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I. Introduction

Government codes can be messy, long, and confusing, whether at the city, state, or federal level. As new problems arise and unique circumstances come to light, the government tries to help control all possible situations, even the most unlikely. Zoning is a situation-specific government-regulated process that is either quite comprehensive or not comprehensive enough. As time goes on, people change, and so do their needs, wants, and codes. Laws and codes can be updated quickly and efficiently. However, buildings cannot always be repurposed or torn down on time. This means that when zoning is changed, some structures and uses of those structures are grandfathered in, often with many restrictions. This process differs from state to state, but the same basic principle applies where a use that was allowed but no longer is under new zoning guidelines can apply and be granted a non-conforming use status.

The purpose of a non-conforming use status is to update an area or a specific piece of land to the new wants and needs of the surrounding area without the government overreach of taking land away from a private landowning individual or company. Non-conforming uses allow landowners to slowly transition away from their original

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use of the land and repurpose or sell the property to other potential buyers. This is potentially problematic, as this new status can, in some instances, create total artificial scarcity of that resource. This scarcity creates conflicting interests between the government and the operator of the non-conforming use. The push and pull between the two users might lead to instances in which the use never leaves. Numerous municipalities and states have adopted many restrictions that prevent this non-conforming use from having as many abilities as permitted uses. One of these restrictions is the ability to expand or enlarge the use. However, this term is not very clear. Does it mean enlargement of the physical footprint, the number of services provided, or even the number of byproducts created? Could it possibly be all of them and more? Confusion across state lines can make issues enforcing when legal precedent is a mixed bag.

This article lays out the framework for cities and states to adopt a new definition for expansion or enlargement of legal non-conforming uses. The definition of enlargement or expansion of a legal non-conforming use varies by municipality and state. However, this definition should be made uniform to mean only an increase in the physical footprint of the use structures on the legal lot or parcel. We also would propose exemptions for uses with diminishing returns.

II. Background

Zoning was instituted in the United States with the Standard State Zoning Enabling Act (SZEA) of 1926 and the following Standard City Planning Enabling Act (SCPEA) of 1928. These two pieces of legislation laid the framework for states to adopt zoning codes and city planning ordinances to regulate and control development of all types. Each state then adopted its own legislation and gave individual municipalities the power to make their own. As cities grew and urbanization expanded, so did the city and state codes that governed zoning.

Zoning is used to control development without constituting a land taking as laid out in the 5th and 14th amendments of the Constitution. One tool municipalities can use to prevent growth when zoning changes are granting the status of "non-conforming use."

This classification allows now non-compatible uses to be grandfathered into new zoning codes and ordinances. However, these non-conforming uses tend to have many restrictions. The process of granting and allowing non-conforming uses to continue operation varies by municipality and state, but one thing remains relatively constant. Non-conforming uses are usually barred from enlarging or expanding the use of the property. However, the definition of what constitutes expansion or enlargement of use is not well defined in most state and city codes, leading to confusion on what constitutes a violation of their non-conforming use status.

Some key terms relevant to the discussion include:

- Zoning: "Legislative act dividing a jurisdiction's land into sections and regulating different land uses in each section in accordance with a zoning ordinance"[2]
- Land Use: The purpose of the property or legal lot. This is what is being done/used/accomplished and the why of a piece of land.
- Non-conforming use: "Also known as a prior nonconforming use (PNU), this exists when a zoning code is changed, but a parcel of land that is already being used for something disallowed by the new zoning code is "grandfathered in" (is allowed to continue). For example, if a neighborhood zoning is changed to residential, a corner grocery store may be allowed to continue to operate. The PNU will generally end when the use of the land is changed (so if the grocery store closes, the new zoning code will bar a new store from moving in)."[3]
- Diminishing returns use: A use that will eventually run out on a parcel of land because it is being used to gather materials or goods. For example, a gravel pit, a mine of any type, an oil field, or a lumber field.
- Taking: This is when the government seizes private property for legitime public use. There are many forms

2 Legal Institute Library, Cornell Law Library: Zoning (Last visited Feb. 23, 2022), https://www.law.cornell.edu/wex/zoning.

3 Id , https://www.law.cornell.edu/wex/nonconforming_use.

> of this, such as the literal taking of the land or taking of total economic value or benefit from the landowner.

Challenges to zoning ordinances were made shortly after the implementation of *Village of Euclid vs. Ambler Realty Company, 1922*.[4] Ambler Realty sued the city of Euclid, Ohio, after the town changed the zoning on their large piece of property into three different zones. They claimed the change was a taking and not allowed under the V and XIV amendments to the Constitution.[5] The courts disagreed and found that zoning was a legitimate form of police power that both municipalities and states could exercise if it pursued general public welfare. The case defined public interest and the bounds and limits of zoning. This case is considered the landmark case that made zoning stick nationally.

Another case that focused heavily on takings and what constitutes takings regarding land uses and restrictions was *Hadacheck vs. Sebastian* (City of Los Angeles), 1915.[6] Mr. Hadacheck was issued a citation for operating a brickyard within the new Los Angeles city limits where it was prohibited. He claimed that he was in operation before the annexation of the territory and should be exempt. However, the courts found that it was not a legitimate use because it was not a legal or monitored business before the annexation. This case went to the U.S. Supreme Court, where it was also decided that this was not a taking as defined under the Equal Protection Clause of the XIV Amendment of the Constitution. They found zoning not only to be a legitimate form of police power but that, to be a taking, they would have to deprive him of all economic value/potential of his land, which in this case, it did not.

Other cases regarding non-conforming uses determined that amortization of the use was allowed if the timing was "reasonable and just" in order for the person to make a return on the land's investment. In two cases, *State ex rel. Dema Realty Co. v. Jacoby* and *State ex rel. Dema Realty Co. v. McDonald*, it was found that the use of amortization used by New Orleans city officials was a legal

4 *Village of Euclid vs. Ambler Realty Company,* 272 US 365 (1926).

5 U.S. Const. amend V & XIV

6 *Hadacheck v. Sebastian,* 239 U.S. 394 (1915).

right of the municipality and did not constitute a taking as the time period allowed was one year.[7] The process of amortization in zoning is the time limit in which a non-conforming use can operate until it must come into conformity with the new zoning code. Other cities have created restrictions that end the non-conforming use, such as transfer of lease or failure to conform with building design and code regulations whenever repairs or alterations are made.

Zoning has traditionally been a messy and confusing topic. Municipalities and states have extensive and lengthy codes and titles that try to overcome all the possible situations and combinations of issues that could arise. Numerous federal and state organizations have been created to help mitigate some of the more prominent issues that arise in zoning. The most prominent environmental protection act related to urban land uses is the National Environmental Policy Act (NEPA). NEPA was passed in 1970 and was the start of the environmental push by the federal government that created the Environmental Protection Agency (EPA). This organization helped layer more restrictions on the growth of many development types. However, over the last 100 years, there have been other missed definitions, contradictions, and mixed-up terms in this pursuit.

As the needs of municipalities have changed, so have the terms and conditions of zoning. Creating a non-conforming use allowed historical uses to be grandfathered into a new zoning code to prevent zoning from being a total taking of someone's property. The purpose of a non-conforming use status is to allow the property owner to leave on their own terms and prevent a business or use from being an abandoned or damaged eyesore. However, the issue in this status is that it creates artificial and total scarcity of that type of use in the area and drives up the demand. This puts the use owner in direct conflict with the municipality trying to zone it out in the first place. With this contradiction and the desire of the municipality to control zoning but not the business, restrictions on the growth or development of these non-conforming uses have been defined.

7 *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 123 S. 314 (1929) : *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 S. 613 (1929) cert. den. 280 U. S. 556 (1929).

These definitions, however, are not consistent or clear in many states and municipalities. The most ambiguous terms are "expansion" or "enlargement" in some areas.

Think of a restaurant in a residential neighborhood. The municipality changes the zoning to all residential and gives the restaurant non-conforming use status. This restaurant now has no competition and will have no new competition. The restaurant decided to expand its dining room on its lot. It is prevented from doing so as it is violating its status by expanding the non-conforming use. However, what about the number of deliveries or meals it serves every night? Before the status of a nonconforming use, it served 200 people a day and made 15 deliveries on average. Post-zoning change, the restaurant now helps over 500 people and has over 500 deliveries a day on average. There has not been an expansion or enlargement of the structure but an expansion of the use. This is where code and titles tend to disagree within the same state or municipality. What counts as an expansion is an issue.

One such case in New Jersey, *Bonaventure International v. Spring Lake* ran into issues when the nonconforming use status of a restaurant was brought into question.8 The restaurant was first granted non-conforming use in 1974 and was a small 48 seat restaurant and bar. Over time the building was sold, expanded, and its use was changed. However, it always partially remained a restaurant. The beachfront restaurant was always a popular location and never met with much opposition. However, the state of New Jersey and the local municipality started to change and limit the expansions and exchanges of legal non-conforming uses. In the 1990s, the restaurant became a 98 seat restaurant that also was a banquet and wedding venue. The plaintiff argued that since the banquet services were new, and they brought tons of customers at once, this was an expansion that is now barred under the new zoning code. The municipal boards did acknowledge and accept that the restaurant is still technically a legal non-conforming use as of 1974, but they did allow for any of the expansions or transfers that happened from 1974-2000. The

8 *Bonaventure International v. Spring Lake*, 350 N.J.Super. 420 (App. Div., 2002).

planning board approved the expansion but put limits on the number of catering services the bar and restaurant could provide and limited the ability of the restaurant to apply for further liquor license renewals and business licensing. This case is an example of one state where the expansion of the building footprint did not change, but the intensity of the use did, and the state voted in different directions in different years as to what constituted an expansion.

For this purpose, I claim a framework that allows for any state or municipality to accept this definition of expansion or enlargement into their respective codes or titles and adjust it to their specific needs. The definition of enlargement or expansion of a legal non-conforming use varies by municipality and state. However, this definition should be made uniform to mean only an increase in the physical footprint of the use structures on the legal lot or parcel.

III. Proof of Claim

A. Constitutional Protections

As stated earlier, zoning is a legitimate use of police power for states and cities to use as long as it pursues benefits for the general good and the public. Above this, however, the Equal Protection Clause of the Fourteenth Amendment and the Fifth Amendment protects individuals from takings.[9] The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation."[10] These amendments prevent planners and lawmakers from creating such laws that would destroy the economic value of a person's private land and property. For this reason, grandfathering rules such as conditional use permits and non-conforming use statuses have been integrated into many states. Some may argue that the regulations and restrictions of each of these permits/statuses constitute takings. However, both allow operation of existing use without expanding and enlarging the use as it no longer contributes to the public good as determined by the law-making body that approved

9 U.S. Const. amend XIV, § 1.

10 U.S. Const. amend V, § 1.

the zoning change. While there is much to be said about the constitutionality of specific state and municipalities restrictions and rules of non-conforming uses, this paper focuses solely on the definition of expansion and enlargement.

B. Why Zone Out Specific Uses?

Certain businesses and types of uses may be zoned out for aesthetic reasons only, but many are for more practical ones, such as removing unsightly or unwanted uses. However, these uses can range from a restaurant to a chemical processing facility. The process for removal must follow the constitutional rights of the landowner, as explained in the previous section, which means much time is dedicated to moving out unwanted uses. The regulations of sexually-oriented businesses are one of the most popular uses that are zoned out. Sexually-oriented businesses include things such as strip clubs, sex shops, adult theaters, and so on. Another common way is to zone-out buildings that do not add to the visual appeal, like factories in high-end commercial districts.

Regardless of the real reasons behind the zone change, most planners and lawmakers prefer an efficient change that limits the amount of time a property is vacant or not in use. As these reasons show, this transition should be helped by promoting the business or use to continue and end on their terms while also helping accomplish the planners' goals as they pursue the public good.

C. NEPA and Application

Some may argue that by allowing places to become more intense in their use or efficiency of the use, they may produce more noxious or unwanted by-products. These could be anything ranging from air and water pollutants to noise and even smells. The reason for not involving environmental restrictions on expansion of the intensity of the use is due to existing environmental and noxious use codes at the municipality, state, and federal levels. Instead of trying to regulate businesses even more, leaving the definition of enlargement at the proposed claim, there is less redundancy in code regulation.

The EPA enforces and also complies with NEPA in all of its policies and initiatives. Through NEPA, however, individual states may also choose to add on or make the regulations even more restrictive when it comes to specific environmental protections. NEPA regulates a list of some of the most harmful and potentially dangerous pollutants that might be produced by certain land uses or industrial processes. They regulate waste overall and pollutants coming from or accumulating from a use. When a specific land use applies to be a non-conforming use, this falls under a type of conditional use permit that will trigger NEPA environmental reviews regularly if the use produces one of these harmful pollutants is in excess. However, this does not cover all possible types of negative or noxious by-products.

States may create their own more regulating agencies, but they only can be equal to or more restrictive than those standards of NEPA. For example, California and Illinois have the respective environmental regulating and permitting agencies, CalEPA and IEPA. Under CalEPA, any and all land-use changes or developments, including zoning changes that would require non-conforming or conditional use permits, require a complete environmental impact study in order to be approved. This may seem extreme, but this gives the state and municipalities the ability to regulate noxious or unwanted uses and prevent them from increasing their efficiency if that efficiency creates more pollutants or environmental issues.

NEPA, or any other state regulating agency, may not have complete control over specific noxious uses that may have slightly more noise, light, or smell pollution. Instead of trying to target it in application to non-conforming uses, a municipality should pursue a separate code change that covers the expansions of ANY noxious use that has these less severe pollutants. This way, all land-use types would fall under this regulation, and non-conforming uses would not be targeted individually, something that might start a constitutional right violation or claims of a taking.

D. Uses of Diminishing Returns

An exemption suggested with this claim and definition of enlargement is those uses that are of diminishing returns. As defined earlier,

this is any use that is gathering some sort of resource from the legal lot or parcel that will eventually run out. Examples would be lumber fields, gravel pits, mines, quarries, or sandpits. These uses are intended to take what the legal lot offers and then repurpose it to sell-off. The purpose behind these uses is short-term, and the intention is never to stay indefinitely. With these intentions, limiting these uses when the zoning changes to not expand the physical structures or area of the use to the entirety of the legal lot would constitute a taking. This violation of constitutional rights can be avoided if uses that are determined to have diminishing returns are allowed to continue the use under a non-conforming status to the entirety of the legal lot.

There is an example of this in Utah. The owner of a 160-acre gravel pit in Tooele County requested the ability to expand his gravel pit within his lot while under a non-conforming use status. The county rejected the request, and the defendant appealed it, arguing that the use was one of diminishing returns and, therefore, a legitimate action he could take. According to Utah Code § 17-27a-510, expansion of a nonconforming use is permitted if the user is found to be in line with the *doctrine of diminishing assets*. The case *Gibbons & Reed Co. v. North Salt Lake City* was the landmark decision that ruled and found that these uses with diminishing assets could expand but only within the legal lot.[11] Other states have similar rules, but the adoption of this exemption would allow a use with a definite end to continue under a non-conforming use status. The use would, as stated earlier, still need to comply with any new or additional environmental regulation that may apply to it.

E. Other Exemptions

Even with the exemption for diminishing returns, municipalities should include sections in their code that allow for an exemption that promotes general health and welfare and promotes overall public safety. Because of the specific needs and case-by-case situations that could arise, the exact wording of these exemptions will depend on the municipality's needs at the time of code adoption and the size

11 *Gibbons & Reed Co. v. North Salt Lake City*, 431 P.2d 559 (Utah 1967).

and scope the municipality wishes to take control of land-use decisions. Some states have taken it upon themselves to adopt specific policies regarding non-conforming uses that may alter this definition of expansions under a non-conforming use.

1. Exemption for rebuilds/reconstruction of destroyed non-conforming use

    a. This case comes from the state of Washington. The plaintiff attempted to rebuild his lumber mill that burned down during its non-conforming use status. Before the permit for the rebuild was requested, the municipality passed a new ordinance that banned lumber yards in the area of the town where the mill was located. However, the Washington Supreme Court ruled that non-conforming uses could not be destroyed or taken away unless their continuance was detrimental to public safety, health, etc. Other similar findings were found in Texas as well (see Crossman v. Galveston).[12]

2. Challenging a non-conforming use definition

    a. In *American Wood Products Co. v. City* of Minneapolis, the courts found that the burden of proof for challenging the definitions of expansions or enlargement of a nonconforming use fell on the landowner in order to challenge a municipalities definition or classification.[13] This meant that unless a non-conforming use owner could prove that their use was no detrimental effect or that the municipality definition was not protecting the public health, interest, etc., then the definition and restrictions would stand.

The specifics of what constitutes a definition of enlargement or expansion still stand at the expansion of the physical use structures.

12 *Crossman v. Galveston,* 112 Tex. 303, 247 **S.W.**810 (1923).

13 *American Wood Products Co. v. City* of Minneapolis 1 F. (2d) 440 (D. C. Minn. 1927); af'd. 35 F. (2d) 657 (C. C. A. 8th, 1929).

While some exemptions are possible, the semantics and logistics of specific cases need to be addressed as they come into the municipality or as the needs of the municipality change.

IV. Conclusion

Overall, non-conforming use classifications are quite individual and depend on the situation as a whole. However, this type of classification allows for more efficient and fair transitions for landowners and lawmakers as cities and needs change. Promoting the business or use while slowing the use to go on their own time allows for a more economically fiscal and overall better transition for the municipality, state, and landowner. However, the problem of ambiguity over the terms "expansion" or "enlargement" has led to confusion and has hindered the ability of this land-use transition. The focus of these terms should only refer to the literal expansion of the physical footprint of the use buildings, but not in the efficiency of the use in the same physical space. The exemptions for this would be any use that is of diminishing returns, and any time the transitional cost or thought of physical expansion is not detrimental to the overall public health and well-being as seen by each specific case-by-case decision.

This claim is not a call to action for all municipalities and states to adopt uniform zoning codes and definitions. That would defeat the purpose of acknowledging and using the many differences experienced across the United States to our advantage. However, this is the framework for planners and lawmakers to adopt a more uniform definition that will benefit them and the many private landowners in their jurisdictions. This allows for more straightforward rules and restrictions to protect those with non-conforming use statuses and the municipality from frivolous lawsuits on unclear violations of the non-conforming use status. Most importantly, this definition clarification will allow businesses to grow and eventually leave on their terms while also allowing the municipality and planners to accomplish their goals for the public. Restrictions do not have to be detrimental to the survival of a business, and property rights do not have to be the bane of governmental intervention in the pursuit of the overall public wellbeing.