame on one edge of the sign frame matches up with the height of a section of the old frame on the other edge of the sign frame. But no precise 'before' measurements are available and the photos do not include a precise frame of reference. Even accepting that the photos may support a competing inference that the new sign frame is the same size as the sign frame it replaced, the Department was entitled to give greater weight to the competing reasonable inference arising from the final inspection and approval of the work completed under the 1981 permit."

However, the court reversed the city's decision that the signs lighting had to be limited to 816 watts. The court pointed out that there is no applicable code provision that limits the wattage of the sign regardless of whether it is nonconforming.

5. *Noble Parking, Inc. v. Centergy One Associates, LLC,* 756 S.E.2d 691 (Ga.App. 2014).

This case illustrates the potential perils of a landowner temporarily using its property, on which a lawful nonconforming use is maintained, for a temporary use of a type that is, or may be, permitted in the zoning district.

Property owner, Nobel, maintained a lawful nonconforming surface for-hire parking use on its property. The City of Atlanta had previously determined that the landowner's surface parking lot use of the property was a legal nonconforming use. Competitor Centergy One, appealed the city determination and lost. The city code stated that if a property on which a lawful nonconforming use is maintained is put to a permitted use, the nonconforming use is superseded by the permitted one.

Shortly after the city determined Noble had a lawful nonconforming surface for-hire parking use, for a period of about three months, Noble authorized a Cirque du Soleil show—"Cavalia" —to run on the parking lot property. During the time the Cirque show occupied the property, it was not rented for surface parking. When the Cirque show left the property, Noble resumed its surface

parking lot use of the property. One month after Cavalia ended, the city code enforcement agency sent Noble a letter claiming that Cavalia had been a permitted use in the zone and so Noble's nonconforming surface parking use had been superseded by a permitted use and forfeited under the city code. Noble wrote back to the city and said the city was wrong and that Noble would resume its nonconforming surface parking use. Noble did not appeal the city code enforcement letter. The city code authorized "outdoor amusement enterprises" as conditionally permitted use.

No land use "special use permit" under this code section had been issued to either Cavalia or Noble. The competing parking company (*Centergy One*) then sued Noble, seeking an injunction against Noble's resumption of the use of the property as a surface parking lot. Competitor claimed Noble's use of the property to host a Cirque show, used the property for a permitted use in the zoning district. Competitor claimed that using the property for a permitted use, even temporarily, meant the nonconforming use had been forfeited. The city intervened on the competitor's side in the case. The city and competitor also claimed that Noble was foreclosed from defending on the basis that its nonconforming use had not been superseded, because it failed to appeal the city's code enforcement letter to the contrary. They characterized plaintiff's defense as an unlawful collateral attack on a final decision of the city. The trial court agreed with competitor and the city and Noble appealed.

The Georgia Court of Appeals reversed the trial court's grant of an injunction and determination that the landowner's claim was barred for failure to exhaust administrative remedies. The court first decided, "we find no authority… holding that a defendant is barred from *defending* an action brought initially by a third-party… [t]his action did not implicate the administrative process because it began as an action between two neighboring private parties." The court also decided that Cavalia was not a "permitted use" within the meaning of the city code which superseded Noble's nonconforming use. The court pointed out that an "outdoor amusement enterprise" use is only a permitted use under the city code, if a special use permit is obtained and no such special use permit had been obtained. In so holding, the court observed the common law rule that land use restrictions are in derogation of the common law, are strictly construed and "never extended beyond their plain and explicit terms." The court held "[w]e therefore decline to hold that a vested right in a legal nonconforming use can be superseded by a use that takes place outside of the express terms required for that use."

6. *City of Brighton v. Bonner*, 2014 WL 5500313 (2014) (Mich. App October 30, 2014) (Unpublished).

The city and property owner had been fighting about the condition of residences on property owned by defendants for decades. The property at issue had several dilapidated, uninhabited and uninhabitable residences on them that posed, among other things, a fire hazard. The city and trial court initially ordered the defendants to bring the residences up to code. Defendants refused. Given defendant's noncompliance with the court's order, the trial court ordered the residences be demolished. The property owner refused arguing it had a nonconforming use right to leave the dwellings as is or repair them to a lesser standard that current building codes. The appellate court agreed with the trial court. The appellate court explained that given the extremely dilapidated condition of the residences, that the trial court's order to bring them to current code was correct. While the appellate court decided that property owner had a nonconforming use, it also decided the trial court was correct they are also a nuisance. The court affirmed that the city had the right to abate the nuisance and that demolition was an appropriate remedy under the circumstances.

7. *Heck v. City of Pacific*, 447 S.W.3d 202 (Mo. App 2014).

This case involves a mobile home park. Within the existing mobile home park pads and associated facilities are spaced less than 20 feet apart. After the mobile home park had been operating for many years, and nearly 20 years after Heck purchased the mobile home park, the city adopted an ordinance requiring mobile homes be spaced at least 20 feet apart. Thereafter, one of the persons who rented a pad from Heck, which was about 14 feet from the next mobile home pad, moved their mobile home. Two years later, Heck moved another mobile home onto this nonconforming pad to rent to another. City advised Heck that it could not put the mobile home on the nonconforming pad without a variance. Heck filed the application for the variance. The city denied the application. At no point in the proceedings did the city consider whether Heck had a nonconforming use right to have the pads within the entire mobile home park be spaced as is.

Heck eventually argued their entire mobile home park had a right to its existing spacing as a lawful use and they did not need a variance. Neither the city nor the trial court considered this argument. The state appellate court remanded, deciding:

> "If in fact the Hecks have continued their lawful nonconforming use for Pacific Manor, the spacing requirements [in the new code] do not apply and no variance is needed. Accordingly, we reverse and remand to the BZA with instructions that both parties be allowed to present evidence on the issue of whether the Hecks are entitled to continue their lawful nonconforming use for Pacific Manor."

The court added a footnote explaining it was strongly of the opinion that the nonconforming use right exempted the Heck's from the spacing requirement.

8. *Kitsap County v. Kitsap Rifle and Revolver Club*, 337 P.3d 328 (2014).

Since 1926 a rifle and revolver club (Club) had operated on a shooting range composed of about on eight acres. In 1993 the county proposed an ordinance limiting the location of shooting ranges. Club expressed concern over the proposed ordinance. In response, the chair of the Board of County Commissioners (Board) notified the Club that it was considered to be a lawful nonconforming use. The county concedes that the Club's use as it existed in 1993 is lawfully nonconforming. Thereafter, the frequency of the use of the shooting range increased greatly, the hours of operation increased, automatic weapons were more frequently used and commercial uses at the Club increased including training courses including for military personnel. The Club also cleared 2.85 acres, engaged in various "large scale" earth work including installing culverts. The Club did not obtain county permits for these activities. In 2009, the Club acquired 72 acres of land from the county but the transactional papers restricted the Club's activities to the historic eight acres but authorized modernization activities.

In 2011 the county filed a code compliance complaint against the Club for injunctive relief and nuisance abatement. The county took the position that the Club had lost its nonconforming use

because it had expanded activities, failed to obtain permits for development work, and was a nuisance.

After a trial on the merits, the trial court issued a permanent injunction prohibiting the operation of the shooting range until and unless a conditional use permit was obtained, which the trial court said the county was free to condition and in any case prohibiting automated firearms, rifles greater than 30 caliber, exploding targets and cannons, and use as an outdoor shooting range before 9 AM or after 7 PM.

Club appealed. It did not challenge the trial court's factual determinations or that its various land clearing and other development related activities required permits and that they did not obtain the required permits. The Club also did not challenge the trial court's findings of statutory and public nuisance on the basis of an unlawful expansion or unpermitted development.

The appellate court determined that the increased houses did not constitute an impermissible expansion of the nonconforming use but other activities did constitute an expansion, explaining as follows:

> "The trial court concluded that three activities 'significantly changed, altered, extended and enlarged the existing use' and therefore constituted an expansion of use: '(1) expanded hours; (2) commercial, for-profit use (including military training); [and] (3) increasing the noise levels by allowing explosive devises [sic], high caliber weaponry greater than 30 caliber and practical shooting.' We hold that the Club's increased hours did not constitute an expansion of its nonconforming use. However, we hold that the other two activities did constitute an impermissible expansion of use."

> "First, the trial court found that the Club currently allowed shooting between 7:00 AM and 10:00 PM, seven days a week. But the trial court found that in 1993 shooting occurred during daylight hours only, sounds of shooting could be heard primarily on the weekends and early mornings in September (hunter sight-in season), and hours of active shooting were considerably fewer than today. We hold that the increased hours of shooting range activities here do not effect a 'fundamental change' in the use and do not involve a use 'different in kind' than the nonconforming use. Instead, the nature and character of the use has remained unchanged despite the expanded hours. By definition, this represents an intensification of use rather than an expansion. We hold that the trial court's findings do not support a legal conclusion that the increased hours of shooting constituted an expansion of the Club's use." (Citations omitted.)

With regard to whether the Club's use was a private nuisance, the appellate court explained: "However, a lawful activity also can be a nuisance. '[A] lawful business is never a nuisance per se, but may become a nuisance by reason of extraneous circumstances such as being located in an inappropriate place, or conducted or kept in an improper manner.'" The appellate court agreed that even though the Club and its hours were a lawful nonconforming use, the loud ongoing noise during the Club's long hours of operation constituted a nuisance.

The appellate court also agreed with the trial court that the county deed of sale to the club in 2009 was not a tacit determination that the club as it existed in 2009 was lawful.

The appellate court however, reversed and remanded the trial court's imposed remedy of discontinuing the nonconforming use regarding the unlawful expansion and unlawful activates. The court explained:

> "The Club argues that the trial court erred in concluding that an unlawful expansion of the Club's nonconforming use, unpermitted development activities, and public nuisance activities terminated the Club's legal nonconforming use of the property as a shooting range. As a result, the Club argues that the trial court erred in issuing a permanent injunction shutting down the shooting range until the Club obtains a conditional use permit. We agree, and hold that the termination of the Club's nonconforming use is not the appropriate remedy for its unlawful uses.
>
> "We hold that termination of the Club's nonconforming use status is not the proper remedy even though the Club did expand its use, engage in unpermitted development activities, and engage in activities that constitute a nuisance. Neither the Code nor Washington authority, supports this remedy and such a remedy would impermissibly interfere with legal nonconforming uses.
>
> "The appropriate remedy for the Club's expansion of its nonconforming use must reflect the fact that some change in use—'intensification'—is allowed and only 'expansion' is unlawful. For the permitting violations, the Code provides the appropriate remedies for the Club's permitting violations."

Concerning the trial court's findings regarding a public nuisance, the appellate court agreed that abatement of the public nuisance activities was appropriate holding:

> "The trial court issued a second permanent injunction designed to abate the public nuisance conditions at the Club's property, which prohibited the use of fully automatic firearms, rifles of greater than nominal .30 caliber, exploding targets and cannons, and use of the property as an outdoor shooting range before 9:00 AM or after 7:00 PM. The Club argues that the court erred in entering the injunction because the activities enjoined do not necessarily constitute a nuisance, and therefore the injunction represents the trial court's arbitrary opinions regarding how a shooting range should be operated. We disagree."

Thus, at least in Washington State, while it is improper to order a nonconforming use be discontinued based on expansion or unlawful activates, it is appropriate to abate public nuisances.