

## Chapter 18

### Nonconforming Uses and Structures

#### 18-100 Introduction

A claim that a use or structure is nonconforming is often raised by a landowner as a defense when the zoning administrator has determined that a particular use is in violation of the zoning ordinance.

The principles that apply to *nonconforming uses* and *nonconforming structures* actually compose a class of vested rights (discussed in chapter 19). However, nonconformities and vested rights are treated in separate chapters in this handbook because different rules apply, even though both are intended to protect certain existing private property interests when zoning regulations are changed.

Nonconforming Uses	Vested Rights
Determines whether a <i>pre-existing</i> use may continue even though it no longer conforms to new zoning regulations.	Determines whether a <i>previously approved</i> use has ripened to the point that it should be allowed to exist, even though it would not conform to new zoning regulations.

The Virginia Supreme Court has made it clear that when one is considering nonconformities, the principle of vested rights is at hand. *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 454, 643 S.E.2d 203, 206 (2007) (operation of a power plant before the city had adopted comprehensive zoning established “a vested right to use the property for operation of a power plant” when the 1963 and 1992 zoning ordinances were adopted); *Holland v. Board of Supervisors of Franklin County*, 247 Va. 286, 441 S.E.2d 20 (1994) (a landowner may acquire a vested right to conduct a nonconforming use on its property if that use was in existence on the effective date of the zoning ordinance; because the quarry was not operational on the effective date of the county’s zoning ordinance, a vested right under the common law of vested rights in effect at that time was not established); *Edenton v. Board of Zoning Appeals of Spotsylvania County*, 37 Va. Cir. 176 (1995) (a nonconforming use is said to be a vested right that zoning regulations generally cannot annul).

The doctrine of nonconformities is similar to, but different than, the concept of *grandfathering*, which is the term used when a locality expressly exempts a use or land from newly adopted regulations that would otherwise apply. See, e.g., *Bertozzi v. Hanover County*, 261 Va. 608, 544 S.E.2d 340 (2001).

The rules applicable to nonconformities are governed by Virginia Code § 15.2-2307(C) through (G). The reader is advised to refer to, be familiar with, and stay current with that statute, because it is regularly amended by the General Assembly.

#### 18-200 The nature of a nonconforming use

When a locality adopts or amends its zoning ordinance, the land within the locality is either undeveloped or developed with uses that may not conform to the new zoning regulations. These pre-existing uses may, if allowed to continue, threaten the effectiveness of the locality’s comprehensive plan and zoning regulations. Nonetheless, it is well established in Virginia law that “as to an existing use, absent condemnation and payment of just compensation, the landowner has the right to continue that use even after a change in the applicable zoning classification causes the use to become nonconforming.” See *Hale v. Board of Zoning Appeals for the Town of Blacksburg*, 277 Va. 250, 271, 673 S.E.2d 170, 180 (2009); *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 626 S.E.2d 374 (2006).

A *nonconforming use* is a lawful use that exists on the effective date of the zoning regulation and continues from that date in non-conformance to the ordinance. *Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005); *Town of Front Royal v. Martin Media*, 261 Va. 287, 542 S.E.2d 373 (2001); *Hardy v. Board of Zoning Appeals of Powhatan County*, 257 Va. 232, 508 S.E.2d 886 (1999); *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 260 S.E.2d 232 (1979).

A nonconforming use may not be established through a use of land which was commenced or maintained in violation of a zoning ordinance. *Board of Supervisors of Washington County v. Booher*, 232 Va. 478, 352 S.E.2d 319 (1987); *Hardy, supra*; *McLane v. Wiseman*, 84 Va. Cir. 10 (2011) (junk vehicles did not become a lawful nonconforming use when the county amended its zoning regulations in 1985 to, among other things, substitute “inoperative motor vehicle” for “junk vehicle” and expanded a definition so as to deem certain maintenance of inoperative motor vehicles to be a permitted accessory use). In *Booher*, the landowner obtained a rezoning of his land in 1975 from A-2 to B-2, and informed the board of supervisors of his intention to establish an automobile graveyard and junkyard. Neither of those uses was allowed by right or by special use permit in the B-2 zoning district. In 1981, the county amended its zoning regulations requiring a conditional use permit for those uses, but only in the M-2 zoning district. The board denied Booher’s application to rezone his property to M-2 and ordered him to discontinue the use and remove the vehicles from his property. The Virginia Supreme Court concluded that the chancellor erred when he determined that Booher’s operation was a lawful nonconforming use because, quite simply, the use was never lawful, despite the county’s implicit acceptance of the use for several years. The Court added that “[i]t may be that the Board intended . . . to grant Booher a special exception. But an automobile graveyard was not then and is not now a permitted use in the B-2 zone. Booher did not apply for a special exception in that zone [and] the Board had no power to grant an exception by implication. . .” *Booher*, 232 Va. at 481-482, 352 S.E.2d at 321.

As used in this chapter, the reference to *nonconforming uses* includes not only uses, but also structures (*e.g.*, the structure does not comply with new setback or height regulations).

### **18-300 The purpose and scope of the nonconformities principle**

The purpose of Virginia Code § 15.2-2307(C) through (G) and the protection it affords to nonconformities is to preserve rights in existing lawful buildings and uses of land, subject to the rule that public policy opposes the extension and favors the elimination of nonconforming uses. *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243, 482 S.E.2d 812 (1997). Nonconforming uses are disfavored because they detract from the effectiveness of a comprehensive zoning plan. *Gardner, supra*. However, a locality may not terminate a nonconforming use in a manner that is not provided in Virginia Code § 15.2-2307. *See Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 643 S.E.2d 203 (2007). In *Mirant*, the Virginia Supreme Court found that the effect of the city’s zoning text amendment effectively required that Mirant’s coal-fired nonconforming power plant to cease operation within seven years and concluded that “termination of the use allowed by virtue of an established vested right impairs the vested right and therefore violates Code § 15.2-2307.”

A zoning ordinance should contain a statement of intent regarding nonconformities. For example, Albemarle County disfavors nonconforming uses, as expressed in Albemarle County Code § 18-6.1, Purpose:

The purpose of this section 6 is to regulate nonconforming uses, structures and lots in a manner consistent with sound planning and zoning principles . . . Nonconforming uses, structures and lots are declared to be incompatible with the zoning districts in which they are located and, therefore, *are authorized to continue only under the circumstances provided herein until they are discontinued, removed, changed or action is taken to conform to the zoning regulations* applicable to the district in which the use, structure or lot is located.

(emphasis added) A locality’s statement of intent in regulating nonconforming uses is relevant when applying that locality’s nonconformities regulations. *See Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005).

### **18-400 A nonconforming use must have been a primary use of the property; an accessory use cannot become a nonconforming primary use**

Not every pre-existing use qualifies as a sufficient use to attain nonconforming status. The courts have long recognized that, for a use to be eligible for nonconforming status, it must have been a primary use of the property; conversely, an accessory use cannot become a primary nonconforming use. *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 260 S.E.2d 232 (1979) (accessory use cannot become a primary nonconforming use).

Two circuit court opinions highlight application of *Knowlton*. In *Bull Run Civic Association v. Board of Zoning Appeals of Loudoun County*, 7 Va. Cir. 201 (1983), the circuit court concluded that a crusher that was accessory to a nonconforming quarry operation under a 1955 permit was limited to processing stone extracted in accordance with the 1955 permit and to extend its use beyond that which was permitted under the prior permit would elevate the crusher to a nonconforming primary use. In *Gwinn v. Lester*, 1991 WL 835353 (1991), the circuit court found that the landowners could not continue to park a dump truck on their residentially-zoned parcel where a prior regulation required that each parcel have one vehicle space per family unit and at that time the parcel had been used for a farm and a residence. The current regulations prohibited parking dump trucks of a certain size in residential zoning districts. Assuming that the parking space requirement under the former regulations was a “use,” the parking of the dump truck was only accessory to the farm and residence use and when the property ceased to be used for that primary use, the previously permitted accessory use – parking the dump truck – could not become a nonconforming primary use.

There also is support for the related position that a nonconforming use must have been substantial. In *Edenton v. Zoning Appeals Board*, 37 Va. Cir. 176 (1995), the issue was whether the appellants had established camping as a nonconforming use on a portion of their property where the activity was irregular and infrequent. In finding that the evidence was insufficient to establish a nonconforming use, the circuit court stated:

Every pre-existing use does not qualify as a sufficient use to give rise to a vested right. The commonly applied guideline is that only a use which is substantial in the sense that its termination would involve *significant* financial, property, or other economic results will be protected. (emphasis added)

This rule is consistent with the prevailing rule throughout the United States – that a use must be substantial in order to attain nonconforming status. If the rule were otherwise, every trivial, incidental, or insubstantial activity, hobby, or act of personal convenience could attain constitutional protection as a nonconforming use; *e.g.*, a meal served in a house where the invitees are asked to contribute to the cost of the food could be the basis for a claimed nonconforming restaurant use; repairing a car in a garage for a friend as part of a bartered exchange or as a hobby could be the basis for a claimed nonconforming commercial garage; a telecommuter who worked at home from time to time could be the basis for a claimed nonconforming commercial office use.

### **18-500 The burden of proof is on the landowner to establish a nonconforming use except in a criminal proceeding**

A landowner has a vested right to continue a nonconforming use if he or she establishes the validity of the nonconforming use. *Dick Kelly Enterprises, Virginia Partnership, No. 11 v. City of Norfolk*, 243 Va. 373, 416 S.E.2d 680 (1992). In a civil proceeding in which a use is challenged as illegal, the challenging party (*e.g.*, the locality) has the initial burden of producing evidence to show the uses permitted in the zoning district in which the land is located, and that the challenged use of the land is not a permitted use. *Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005). Upon a sufficient evidentiary showing by the locality, the burden then shifts to the landowner to show that the use is a lawful nonconforming use. *Patton, supra*. The reason for placing the burden of proof on the landowner in a civil proceeding is because the landowner has better access to the evidence pertaining to the uses of his or her own property. *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 260 S.E.2d 232 (1979).

The rule imposing the burden of proof on the landowner is not excused by a locality’s incomplete or absent records. *See Town of Front Royal v. Martin Media*, 261 Va. 287, 542 S.E.2d 373 (2001), cited in *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 69 Va. Cir. 129 (2005).

There is no presumption that a lawful nonconforming use exists, so the landowner must produce probative material evidence to meet the burden. In *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 626 S.E.2d 374 (2006), the landowners failed to show that a garage apartment was a lawful nonconforming use from the unsubstantiated opinion of the original landowner’s daughter that the garage apartment was built in accordance with the 1941 zoning ordinance. In *Emerson v. Zoning Appeals Board of Fairfax County*, 44 Va. Cir. 436 (1998), the landowners attempted to establish that their vehicle light service business was

established before the 1941 zoning ordinance was adopted. The landowners acquired the property in 1949, and they failed to present any evidence regarding the property’s use prior to 1949. The circuit court rejected the landowners’ request that the court simply presume that the use of the property was lawful until 1949. *See also Shilling v. Baker*, 279 Va. 720, 728, 691 S.E.2d 806, 810 (2010) (the trial court did not err in concluding that a cemetery did not exist on the property prior to or at the time the urn containing the cremated remains of Shilling’s mother was buried and that the interment of the urn at that location violated county code requiring a special use permit to use the land as a cemetery).

Likewise, circumstantial evidence alone may be insufficient to establish a nonconforming use. In *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 69 Va. Cir. 129 (2005), the circuit court declined to infer that a second dwelling on the landowners’ property was legally nonconforming because the zoning administrator had issued a partially illegible building permit for interior alterations in 1984. The court found that the BZA’s determination that the landowner had failed to sustain her burden was not plainly wrong.

**18-600 The prerequisites to preserving nonconforming status**

Virginia Code § 15.2-2307(C) provides that a zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued provided that three prerequisites are established, as set forth below:

<b>Elements to Establish a Nonconforming Use</b>
<ul style="list-style-type: none"> <li>• The then-existing or a more restricted use continues.</li> <li>• The use is not discontinued for more than two years.</li> <li>• Buildings or structures are maintained in their then structural condition.</li> </ul>

Virginia Code § 15.2-2307(C) also enables a locality to require that the uses of buildings or structures conform to the current zoning regulations whenever they are enlarged, extended, reconstructed or structurally altered. In *Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005), the Virginia Supreme Court held that the right to continue a nonconforming use did not extend to other areas of a building (not used for the nonconforming use) unless, at the time the regulations were adopted, the design of the building clearly indicated that the use was intended throughout. The Court concluded that the owners failed to establish that they had the right to extend the apartment use on the second floor of their building to the first floor, where they only showed that they intended renovations to the first floor, but failed to prove that the first floor was arranged or designed for the apartment use when the regulations were adopted. The Court also confirmed that a locality may establish the manner in which the extension of a use may be permitted, or it may prohibit extension of a use altogether.

An increase in the *land area* of a nonconforming use is generally prohibited. *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243, 482 S.E.2d 812 (1997); *Board of Supervisors of Chesterfield County v. Trollingwood Partnership*, 248 Va. 112, 445 S.E.2d 151 (1994). Also, Virginia Code § 15.2-2307(C) enables a locality to prohibit a nonconforming building or structure from being moved on the same lot or to any other lot that is not properly zoned to permit the nonconforming use.

Finally, in determining whether a nonconforming use is established, equitable concerns cannot be the basis for a decision by the zoning administrator or the BZA. *Board of Supervisors of Fairfax County v. Board of Zoning Appeals of Fairfax County*, 271 Va. 336, 626 S.E.2d 374 (2006) (concern expressed by BZA about ending use of unlawful garage apartment after 54 years of use).

**18-610 The first prerequisite: continuing the existing use or a more restricted use**

The first prerequisite to establishing the right to continue a nonconforming use is that “the then existing or a more restricted use continues.” *Virginia Code § 15.2-2307(C)*. This question is resolved by determining whether the character of the use has changed. *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 576, 260 S.E.2d 232, 236 (1979).

A nonconforming commercial use need not remain static. *Knowlton, supra*. Trivial, insubstantial or reasonably customary and incidental change may be permitted by the zoning ordinance. Numerous cases from other states hold that these minor changes are allowed for commercial uses only; the principle does not apply to residential uses. Unlawful changes of use can result from increased volume or frequency of use. See *83 Am. Jur. 2d, Zoning and Planning, p. 669*. The degree of relevance of any change depends in each case upon the quantum of the increase and its effect upon the purposes and policies the zoning ordinance was designed to promote. *Knowlton, supra; Wheelabrator Clean Water System, Inc. v. County of King George*, 43 Va. Cir. 370 (1997).

Whether a nonconforming use has been increased in size or scope is merely one circumstance relevant to the key determination of whether the character of the use has been changed. *Knowlton, supra*. However, a zoning ordinance may expressly restrict the manner in which a nonconforming use can be extended throughout an entire building, or expressly prohibit extension of the use. *Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005). A zoning ordinance also may prohibit the enlargement of a nonconforming structure. *Adams Outdoor Advertising, L.P. v. Board of Zoning Appeals of the City of Virginia Beach*, 274 Va. 189, 645 S.E.2d 271 (2007) (zoning regulation prohibited nonconforming sign from being structurally altered, enlarged, moved or replaced unless it is brought into compliance with the zoning ordinance; billboard was enlarged because electronic message board attached to the face of a billboard increased both the weight and the mass of the billboard; the fact that the surface area of the message board did not increase the advertising surface area of the billboard was not the controlling factor).

The following cases are examples where the courts found that the changes in the uses were sufficient to change the character of the use and destroy its nonconforming status:

- *General cargo to trash hauling*: The character of the use had changed where a general trucking business engaged in hauling random cargoes using four small trucks parked on unimproved land and repaired and maintained in the shade of a tree, transformed into a specialized commercial enterprise engaged in collecting and disposing trash, using a fleet of 18 large trash compactors whose repair and maintenance required a spacious garage on the site and two gasoline tanks installed underground. *Knowlton v. Browning-Ferris Industries of Virginia, Inc.*, 220 Va. 571, 260 S.E.2d 232 (1979).
- *Warehouse and repair to assembly and fabrication*: The character of the use had changed where the property was used as a warehouse and automobile repair shop prior to adoption of the zoning ordinance, and was thereafter used to assemble boats, trailers, and related equipment, and still later was used for a metal fabrication operation. *Spotsylvania County Board of Zoning Appeals v. McCalley*, 225 Va. 196, 300 S.E.2d 790 (1983).
- *Primary structure to accessory structure*: A barn lost its nonconforming status under a regulation that required accessory structures to be located in the rear yard of a single family dwelling. When a new single family dwelling was established on the property, the barn's status as a primary structure changed to that of an accessory structure, and it was now located in the front sideyard in violation of the regulation. *Aesy v. Board of Zoning Appeals of City of Salem*, 66 Va. Cir. 382 (2005). Note that this is not a true nonconformities case because no change in the locality's zoning regulations made a lawful structure unlawful; instead, it was the actions of the landowner to create a second primary structure that changed the status of the barn.
- *Vehicle repair to paving and sealing*: The character of the use changed where the property was used as a vehicle towing and repair business prior to the adoption of the zoning ordinance, and was thereafter used for the storage of vehicles, equipment, materials and supplies used in a paving and sealing business. Relying on *Knowlton*, the court rejected the landowners' argument that the vehicle repair activities under the original use opened the door for the paving and sealing business because there were truck repair activities associated with the prior use of the property; the similar accessory repair activities could not open the door to allow a different primary use – the paving and sealing business. *Seeksford v. Zoning Appeals Board of the Town of New Market*, 49 Va. Cir. 112 (1999).
- *Residence school and dormitory to primary residence and guest house*: Assuming a lawful nonconforming use had existed, the character of the guest house changed where the property was originally used as a “private residence primary school” with a dormitory, and the rented guest house was originally used for classrooms. Even if the rented

guest house had served as the dormitory, the character changed because using the guest house for a school was not the same as using the guest house for apartments. *Hughey v. Fairfax County Zoning Appeals Board*, 41 Va. Cir. 138 (1996) (ultimately finding that although residence school and dormitory was originally nonconforming, original owners had obtained a special exception from the county in 1945 which converted the nonconforming use into a conforming use).

- *Auto repair; expansion in scope and intent*: Assuming that a lawful nonconforming use had originally existed, the character of a vehicle light service business had changed when the original one-car garage was replaced by a two-car garage, and the landowner turned the part-time business into a full-time business. *Emerson v. Zoning Appeals Board of Fairfax County*, 44 Va. Cir. 436 (1988).
- *Carnival equipment storage with occasional repair to commercial garage*: The character of the use changed where the nonconforming use had been the storage of carnival equipment when not in use, carnival equipment repair, and occasional repair and maintenance of trucks and trailers that transported carnival equipment, and the use became commercial truck and motor vehicle repair and a towing facility. *Town of Mount Jackson v. Fawley*, 53 Va. Cir. 49 (2000).
- *Infrequent to permanent*: The character of the use had changed where the portion of the property on the east side of a creek was infrequently used for camping prior to the adoption of the zoning ordinance, and was thereafter changed to a permanent commercial campground. *Edenton v. Board of Zoning Appeals of Spotsylvania County*, 37 Va. Cir. 176 (1995).

A change in the character of the use is not relevant if the nonconformity pertains to something other than the use. For example, in *Lievan v. County of Fairfax Board of Zoning Appeals*, 2000 Va. Cir. LEXIS 395, 2000 WL 33316930 (2000), the circuit court concluded that the BZA correctly determined that a dry cleaning business was not prohibited in the zoning district where the structure had been used as a shoe store when the applicable zoning regulations were adopted. The court rejected the petitioner's (a competing dry cleaner) argument that the change in the use of the property from a shoe store to that of a high-volume cleaners was a change in the character of the use to one that was more intense. The court noted that the change in use was not relevant because the nonconformity at issue concerned the size of the building used, not the use.

The failure to comply with a particular zoning requirement other than those provided in Virginia Code § 15.2-2307 and the locality's nonconformities regulations cannot be the basis for terminating a nonconforming use. *Donovan v. Board of Zoning Appeals of Rockingham County*, 251 Va. 271, 467 S.E.2d 808 (1996) (failure to screen nonconforming automobile graveyard as required by current zoning ordinance could not be basis for terminating nonconforming use). In *Gwinn v. Herring*, 2000 Va. Cir. LEXIS 392, 2000 WL 33316932 (2000), the circuit court held that a nonconforming junkyard did not become an illegal junkyard when it expanded in the absence of a zoning regulation specifically invalidating the use itself for failure to comply with the regulation.

### **18-620 The second prerequisite: not discontinuing the use for more than two years**

The second prerequisite to establishing the right to continue a nonconforming use is that "the use is not discontinued for more than two years." *Virginia Code § 15.2-2307(C)*.

The Virginia Code does not define what it means to *discontinue* a use. One legal dictionary defines *discontinue* to mean: "Ending, causing to cease, ceasing to use, giving up, leaving off. Refers to the termination or abandonment of a project, structure, highway, or the like." *Black's Law Dictionary*, 6<sup>th</sup> ed. (1990). Another dictionary defines the term to mean: "to break off, give up, terminate, end the operations or existence of, cease to use." *Webster's Third New International Dictionary* 646 (2002). The Virginia Supreme Court has not expressly determined what it means to *discontinue* a use under Virginia Code § 15.2-2307(C).

## 18-621 Whether intent to abandon is required in order for the two-year period to run

The case law nationwide is all over the board on the question of whether discontinuing a use requires an intention to abandon. Some courts have said that *discontinue* is synonymous with *abandon* and require some evidence of intent to abandon. Other courts have said that ordinances terminating a nonconforming use if the use is discontinued for a specified period of time (*e.g.*, 2 years) creates a rebuttable presumption that the landowner intended to abandon the use. Still other courts have held that these regulations require no evidence of intent to abandon the use by the landowner, but instead look to only whether the use existed during the requisite period. *See Hartley v. City of Colorado Springs*, 764 P.2d 1216 (1988) for an exhaustive analysis of this issue.

Two trial court decisions out of the City of Norfolk appear to require that there be some evidence of an intent to abandon the nonconforming use. *Montgomery v. Zoning Appeals Board of the City of Norfolk*, 45 Va. Cir. 126 (1998); *Turock Estate v. Thomas*, 7 Va. Cir. 222 (1984). In *Montgomery*, the BZA determined that a duplex did not lose its nonconforming status even though it had been more than two years since both units had been occupied. The BZA decision was described by the court as follows:

The BZA based its decision on its reading of discontinuance as requiring a look at the totality of the circumstances of use as a duplex, including the intent of the landowner to use the property as a duplex, as well as overt acts in furtherance of that intent, not simply focused on the single fact of whether the property was occupied by one or two tenants during the time frame.

The *Montgomery* court agreed with the decision of the BZA and interpreted the meaning of *discontinuance* in the Norfolk zoning ordinance to mean that it required an intention to abandon, noting the prevailing view described above from other states, citing several decisions from other state courts, and referring to the definition of *discontinuance* in a law dictionary which defined the word to be “synonymous with abandonment.” One key factor in *Montgomery* is that Norfolk’s zoning ordinance included the following, which may or may not have been relied upon by the Norfolk BZA in reaching its decision: “The words ‘used or occupied’ include the words ‘*intended*, designed or arranged to be used or occupied.”

A trial court from the City of Chesapeake in *In re April 23, 2015 Decision of the Board of Zoning Appeals*, 92 Va. Cir. 246, 248 (2015) has followed *Montgomery*, holding that a nonconforming towing and recovery lot did not lose its nonconforming status where the owner attempted to lease the property throughout the period during which the towing lot use was discontinued and obtained a tenant within the 2-year period whose actual use was prevented by the zoning dispute at issue in the case. The court said that “discontinuance or abandonment as used in zoning laws is construed to contain an element of intent, plus overt acts indicative of abandonment.”

A locality should address whether an intention to abandon is part of the determination as to whether a use has been discontinued for two or more years in its zoning regulations. The General Assembly has not required an intention to abandon in the language it chose in Virginia Code § 15.2-2307(C), thereby allowing localities to define the parameters of what it means to *discontinue* a use for two years. The Virginia Supreme Court has been willing to look at and defer to a locality’s nonconformities regulations implementing the authority granted by Virginia Code § 15.2-2307. *See, e.g., Patton v. City of Galax*, 269 Va. 219, 609 S.E.2d 41 (2005); *Masterson v. Board of Zoning Appeals of City of Virginia Beach*, 233 Va. 37, 353 S.E.2d 727 (1987).

## 18-622 The starting and ending dates for the two-year period

The starting date for the running of the two-year period may be easy to determine in some cases, such as when a nonconforming grocery store use closes after the building is damaged by a fire. For other nonconforming commercial uses, the only evidence as to when the use discontinued may be from evidence of the date a business license expired, a business tax went unpaid, or a lease agreement expired. For residential uses, the two-year period may begin when the structure is no longer occupied. Localities may need to obtain evidence from neighbors as well as utilities who may be able to determine if and when service was terminated.

The other key issue is whether a use has restarted within the two-year period. In *Board of Zoning Appeals of the City of Norfolk v. Kabhal*, 255 Va. 476, 499 S.E.2d 519 (1998), the owners' grocery store was closed after it was damaged by a fire. Within the two-year period after the store was closed, the owners secured financing to repair the property, paid a meals tax bond, obtained business licenses, obtained building permits and associated sub-permits, and requested and obtained other required inspections. In other words, the owners in *Kabhal* successfully completed virtually all of the steps necessary to re-open their grocery store within the two-year period except to actually re-open its doors for business. The Virginia Supreme Court found that the nonconforming use had restarted within the two-year period. *Kabhal* was followed in *In re April 23, 2015 Decision of the Board of Zoning Appeals*, 92 Va. Cir. 246, 248 (2015), discussed in section 18-621. Merely obtaining a business license is likely insufficient to continue a nonconforming use. *Babazadeh v. Fairfax County Board of Zoning Appeals*, 1997 WL 107641 (Va. Cir. Ct. 1997).

The rule emerging from *Kabhal* and *Babazadeh* is that a landowner must obtain the requisite governmental approvals and successfully engage in a series of activities toward restarting the use within the two-year period in order to preserve the use's nonconforming status. A landowner should not be able to preserve the nonconforming status of her use or structure under *Kabhal* simply by engaging in various activities that fail to re-start the use within the two-year period. For example, obtaining a building permit but allowing it to expire, leasing the property but never re-starting the use, failing to pursue the full range of permits and approvals necessary to re-start the use, are all evidence of a failure to continue the use within the two-year period. In other words, the landowner must demonstrate that she has successfully completed all or virtually all of the steps to re-start the use, rather than merely engage in a series of activities during the two-year period.

### **18-623 Abandoned signs**

A locality may order the removal of a nonconforming sign that has been abandoned after attempting to provide notice to the owner. A sign is considered abandoned if the business for which the sign was erected has not been in operation for a period of at least two years. The locality may remove the sign and charge the costs to the owner if the owner refuses to remove the sign after reasonable attempts by the locality to notify the owner. *Virginia Code* § 15.2-2307(G).

### **18-630 The third prerequisite: maintaining structures and buildings in their then structural condition**

The third prerequisite to establish the right to continue a nonconforming use is that “the buildings or structures [be] maintained in their then structural condition.” *Virginia Code* § 15.2-2307(C). As noted above, *Virginia Code* § 15.2-2307(C) enables a locality to require that the uses of buildings or structures conform to the current zoning regulations whenever, with respect to the building or structure, the square footage of a building or structure is enlarged, or the building or structure is structurally altered as provided in the Uniform Statewide Building Code (*Virginia Code* § 36-97 *et seq.*). In addition, a zoning ordinance may provide that “no nonconforming use may be expanded, or that no nonconforming building or structure may be moved on the same lot or to any other lot which is not properly zoned to permit such nonconforming use.” *Virginia Code* § 15.2-2307(C).

The requirement that “the buildings or structures [be] maintained in their then structural condition” means that “[w]hen a property owner wishes to make certain changes to, or to move, a building or structure which supports a nonconforming use or is itself nonconforming, the proposed changes are subject to the regulations of the zoning ordinance.” *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243, 247, 482 S.E.2d 812, 815 (1997). A locality may regulate or prohibit new construction related to a nonconforming use. *Gardner, supra* (holding that city could prohibit a cemetery from constructing new buildings or structures to support a nonconforming use).

In *Adams Outdoor Advertising, L.P. v. Board of Zoning Appeals of the City of Virginia Beach*, 274 Va. 189, 645 S.E.2d 271 (2007), the Virginia Supreme Court did not consider the circuit court's holding that the addition of an electronic message sign to a billboard *structurally altered* the billboard because it had already determined that the addition of the electronic message sign had *enlarged* the billboard in violation of the zoning ordinance. *See section 18-610.*

Of course, a change to the structural condition of a building or structure associated with a nonconforming use does not destroy the nonconforming status if the zoning ordinance allows the change. In *Masterson v. Board of Zoning*



*Appeals of City of Virginia Beach*, 233 Va. 37, 353 S.E.2d 727 (1987), a nonconforming hotel was enlarged and the Virginia Supreme Court held that the change in the hotel's structural condition did not terminate its nonconforming status. The change itself did not increase the nonconformity, and the city's zoning regulations allowed "additions or alterations that themselves conform to zoning requirements, as such changes cannot also increase the nonconformity."

#### **18-700 Restrictions on local zoning authority pertaining to certain nonconforming structures and uses: business licenses, building permits, property taxes, and other permits**

If a use was nonconforming and a business license was issued by the locality for the nonconforming use, the holder of the business license operated continuously in the same location for at least 15 years and paid all local taxes related to the nonconforming use, the locality must allow the business license holder to apply for a rezoning or a special use permit without charge by the locality or any agency affiliated with the locality for fees associated with the filing. *Virginia Code* § 15.2-2307(C).

Virginia Code § 15.2-2307(D) prohibits localities from declaring that nonconforming structures are illegal and subject to removal solely because of the nonconformity if: (1) the locality "has issued a building permit, the building or structure was thereafter constructed in accordance with the building permit, and upon completion of construction, the local government issued a certificate of occupancy or a use permit therefor"; or (2) the owner of the building or structure has paid taxes to the locality for such building or structure for a period of more than the previous 15 years." This provision is *restrictive legislation*, as compared to *enabling legislation*, and operates regardless of whether the locality has adopted an ordinance implementing the statute. *Lamar Co., LLC v. City of Richmond*, 287 Va. 348, 352, 756 S.E.2d 444, 446-447 (2014). The protections provided under Virginia Code § 15.2-2307(D) when taxes have been paid on buildings or structures apply even when the nonconforming buildings or structures are not separately taxed. *Cohn v. Board of Supervisors for the County of Fairfax*, 2017 Va. Cir. LEXIS 111 (2017).

In *Cohn*, the Cohns' parcel had three dwelling units on it, where the applicable R-1 zoning district allowed only a single dwelling unit. The two illegal structures apparently were constructed before the Cohns acquired the parcel in 1998. From 1998 to 2009, the first 12 years the Cohns owned the parcel, the three structures were not taxed as separate dwelling units. In 2010, the County began taxing the dwelling units separately. Soon thereafter, the zoning administrator issued a zoning violation because two of the structures had been constructed without building permits or a "use permit." The Cohns appealed, claiming that the two illegal structures had vested rights under Virginia Code § 15.2-2307(D)(ii) because they had been paying real estate taxes on them for at least the 15 previous years. The board of zoning appeals determined that Virginia Code § 15.2-2307(D)(ii) did not apply because the Cohns had not been paying real estate taxes on each separate structure. The board of zoning appeals also decided that Virginia Code § 15.2-2307(D)(ii) does not protect the unlawful use of the structures as dwelling units.

The trial court first concluded that Virginia Code § 15.2-2307(D)(ii) creates vested rights for both the illegal structures and their uses. The trial court also concluded that the protections of Virginia Code § 15.2-2307(D)(ii) applied regardless of whether they were taxed by the county separately, or collectively together with the lawful dwelling unit, and the Cohns were not obligated to report their use of the structures and determine the amount of taxes of each separate structure.

Structures eligible for the protections of Virginia Code § 15.2-2307(D) are nonetheless nonconforming, and a locality may require in its ordinance that such a structure "be brought in compliance with the Uniform Statewide Building Code, provided that to do so shall not affect the nonconforming status of such building or structure." Virginia Code § 15.2-2307(D) also provides that if a locality "has issued a permit, other than a building permit, that authorized construction of an improvement to real property and the improvement was thereafter constructed in accordance with such permit, the ordinance may provide that the improvements are nonconforming, but not illegal."

## **18-800 Reconstruction or restoration of involuntarily damaged or destroyed nonconforming building**

A locality's zoning ordinance must permit the owner of any residential or commercial building damaged or destroyed by a natural disaster or other act of God to repair, rebuild, or replace the building to eliminate or reduce the nonconforming features to the extent possible, without the need to obtain a variance. *Virginia Code § 15.2-2307(E)*. An "act of God" includes a hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, or certain fires. *Virginia Code § 15.2-2307(E)* also provides that a fire caused by an individual other than the owner does not adversely affect the rights vested in the affected property.

If a building is damaged greater than 50 percent (the statute does not state whether it is 50 percent of the physical structure or 50 percent of its value) and cannot be repaired, rebuilt or replaced except to restore it to its original nonconforming condition, it may be restored to that condition. *Virginia Code § 15.2-2307(E)*.

If the building cannot be repaired, rebuilt or replaced except to restore it "to its original nonconforming condition," the landowner has the right to do so. *Virginia Code § 15.2-2307(E)*.