



Commonwealth of Massachusetts  
DEPARTMENT OF HOUSING &  
COMMUNITY DEVELOPMENT

Deval L. Patrick, Governor ♦ Timothy P. Murray, Lt. Governor ♦ Tina Brooks, Undersecretary

**NONCONFORMING STRUCTURES AND USES**

November 30, 2009

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This outline gives limited information relative to nonconforming structures and uses and is intended only for informational and reference purposes. When a question of legal interpretation arises, local officials should always seek the advice of their municipal counsel.

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**I NONCONFORMING STRUCTURES AND USES**

Chapter 40A, Section 6. "Except as hereinafter provided, a zoning ordinance or bylaw shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, ... ."

1. The existence of a nonconforming use is determined as of the date of the first publication of notice of the public hearing on the bylaw. Tamerlane Realty Trust v. Board of Appeals of Provincetown, 23 Mass. App. Ct. 450 (1987).
2. A nonconforming use or structure is created due to a zoning change and where a business use had begun by variance such use was not a nonconforming use which could be altered by special permit. Mendes v. Board of Appeals of Barnstable, 28 Mass. App. Ct. 527 (1990).
3. A use of property which existed prior to the adoption of a town's zoning bylaw, and would require a special permit under the bylaw were it not pre-existing, qualifies as a nonconforming use. Shrewsbury Edgemere Associates Ltd. Partnership v. Board of Appeals of Shrewsbury, 409 Mass. 317 (1991).
4. Use of property which does not comply with parking requirements could be categorized as a nonconforming use. Osgood v. Town of Andover, 38 Mass. App. Ct. 1129 (1995).

5. A self-inflicted nonconformity makes a conforming structure an "unprotected" structure. Martin v. Board of Appeals of Yarmouth, 20 Mass. App. Ct. 972 (1985); Marblehead v. Deery, 356 Mass. 532 (1969).
6. Issuance and reissuance of a fuel storage permit did not entitle a use to nonconforming protection as a lawfully existing use. Whitten v. Board of Appeals of Woburn, 38 Mass. App. Ct. 949 (1955).
7. Issuance of a special permit rather than the recording of the permit marks the beginning of protection from subsequent zoning changes as a prior nonconforming use. Cohasset Heights, Ltd. v. Zoning Board of Appeals of Cohasset, 53 Mass. App. Ct. 116 (2001).
8. A nonconforming use is not extinguished by a transfer of property. Cape Resort Hotels, Inc. v. Alcoholic Licensing Board of Falmouth, 385 Mass. 205 (1982); Revere v. Rowe Contracting Company, 362 Mass. 884 (1972).
9. A structure is nonconforming if located on a lot that does not meet the minimum lot area requirement of the zoning bylaw. Fitzsimonds v. Board of appeals of Chatham, 21 Mass. App. Ct. 53 (285).
10. Use operated for over 10 years in accordance with a building permit but which did not obtain a special permit as required by the bylaw was not entitled to protection as a prior nonconforming use. Bruno v. Board of Appeals of Wrentham, 62 Mass. App. Ct. 527 (2004).
11. The use of property under a lease for a proper Federal purpose may be immune from the application of a town's zoning bylaw, but it is still considered a nonconforming use. Durkin v. Board of Appeals of Falmouth, 21 Mass. App. Ct. 450 (1986).
12. The burden of establishing a prior nonconforming use is on the party claiming the benefit of such protection. Hall v. Zoning Board of Appeals of Edgartown, 28 Mass. App. Ct. 249 (1990).

## II PROTECTED STRUCTURES AND USES

Chapter 40A, Section 7. "... if real property has been improved and used in accordance with the terms of the original building permit ..., no action ... to compel the abandonment, limitation or modification of the use allowed by said permit or the removal, alteration or relocation of any structure erected in reliance upon said permit by reason of any alleged violation ..., shall be maintained, unless such action, ... is commenced ... within six years next after the commencement of the alleged violation of law;

... no action, ... the effect or purpose of which is to compel the removal, alteration, or relocation of any structure by reason of any alleged violation ..., shall be maintained, unless such action, ... is commenced ... within ten years next after the commencement of the alleged violation."

1. In contrast to the six-year statute of limitations, which explicitly covers both structural violations and use violations, the ten-year period for zoning violations covers only structural violations. The omission

of protection for use violations not sanctioned by the permit is plain on the face of the statute. Lord v. Board of Appeals of Somerset, 30 Mass. App. Ct. 226 (1991).

2. The six-year statute of limitations is applicable where the building permit authorizes the activity which is in violation of the zoning bylaw. Lord v. Zoning Board of Appeals of Somerset, 30 Mass. App. Ct. 226 (1991).
3. A structure on a lot which did not comply with the lot width requirements of the zoning bylaw due to a conveyance was protected by the ten-year statute of limitations. Murphy v. Kotlik, 34 Mass. App. Ct. 410 (1993).
4. A use protected by Section 7 is not entitled to nonconforming use protection. Bruno v. Board of Appeals of Wrentham, 62 Mass. App. Ct. 527 (2004).
5. The burden of establishing whether a use or structure is protected by Section 7 is on the party claiming the benefit. Moreis v. Oak Bluffs Board of Appeals, 62 Mass. App. Ct. (2004).
6. A building permit indicating that a building would be used for “commercial use” lacked the specificity to trigger the Section 7 protection where the court found it absurd to suggest that the Legislature in adopting Section 7 intended “terms of the original building permit” to authorize any and all imaginable commercial uses with no greater specification or description. Moreis v. Oak Bluffs Board of Appeals, 62 Mass. App. Ct. 53 (2004).

### **III ALTERATIONS TO NONCONFORMING STRUCTURES**

Chapter 40A, Section 6. "... a zoning ordinance or by-law shall not apply to structures ... lawfully in existence ... but shall apply ... to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner ... ."

1. When a nonconforming structure is altered to provide for a use different from the use prior to alteration, the ordinance applies even if the new use is a permitted one. Nichols v. Board of Zoning Appeal of Cambridge, 26 Mass. App. Ct. 631 (1988).
2. Repairing is simply mending defective portions of a structure, while an alteration is a change of such a nature and extent as to produce a different structure or a structure so changed in some essential aspects as to constitute a different structure. Boston and Albany R.R. v. Dept. of Pub. Utilities, 314 Mass. 634 (1943).
3. The court recognizes that a municipality may specify conditions for and limitations on changes to nonconforming signs and did not permit a rewording of a nonconforming sign where the bylaw specifically prohibited rewording unless the sign was brought into compliance with the bylaw. Strazzula v. Building Inspector of Wellesley, 357 Mass. 694 (1970).

4. If a zoning bylaw does not specifically prohibit rewording, a rewording of a nonconforming sign is not an alteration of a structure to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent. Barron Chevrolet, Inc. v. Danvers, 419 Mass. 404 (1995).

#### **IV THE SECTION 6 REVIEW AND FINDING**

Chapter 40A, Section 6. "Pre-existing nonconforming structures or uses may be extended or altered, provided that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood."

1. In order to render the statute intelligible, the court added the term "structure" so that the concluding portion of this sentence would read "shall not be substantially more detrimental than the existing nonconforming structure or use to the neighborhood." Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987).
2. The extent that nonconforming structures or uses may be extended, altered or changed is left to the discretion of the local legislative body. The Zoning Act does not require that communities authorize the extension, alteration or change of nonconforming structures or uses. Blasco v. Board of Appeals of Winchendon, 31 Mass. App. Ct. 32 (1991).
3. We conclude that the statute authorizes, but does not require, a municipality to choose a special permit application as the procedure for extension or alteration of a nonconforming use. The statute permits a town to require the same number of affirmative votes to grant applications for the alterations of a nonconforming use as to the grant of any other special permit, or to delegate the chore to the permit granting authority which would permit approval by a simple majority. Shrewsbury Edgemere Associates, Ltd. Partnership v. Board of Appeals of Shrewsbury, 409 Mass. 317 (1991)
4. The statute requires that, in the absence of a variance, any extension or structural change of a nonconforming structure must comply with the bylaw. If the proposed extension or change conforms to the bylaw, the statute requires a finding that the extension or change will not be substantially more detrimental to the neighborhood. Indeed, even as to single or two-family residences, structures to which the statute appears to give special protection, the zoning bylaw applies to a reconstruction, extension, or change that would intensify the existing nonconformities or result in additional ones. Rockwood v. The Snow Inn Corp., 409 Mass. 361 (1991).
5. The statute requires that, in the absence of a variance, any change or substantial extension of a nonconforming use must comply with the bylaw. Cox v. Board of Appeals of Carver, 42 Mass. App. Ct. 422 (1997).
6. An ordinance that permitted an alteration to a nonconforming use in the absence of a finding would violate the literal mandate of Section 6. McLaughlin v. Brockton, 32 Mass. App. Ct. 930 (1992).

7. Zoning bylaw authorized the Board of Appeals to grant a special permit allowing a nonconforming structure to be expanded where, in the opinion of the Board, such expansion would not be "more objectionable to, or detrimental to, the character of the neighborhood than the original preexisting nonconforming structure." This language authorized the Board to grant a special permit which would increase an existing nonconformity and diminish another. Tweed v. Zoning Board of Appeals of Tisbury, 28 Mass. App. Ct. 1106 (1989).
8. Zoning bylaw authorized the Board of Appeals to grant a special permit allowing an extension to a nonconforming structure if such extension would "be in harmony with the general purposes and intent" of the ordinance. This language did not authorize the Board to grant a special permit allowing an extension which would violate existing setback requirements. Wrona v. Board of Appeals of Pittsfield, 338 Mass. 87 (1958).

## V SINGLE AND TWO-FAMILY EXEMPTION

Chapter 40A, Section 6. "... a zoning ordinance or by-law shall not apply ... to any ... alteration, reconstruction, extension or structural change to a single or two- family residential structure [which] does not increase the nonconforming nature of said structure."

1. An alteration, reconstruction, extension, or structural change of a nonconforming single-family or two-family residential structure is legitimate if it does not increase the nonconforming nature of the structure; otherwise, it must be submitted to the special permit procedure of the second sentence for a determination by the board of the question whether it is "substantially more detrimental than the existing nonconforming use to the neighborhood." Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53 (1985).
2. In identifying nonconforming nature, it should be determined in what respects the existing structure does not comply with the bylaw and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones. Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987).
3. The building inspector must make the initial determination whether the home is nonconforming and, if so, whether the proposed improvement would increase the nonconforming nature of the structure. Bramsford v. Zoning Board of Appeal of Edgartown, 444 Mass. 852 (2005).
4. Zoning bylaw which authorized construction of a house outside the footprint of a demolished nonconforming single-family structure without obtaining a special permit is not inconsistent with the Zoning Act. Murphy v. Duxbury, 40 Mass. App. Ct. 513 (1996).
5. Building a larger home on a substandard lot increases the nonconforming nature of the structure. Bjorklund v. Zoning Board of Appeals of Norwell, 450 Mass. 357 (2008).

6. A zoning bylaw provision requiring that a nonconforming building discontinued for a period of two years or more must comply with the zoning bylaw applied in a situation where a nonconforming single-family structure on a substandard lot had been demolished and the existing home was not rebuilt within the two year period. The court ordered the removal of an existing home. Wells v. Zoning Board of Appeals of Billerica, 68 Mass. App. Ct. 726 (2007).

## VI CHANGE OF NONCONFORMING USE

Chapter 40A, Section 6. "... , a zoning ordinance or by-law ... shall apply to any change or substantial extension of such use, ... ."

1. There exists a three part test for determining whether a current use of property is protected as a nonconforming use. Bridgewater v. Chuckran, 351 Mass. 20 (1966).
  - a. Does the use reflect the nature and purpose of the use prevailing when the zoning bylaw took effect?
  - b. Is there a difference in the quality of character as well as the degree of use?
  - c. Is the current use different in kind in its effect on the neighborhood?
2. An existing use will lose the protection afforded a nonconforming use for failure to satisfy even one of the tests. Green v. Board of Appeals of Provincetown, 26 Mass. App. Ct. 469 (1988).
3. Key cases that give a good outline of the three part test are:

Bridgewater v. Chuckran, 351 Mass. 20 (1966); Powers v. Building Inspector of Barnstable, 363 Mass. 648 (1973); Cape Resort Hotels v. Alcoholic Licensing Board of Falmouth, 385 Mass. 205 (1982); Selectmen of Blackstone v. Tellestone, 4 Mass. App. Ct. 311 (1976); Morin v. Board of Appeals of Leominster, 352 Mass. 620 (1967); Berliner v. Feldman, 311 Mass. 767 (1973); Jasper v. Dolan, 355 Mass. 17 (1968); Building Inspector of Groton v. Vlahos, 10 Mass. App. Ct. 890 (1980); Derby Refining Co. v. Chelsea, 407 Mass. 703 (1990).

## VII NON-USE AND ABANDONMENT

Chapter 40A, Section 6. "A zoning ordinance or by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more.

1. The abandonment of a nonconforming use results from the concurrence of two factors; (1) the intent to abandon and (2) the voluntary conduct that carries the implication of abandonment. Pioneer Insulation and Modernization Corp. v. Lynn, 331 Mass. 560 (1954); Dobbs v. Board of Appeals of Northampton, 339 Mass. 684 (1959); Derby Refining Co. v. Chelsea, 407 Mass. 703 (1990).

2. Non-occupancy or suspension of business due to causes over which the owner has no control do not of themselves constitute abandonment and lapse of time not the controlling factor. Pioneer Insulation and Modernization Corp. v. Lynn, 331 Mass. 560 (1954).
3. The Legislature has provided express criteria distinctly stated in the disjunctive so that communities may employ either or both. The first criterion is abandonment that can happen momentarily, without lapse of any stated period of time. Bartlett v. Board of Appeals of Lakeville, 23 Mass. App. Ct. 664 (1987); Ka-Hur Enterprises, Inc. v. Zoning Board of Appeals of Provincetown, 424 Mass. 404 (1977).
4. We think the Legislature intended to authorize municipalities to extinguish otherwise protected nonconforming uses if particular premises are not in fact used for the protected purposes for a minimum of two years. Bartlett v. Zoning Board of Appeals of Lakeville, 23 Mass. App. Ct. 664 (1987); Ka-Hur Enterprises, inc. v. Zoning Board of Appeals of Provincetown, 424 Mass. 404 (1997).
5. Nothing in the Zoning Act suggests that the abandonment or non-use requirements do not apply to nonconforming single and two-family dwellings and the court assumed that such provisions would be applicable to nonconforming single and two-family dwellings. Dial Away Co., Inc. v. Zoning Board of Appeals of Auburn, 41 Mass. App. Ct. 165 (1996).
6. The voluntary demolition of a building constitutes abandonment. Berliner v. Feldman, 363 Mass 767 (1973).
7. The lapse of 23 years following the demolition of a nonconforming single-family structure was so significant that abandonment existed as a matter of law. Dial Away Co., Inc. v. Board of Appeals of Auburn, 41 Mass. App. Ct. 165 (1996).
8. Where the lapse of time (40 years) following the cessation of a nonconforming use was so significant that abandonment exists as a matter of law and evidence of things done or not done carries the implication of abandonment and supports a finding of intent, whatever the avowed state of mind of the owner. Orange v. Shay, 68 Mass. App. Ct. 358 (2007).