

The Grandfathering Clock: Zoning And Nonconforming Uses

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In New York City, as in most jurisdictions with zoning codes, the City's Zoning Resolution provides for the continuation of land uses that are made nonconforming by a change in zoning (grandfathering). The ZR defines a nonconforming use as "any lawful use ... which does not conform to any one or more of the applicable use regulations" of the ZR "as a result of any subsequent amendment thereto." In other words, where, for example, the zoning designation is changed from commercial to residential, existing commercial uses are considered grandfathered and may continue to operate even though no longer permitted by the new residential zoning.



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However, to maintain its grandfathered status, a nonconforming use must be continuous. Under the ZR, if "substantially all the nonconforming uses in any building" are discontinued for two years or longer, "such land or building ... shall thereafter be used only for a conforming use." Maintaining such continuity is important not only with respect to the use in existence at the time of the rezoning but also with respect to future uses. That is because in certain circumstances, and within limits, the ZR allows a nonconforming use to be changed to another nonconforming use.

In the ZR, permitted commercial uses are organized and categorized into use groups, numbered six through 16. Uses in the higher use groups are generally larger and/or more intensive, such as theaters (Use Group 8), department and "big box" stores (Use Group 10) and warehouses (Use Group 16). Use Group 6 uses are smaller, convenience retail stores and businesses such as dry cleaners, drug stores, hair salons and newsstands. Generally, nonconforming commercial uses in the larger/more intensive Use Groups 7 through 16, may only be changed "downward" to a less intensive use group use. However, even that ability is lost if the commercial use is discontinued for more than two years.

The seminal case in New York with regard to grandfathering of nonconforming use is *Toys 'R' Us v. Silva*, 654 N.Y.S.2d 100 (1996). That case involved a warehouse that had been made nonconforming when the zoning was changed from commercial to residential. The warehouse remained in continuous operation until the owner contracted to sell the building and in anticipation of such sale, ceased its warehouse use of the building. When, after 20 months, the sale fell through, the owner moved a limited amount of goods from its other warehouses into the building to preserve its nonconforming status. Several years later, when Toys 'R' Us bought the first two floors of the building, it was issued permits by the Department of Buildings (DOB) to reconfigure the floors and convert the use from a Use Group 16 warehouse to a Use Group 6 toy store, as permitted by the ZR.

A coalition of neighborhood associations appealed the issuance of the building permit to the Board of Standards and Appeals (BSA). Finding that the extent of the reestablished warehouse use was minimal, the BSA revoked the building permit. Toys 'R' Us commenced a civil proceeding to reinstate the permit. Both the trial court and the Appellate Division held that any amount of activity, no matter how small, was sufficient to maintain the continuity of a nonconforming use — in effect holding that all of the use be discontinued before the grandfathering is lost. The Court of Appeals reversed, holding that the statutory language was clear: “substantially all” does not mean “all.”

In a more recent case, the BSA again addressed the question of what constitutes “substantially all” of a nonconforming use, this time where a building contained multiple nonconforming uses. CPW Retail LLC, BSA No. 40-11-A (2011) involved a 32-story residential building with commercial uses on the ground floor that were made nonconforming when the commercial zoning was changed to residential. The building was subsequently declared a condominium with the three ground floor stores, occupied by a grocery, a dry cleaner and a drug store, each being a commercial condominium unit. While the dry cleaner and drug store remained in active operation with no interruption, the grocery store was discontinued for more than two years. The DOB denied a permit for reestablishing commercial use in the unit because it determined that the “substantially all” standard must be applied individually to each store. The owner appealed to the BSA, which found for the owner and reversed the DOB.

The BSA held that the operative phrase “substantially all the nonconforming uses in the building,” means the two-year discontinuance period applies to *all* of the uses in the *entire* building. Because the two stores that never ceased operations constituted nearly half of the combined commercial floor area, the discontinued grocery store could not be considered “substantially all” of the building’s commercial uses and therefore the commercial use could be reactivated.

As stated by the Court of Appeals in *Toys*, while “[t]he law ... generally views nonconforming uses as detrimental to a zoning scheme, and the overriding public policy of zoning in New York State and elsewhere is aimed at their reasonable restriction and eventual elimination,” at the same time “zoning regulations being in derogation of common-law property rights, should be strictly construed in favor of the property owner.” This countervailing public policy interest was a major consideration in several cases dealing with the question of when the discontinuance period may be tolled.

In *149 Fifth Avenue Corp v. Chin*, 305 A.D.2d 194 (1st Dept. 2003), a nonconforming sign was removed from an exterior wall to perform legally mandated building facade inspection and repairs, which took 27 months to complete. The DOB then denied a permit to restore the sign because the use had been discontinued for more than two years. On appeal by the owner, the BSA agreed with the DOB, but in a civil proceeding brought by the owner, the Supreme Court reversed and the Appellate Division affirmed. “Where, as here,” the Appellate Division held, “interruption of a protected nonconforming use is compelled by legally mandated, duly permitted and diligently completed repairs, the nonconforming use may not be deemed to have been ‘discontinued’ within the meaning of [the] Zoning Resolution.”

In *Bogey’s Emporium v. City of White Plains*, 114 A.D.2d 363 (2nd Dept. 1985), the owner was denied a license to continue a nonconforming cabaret use for the reason that the six-month discontinuance period had run. However, the Supreme Court held and the Appellate Division affirmed that the “only” reason the owner was prevented from continuing the cabaret use within six months was that the city took nine months to review and approve his license application.

In *Greentree Realty LLC v. Village of Croton-on-Hudson*, 46 A.D.3d 512 (2nd Dept. 2007), the owner of the subject property sought a judgment declaring that use of the property as a waste transfer station

was a continuation of a legally nonconforming use. The Village moved for a preliminary injunction on operating the waste transfer station unless and until the owner obtained a special permit. The motion was granted. The owner cross-moved for an order tolling the discontinuance period for the duration of the litigation, which motion also was granted. On appeal by the Village, the Appellate Division upheld the tolling of the discontinuance period, finding that reestablishment of the nonconforming use was “prohibited by operation of a legal mandate — the preliminary injunction.”

While tolling of the discontinuance period may, in some cases, give property owners a bit of “breathing room” to continue or reestablish a nonconforming use, a property owner’s best defense is to ensure that there is no discontinuance in the first place. Owners are well-advised to familiarize themselves with the applicable regulations in their city or town and if a nonconforming use is discontinued, keep a close eye on the grandfathering “clock.”

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