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Enforcing the Law Against "Grandfathers"
Evolution and Current Issues Regarding Non-Conforming Uses

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Enforcing the Law Against "Grandfathers": Evolution and Current Issues Regarding Non-Conforming Uses

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An often perplexing issue facing code enforcement officials involves pre-existing, non-conforming uses, often called "grandfathered" uses. "Text book" descriptions, like so many other aspects of land use controls, may portray concerns as rather simple, black and white issues. Reality, though, suggests that the concepts and practical issues involved in non-conforming use practice involve many shades of gray.

Perhaps under the notion that silence is a virtue, the Standard State Zoning Enabling Act (SZEA") did not contain any reference to nonconforming uses. Nor did many of the early zoning ordinances that formed the basis for much of the development of early zoning law in this country. That said, both statutory enabling (and limiting) legislation now generally do speak to the concept, as do virtually all local adopted zoning and land use controls. Constitutional protections for property rights, as shaped by court decisions, now play a major role in the treatment of non-conforming uses.

Accordingly, this paper seeks to provide guidance primarily in a code enforcement context, but with some historical perspective as well. Thus, this paper includes sections on:

A. Basis and Genesis: Policy and Background.
B. Identification and Creation.
C. Abandonment and Termination.
D. Expansion/Extension.
E. Alteration/Change.
F. Some Recent Cases.
G. Enforcement Guidance.

A. "In the Beginning": Basis and Genesis. Municipalities existed before zoning or other land use controls were adopted. Accordingly, property uses were in existence and likely developed in a haphazard manner without a cohesive or organized pattern, though a process akin to "natural selection" likely separated some of the more objectionable uses from the more "desirable" ones by operation of nuisance principles and property owner choice. Even with those limiting factors, though, the imposition of a map created by local government that outlined uses and dimensional requirements[1] necessarily meant that some property uses and conditions that pre-dated land use controls were made "illegal" by the newly adopted controls. Thus, one definition of non-conforming use ("NCU") that seems apt is:

> A land use which precedes a zoning regulation, but which becomes illegal under the subsequently effective ordinance (or amendment) is called non-conforming.[2]

A primary reason why non-conforming uses have some degree of protected status is to avoid a retroactive (*ex post facto)* adverse impact on vested property rights that could amount to an uncompensated taking of property in violation of the Fifth Amendment, Due Process, and

[1] One factor in examining nonconformity is to recognize that it may arise in both the use regulation component of zoning and in the application of dimensional requirements.
[2] Burke, Understanding the Law of Zoning and Land Use Controls, (2nd Ed., 2009), §7.03, citing *Odegard Outdoor Advertising, LLC v. Zoning Board of Adjustment of Jackson City,* 6 S.W.3d 148 (Mo. 1999).

comparable state constitutional provisions. Though the government power of eminent domain might be used to effect immediate removal of such non-conformities, the cost involved would be impracticably prohibitive. Instead, by carefully proscribing their expansion or alteration,[3] it was to be expected that NCUs would wither and "just go away." Particularly in the context of nonconforming signs, a doctrine called amortization[4] appeared whereby NCUs that had lived their useful lives would naturally disappear and ride off into the sunset never to be seen again.[5] Accounting, old English land titles, and modern land use, though, are different worlds. While accounting principles do amortize uses, property does not necessarily follow those rules. Instead, structures and other property retained their value and were modernized and adapted to new conditions (with or without permission) so that NCUs did not just "fade away."

Reality, having reared its ugly head at this point, provided an intersection between policy, practicality, and property rights, with resulting head-on collisions. History had advised us that, contrary to early thought and expectations, NCUs seldom just "go missing." Indeed, in retrospect, logic could have been seen as dictating a contrary result. Property values arise in different ways – one of which is its unique setting. Thus, a non-conforming property may have increased utility (and, hence, higher value) just **because** it is non-conforming. Examples can be found in such instances as:

- A pre-existing neighborhood "Mom and Pop" store in a residential zone;
- A multi-family dwelling in a newly-zoned single family district;
- A cattle feed operation on the fringes of growing residential, retirement home developments.[6]

While the origin of non-conforming use theory lies in preventing unconstitutional takings of property rights protected under the constitution, its evolution and current status under both legislation and zoning ordinances often reflects treatment that is notably more generous than the bare "continuation of the use" protected under property rights doctrine. Moving on from the

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[3] Often described in terms such as "It is the express policy of zoning to eliminate non-conforming uses," a statement which seems more often honored in the breach than in the observance. *McKenzie v. Town of Eaton Zoning Bd. of Adjustment*, 917 A.2d 193 (N.H. 2007), citing 4 *Zeigler, Rathkopf,* The Law of Zoning and Planning , § 74:11, ("the spirit of zoning is to restrict, rather than increase, nonconforming uses and to eliminate such uses as speedily as possible").

[4] "Borrowed," it would seem, from the accounting world and from the term "mortmain" denoting alienation of lands to corporations and the English acts seeking to prevent land from being perpetually possessed by religious corporations.

[5] One early problem was trying to compute an amortization period that was not artificial and that allowed sufficient recovery of investment-backed expectations, *Loundsbury v. Keene*, 453 A.2d 1278 (N.H. 1982). The notion of investment-backed expectations is now seen as one way of looking at vesting of property rights, *AWL Power, Inc. v. City of Rochester*, 813 A.2d 517 (N.H. 2002), and as an indicator of when governmental action may arise to a regulatory taking, *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

[6] This example refers to the famous decision in *Spur Industries, Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972) wherein a pre-existing cattle feed operation was found to be an abatable nuisance in the path of on-coming residential development, but the abatement was conditioned upon the residential developer paying to relocate the operation. The remedy presumably reflected the bargain price at which the developer was able to purchase *aromatic* property near a stockyard. Traditional nuisance law might have left the stockyard in place as the developer "came to the nuisance." In lieu of adopting zoning and "taking the stockyard by requiring immediate cessation" or waiting for an amortization period to expire, this "pay-to-play" remedy, in effect, provided compensation for what might be viewed in today's case law jargon as a "judicial taking." *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. ___; 130 S. Ct. 2592, 177 L. Ed. 2d 184, 78 (2010).

SZEA, state statutes and ordinances now may state an overall general policy that recognizes the legitimacy of continuing an NCU, but limiting their extension and expansion. For example, New Hampshire law states:

> **RSA 674:19 Applicability of Zoning Ordinance.** A zoning ordinance adopted under RSA 674:16 shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration.

However, NH statutes now provide much greater protections for property owners. RSA 674:39 vests approved site and subdivision plans from subsequent regulatory changes for five years if active and substantial development is commenced within twenty-four months after approval. RSA 676:12 insulates a project from subsequent regulatory changes if the application for approval (site plan or subdivision) is formally accepted by the planning board before it posts notice of proposed changes.

The general policy, if not limited by statute, may be continued within the regulatory structure; or, as may be the case, the general policy may become riddled with exceptions, permitted alterations, and special provisions that seem far from limiting. These limitations on the general policy to eliminate NCUs may arise from statute, ordinance, or case law that recognizes that property rights are not static and that ability to use property is what gives it value.

> ⊙ **Practice Tip:** NCU problems might be lessened by drafting ordinances and amendments with due regard for present-day land uses. Occasional discussions between the Board of Adjustment[7] and Planning Officials as to NCU and variance applications may disclose areas where zoning amendments might be appropriate.

B. "And on the 8th Day, Zoning Created NCUs": Identification and Creation. For an NCU to have protected status, it must have come into existence in some legal manner, in some incarnation, at some time prior to adoption of the regulation making the use or condition non-conforming. It might appear that identification of the point in time at which this genesis occurs should be relatively easy; but appearances can be deceiving.

A number of principles govern this identification process and their applicability may vary from jurisdiction to jurisdiction. In general, though, the following "rules" may be said to apply:

- Mere intent to do something with land is insufficient to create vesting.[8] Thus, merely having a building permit provides "paper rights" to act, but does not necessarily vest that right from subsequently changed regulations. (See comments above as to NHRSA 674:39 and 676:12.)
- The use also must exist legally in order to attain protected status.[9]
- The burden of demonstrating the existence of an NCU is on the person claiming it.

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[7] This paper uses the term Zoning Board of Adjustment (ZBA); other states may give it another title, e.g. Board of Appeals.

[8] *Wunderlich v. Webster*, 371 A.2d 1177 (N.H. 1977), citing 1 R. Anderson, American Law of Zoning § 6.18 and 8A E. McQuillin, The Law of Municipal Corporations § 25.186.

[9] *Arsenault v. Keene*, 187 A.2d 60 (N.H. 1962), as to apartment constructed without required building permit; *Derry v. Simonsen*, 380 A.2d 1101 (N.H. 1977), holding that rewrite of zoning ordinance did not create nonconforming use status for unapproved campground.

NCU status, as a form of vested rights, generally relates to an existing structure or use of a structure or property. Vesting, though, may prove to encompass more than what currently exists "on the ground." For example, a partially developed subdivision begun prior to adoption of minimum lot size requirements substantially larger than the developed lots was deemed "grandfathered" from those new standards because they were incompatible with the existing pattern, and completion of the subdivision using the larger lots would substantially decrease the value of the remaining property and the return on the investment already made.[10]

The applicability of laches or equitable estoppel against local government may vary by jurisdiction, but failing to take enforcement action against an open or otherwise "known" regulatory violation cannot be viewed as helpful in seeking to contest nonconforming use status. Where questions arise as to when or how a use came into existence, absence of municipal documentation may not be fatal but, again, will not be helpful and records that do exist may raise concern.[11] Therefore, review of municipal records (land use, assessment, and others) is an important first step in determining if enforcement action is warranted.

- ***Practice Tip.*** A variety of sources exist for determining if a use was physically present at any given time, including assessment records, aerial photos (now replaced by satellite images), neighborhood observations, business licenses, and perhaps state or local business or income tax records. Observation of uses that do not conform to land use regulations should result in some form of action or at least notice to avoid accusations that enforcement should be denied because the municipality "sat on its rights," particularly if the property owner in good faith reliance has changed position or made investments so as to be detrimentally affected by a delayed enforcement action.

- ***Practice Tip.*** Uses that have come into existence as the result of a special exception or conditional use approval are not viewed as having protected NCU status if they no longer meet criteria required for approval or if conditions imposed in the approval are not met. Hence, a good code enforcement practice will ensure that notices of conditions on approval or other factors relating to such uses are readily accessible, and are periodically reviewed for compliance.[12]

C. "Crying in the Wilderness": Abandonment and Termination. NCU status is not limited to the owner at the time it was created, but may be passed on unless somehow limited by application of law as discussed below under termination. NCU status, though, may be lost if the use is "abandoned." Mere discontinuance is not generally viewed as constituting abandonment. Instead, two factors may be required: a) intent to abandon or relinquish the use and b) some overt act or omission which implies that the use is no longer being used or claimed.[13]

Ordinance provisions stating that an NCU is abandoned if discontinued for a set period of time (sometimes as short as several months or a year) are likely to be interpreted as implying that

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[10] *Henry and Murphy v. Allenstown*, 424 A.2d 1132 (N.H. 1980).

[11] A judge may take a dim view of an argument that a municipality was not aware of a non-complying property when it assessed the property based on the non-complying use and received property taxes based on that value.

[12] See, e.g., Mandelker, et als., Planning and Control of Land Development: Case and Materials (8th Ed.) § 3 D [4]. Again, coordination with the local assessing office is helpful, but the code enforcement office or other appropriate official should institute a "tickler" system for checking on the status of conditions.

[13] *Lawlor v. Salem*, 352 A.2d 721 (N.H. 1976).

intent is manifested by such discontinuance. The general rule, though, appears to be that mere cessation of use for a stated period cannot automatically equate to abandonment.

On the other hand, absence of ordinance language governing abandonment is not necessarily fatal to the case for abandonment, at least if applicable jurisdictional tests for abandonment are met.[14] Some jurisdictions do equate discontinuance with abandonment based on the theory that an owner who is not using property manifests an intent to no longer do so. While an owner may bear the initial burden of providing existence of an NCU, a municipality in an enforcement action based on abandonment likely bears the burden of proof.[15]

- ***Practice Tip.*** Given current economic conditions, proving an intent to abandon NCU status based on temporary cessation of use may prove to be more difficult given the stronger possibility that cessation was not intended, but was caused by some external force.

Termination requirements of a zoning ordinance, other than those arising out of abandonment, are not invalid *per se*. They may be upheld, for example, if the public benefit or termination outweighs private injury and if the time allowed to terminate is reasonable. In NH, for example, termination has been upheld where junkyards and excavations were amortized over time.[16] Though zoning law is not based on nuisance law and instead is an exercise of police power, nuisance law may be a prism through which termination may be seen as valid.

However, the use of involuntary termination or amortization may not have been helped by the *Lucas*[17]*' per se* economic wipe-out doctrine (by which a wipeout of economic value might arise to a regulatory taking unless the use was barred by a state's underlying nuisance law). Yet a post-*Lucas* decision did uphold a five-year amortization period for a non-conforming sign.[18] While guidance does exist, termination involves an array of considerations that range from investment backed expectations to property rights expectations inherent in property ownership.[19]

- ***Practice Tip.*** Courts in many jurisdictions appear to be assuming a stronger property rights focus, possibly resulting in more intense scrutiny for amortization or termination provisions that limit the ability to carry on an NCU. As discussed in parts D and E, pre-existing uses may create vested rights to similar future uses not necessarily identical with the pre-existing use. Accordingly, termination of such an NCU may be viewed narrowly.

D. "Looking for Life Eternal": Expansion/Extension. As is the case with ordinance treatment of NCUs in general, regulatory language may limit or allow "extension" and/or "expansion." Initially, one might ask what the difference is. In some eyes, the former relates to temporal concepts – repair, minor alteration, renovation; the latter refers to physical expansion, beyond the physical boundaries of, e.g., an existing building or structure.

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[14] American Law of Zoning, *supra,* at § 6.65.
[15] *Ibid.*
[16] *LaChapelle v. Goffstown*, 225 A.2d 624 (N.H. 1967) and *Flanagan v. Hollis*, 293 A.2d 328 (N.H. 1972).
[17] *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).
[18] *Outdoor Graphics v. City of Burlington*, 108 F.3d 690 (8th Cir. 1996).
[19] Consideration of the date on which property is acquired needs to be assessed in light of *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448; 150 L. Ed. 2d 592 (2001).

Judicial treatment may be difficult to categorize in instances where issues are seen as involving alteration or change (as discussed in part E). Absent express and reasonably clear limits within statutory or ordinance language, the range of permissible actions under the umbrella of extension or expansion may be viewed as asking if the proposal is reasonably consistent with the pre-existing use. On the other hand, even "normal repair" can be viewed as violating the basic premise of zoning – its policy is to gradually and ultimately eliminate non-conforming uses.

It has been suggested that omission by the framers of the SZEA of language addressing NCUs was designed to lead the owner to make a voluntary choice: either continue use of an NCU that cannot be altered or relinquish that NCU protection to better utilize the property under current conditions.[20] In contrast to that voluntariness aspiration, ordinances today do appear to more actively address the ability of a property owner to take action that might alter the path to elimination that might occur naturally. The paths allowed by local regulation appear to follow no set standard and likely depend on the land use rules of the jurisdiction as well as the views of the citizenry as to how NCUs should be treated.

- ⊙ ***Practice Tip.*** Code enforcement involving maintenance, repair, or other action that might "prolong" the life on NCU must be undertaken with due regard for jurisdictional and ordinance protection for, or limitation on, the ability to extend, as well as expand, an NCU.

E. "Modern Translation of the Land Use Bible": Alteration or Change. Without seeking to diminish the extent to which issues addressed previously raise problems, perhaps the most vexing NCU concern lies in the concept of change or alteration in the use. At the outset, candor compels acknowledgement that changes in NCUs do occur all the time. The question, then, is whether the change will result in loss of NCU status and, from a code enforcement perspective, what practices might work best to achieve code compliance.

Consideration of these questions requires analysis of an array of factors that may be phrased in different ways, even within the same jurisdiction. Certainly expansion or extension as discussed in part D may be viewed as a change or alteration in the use. This part of the paper focuses more on use change than on temporal or area change, though the latter is addressed.

At one extreme, NCU doctrine suggests that an existing NCU may not be replaced by a new use unless that used conforms to the ordinance. [A variation of this issue asks if the use of a non-conforming structure may be changed if the use conforms to the ordinance. While state law and ordinance provisions must be considered, in general, a dimensional non-conformity (structure size, setback, lot size) does not necessarily mean that a use cannot be changed so long as the use is permitted by zoning.]

Often, the determination as to what alteration, if any, is allowed requires both quantitative and qualitative analysis. For example, the conversion of utility company office space to a probation office was not barred,[21] while addition of go-go dancers to a restaurant was an impermissible change.[22] Over the years it seems that numerous cases have involved an intent to convert the use of a structure to a more modern, more profitable form of entertainment, e.g., vaudeville to motion pictures, serving adult beverages or conducting adult entertainment.

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[20] Mandelker, Planning and Control of Land Use Development, *supra*, at § 3, D [4], p. 345.
[21] *DiBlasi v. Zoning Board of Appeals*, 624 A.2d 372 (Conn. 1993).
[22] *Philm Corp. v. Washington Township*, 638 A.2 388 (Pa. Commw. 1994).

Though specific tests may vary from jurisdiction to jurisdiction and over time, common elements seem to include these questions:

- To what extent does the use in question reflect the nature and purpose of the pre-existing, nonconforming use?
- Is it merely a different manner of exercising the same use or does it constitute a use different in character, nature and kind? Is it intensification in kind or something more?
- Does the use have a substantially different effect on the neighborhood?[23]

Some examples from the New Hampshire may assist in clarifying application of these principles:

- Conversion of some traditional penny arcade games such as "Skee-ball" to non-attended video games was permissible, but expansion of the arcade use into a different portion of the building formerly used as gift shop was not.[24]
- A change which would require expansion of a structure so as to violate setbacks was not permitted.[25]
- Enclosing a previously open carport within the footprint of a nonconforming building was permissible.[26]
- If an ordinance bars enlargement of a NCU, expanding its volume even without further violating a front setback (i.e., within the building's footprint in that area) may be a violation.[27]
- Conversion of rental apartments to condominium ownership with no physical alteration was neither a change nor expansion of an NCU.[28]
- Prior use of property to stockpile manure in connection with livestock operations could not continue when the livestock operations ceased.[29]

Even though some alteration in an NCU may be allowed, that action may be subject to other land use approvals, including, e.g., building permits or site plan review – but the purpose and effect of the review is for compliance with the applicable code requirements, not to assess the propriety of the change in the NCU.[30]

Moving away from examples in the Granite State, the same or similar standards can be seen as applicable, though the manner in which they are applied is subject to some variation, partially based on how a jurisdiction views property rights as well as NCUs.

- Nonconforming livestock grazing land could be converted to a year-round feed lot.[31]
- Replacing nonconforming structures with larger ones while effectively maintaining the same use (sometimes characterized as "mansionization") may not be permitted.[32]

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[23] *New London v. Leskiewicz*, 272 A.2d 856 (N.H 1970).
[24] *Hampton v. Brust*, 446 A.2d 458 (N.H. 1970).
[25] *Colby v. Rye*, 453 A.2d 1270 (N.H. 1982).
[26] *Seabrook v. D'Agata*, 362 A.2d 182 (1976).
[27] *Granite State Minerals, Inc. v. City of Portsmouth*, 593 A.2d 1142 (1991).
[28] *Cohen v. Henniker*, 593 A.2d 1145 (1991).
[29] *Salem v. Wickson*, 770 A.2d 1120 (N.H. 2001).
[30] *Seabrook v. Vachon Management, Inc. 745 A.2d 1155 (2000).*
[31] *Baxter v.City of Preston,* 768 P.2d 1340 (Idaho 1989).
[32] *City of Marion v. Rapp*, 655 N.W.2d 88 (S.D. 2002).

- The ability to "change" an NCU to another NCU may be affected by whether the proposed use is viewed as "moving up or down the use chain."[33]

    - ⊙ ***Practice Tip.*** Prior to instituting a code enforcement action against "changes" in an NCU, the question of whether the change is allowed or barred must be examined in light of the jurisdiction's overall rules and the local government's regulations "enlightened" by past practice.

Recognizing that meeting criteria for a variance to change an NCU might be difficult, communities may choose to allow expansion, extension, or even change through the granting of a special exception or other type of conditional use permit. Certainly, one primary issue that arises is whether the criteria are clearly enumerated so as to avoid vagueness and overbroad delegation issues (as in the case cited in note 33). A secondary issue may arise as to the effect of granting the special exception: does that act constitute a voluntary abandonment of the prior NCU and does the property lose any NCU status, i.e., is the property now "conforming" because it has received the special exception or conditional use permit?

F. Some Recent Cases. Though one might think that all the issues in the world have already been decided in the almost 100 years of zoning history in this country; yet, new issues, restatements of older decisions, and subtle fact nuances continually alter the face of NCU law. Here are some recent examples.

- ♦ Where a the lot currently did not meet the width requirement of zoning, it did comply with the requirements that were in effect when the lot was filed as part of a subdivision in 1979, constituting it as a "nonconforming lot of record." A provision in the town code allowed for a single family detached dwelling to be erected on any single nonconforming lot of record. Therefore, the petitioners were entitled to a building permit.[34]

- ♦ In 2003 Kendrick purchased a mobile home park (Stagecoach Trails MHC) and began to make improvements, obtaining permits for 34 mobile homes that were installed. Although none of the park's spaces were large enough to comply with minimum space requirements, the city issue the permits anyway. In 2009 the city informed all mobile home park operations that it would be enforcing minimum space requirements for any future applications. In 2010, Stagecoach applied for a permit to install a new mobile home on space 27, but the zoning administrator denied the application since it did not comply with several requirements. Stagecoach appealed arguing that it did not need to comply because it was a nonconforming use. The city appealed the superior court's judgment for Stagecoach. The appeals court ruled that the superior court was limited to determining whether the Board "acted arbitrarily, capriciously or in an abuse of its discretion." Once the superior court invalidated the zoning regulation, it reached the limits of its jurisdiction and had no authority to consider additional bases for the denial of the permit. The city also contended that the superior court erred in granting mandamus relief, a claim upheld on appeal.[35]

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[33] But see *Kopietz v. Zoning Bd. of App. for the City of Clarkston*, 535 N.W.2d 910 (Mich. App. 1995) holding invalid an overly broad delegation of authority to ZBA in allowing it to approve change if it would make the use more appropriate to the district in place of the existing NCU.

[34] *McGrath v. Town of Amherst Zoning Board of Appeals*, 94 A.D.3d 1522 (NYAD 4 Dept., 4/27/2012). This description and some others to follow are from Patricia Salkin's Law of the Land Blog available at (http://lawoftheland.wordpress.com/).

[35] *Stagecoach Trails MHC, LLC, v. City of Benson*, 2012 WL 1963409 (Ariz. App. Div. 5/61/2012).

- After petitioner changed the use of premises from residential to both residential and commercial by fencing off a garage and permitting it to be used as an accessory structure by a business conducted on an adjacent parcel, the zoning board denied his petition claiming a nonconforming use on the premises. The appellate court upheld the denial since a rational basis supported the determination that the land was impermissibly changed by the petitioner.[36]

- In 2008 Cornerstone Church filed three applications in connection with its plan to construct a church. The first application was to remove a proposed road designated for a section of Tolbert Lane that had not yet been constructed and was on Cornerstone's property. The second was an application to change the zoning district to allow a church as a permitted use. Lastly, Cornerstone requested an exemption to allow it to operate a daycare on the premises. As the town's transportation needs had changed, the town no longer considered Tolbert Lane necessary and approved Cornerstone's request. This resulted in Tolbert Lane ending in a cul-de-sac that Long Lane Associated Limited Partnership (Long Lane) had constructed and dedicated to the town. Cornerstone's remaining applications were approved. Long Lane challenged ordinances adopted by the town council, arguing that the town "could not amend application of the conditions required by a 1988 rezoning ordinance without the consent of all owners of property originally included in the rezoning" and Long Lane did not consent. The circuit court ruled Long Lane had a vested right to the completion of Tolbert Lane and the development it had set forth. Thus, approval of Cornerstone's request for rezoning was void because it violated Long Lane's vested rights. On appeal, Long Lane's rights were found to have vested based on its change in position in reliance on the rezoning, but that vesting extended only to its own land, and did not prevent Cornerstone from seeking to address its own proposals on other land.[37]

- Cobleskill Stone Products owned a quarry in Schoharie that had been in use for mining since the 1890s. Traditionally mining in the area required a special permit, but as a prior nonconforming use, the quarry did not require approval. It expanded onto new property, which required a permit that was obtained. It then purchased additional property and sought to amend its permit to include the new property. While the application was pending the town amended its zoning to prohibit mining in the area. Eventually, the appellate court reasoned that a municipality is free to alter its zoning regulations and no vested right exists to have the existing zoning ordinance continue unchanged, so long as the police power has been rationally exercised and the zoning is done for the well-being of the community. However, landowners do have rights where the property was used for nonconforming purposes at the time the zoning ordinance became effective. However, mining was never conducted or permitted on the property in question and Cobleskill had not made infrastructure improvements needed to do so. Also to be considered is whether the property interest affected by the ordinance is too substantial to justify its deprivation. Things like prior zoning restrictions as well as the impact of the property use on the greater community should be considered. Here, the property was acquired after the town's adoption of the 1974 zoning ordinance and petitioner was aware that the town would need to issue a mining permit. Given the property's proximity to populated areas and historic sites, it was arguably not in the best interest of the greater community to allow the expansion of the quarry.[38]

G. "Can Anything Buy Us Peace in Our Time?": Enforcement Guidance. If nothing else, this paper can be thought of as demonstrating that two little words – non-conforming use – unleash an array of complexities for the code enforcement office. So, let us close our

[36] *Prel 32 Realty, LLC v. Richard I. Scheyer*, 2012 WL 2125876 (N.Y. A. D. 2 Dept. 6/13/2012).
[37] *Town of Leesburg v. Long Lane Associates Limited Partnership*, 726 S.E.2d 27 (VA. 6/7/2012)
[38] *Cobleskill Stone Products, Inc. v. Town of Schoharie*, 2012 WL 1948307 (NYAD 3 Dept. 5/31/2012)

consideration of the topic with some optimism that things really may not be as difficult as this picture might suggest.

There is no guarantee that the suggestions that follow will work in all instances, or that problems will not continue, or that all uncertainty will magically disappear. It can be hoped, though, that experience with them will lead to the same conclusion as touted in once-prevalent TV commercials: "Try it. You'll like it."

- ✓ ***Compile Experiences in Handling NCUs.*** Within the latitude allowed by the constitutional and statutory law, local governments can define the manner in which NCUs are governed. Ordinances and regulations may have been in place for a number of years that were not created with the benefit of experience. Times change. Expectations of property owners change, as do those of the community at large. Generating a data base of issues associated with NCUs can be a most effective guide in crafting local provisions to deal effectively, efficiently, and economically with them.

- ✓ ***Talk, Talk, and Talk Some More.*** Code enforcement officials, zoning boards, planning boards, and governing boards too often may be viewed as isolated islands within a local government. Occasional meetings (informal or held with a set agenda) may identify regulatory language or provisions which are problematic or unclear. ZBAs, for example, may find that variances or administrative appeals commonly focus on similar matters involving NCUs, and that they are struggling to provide justified relief under the stringent criteria required for variances. While solutions should not eliminate the planning goals inherent in creating the ordinance, the ability to more effectively allow adapted use of property under the scope of an NCU may be in the public interest [with the added advantage that the CEO's job might be less confrontational!].

- ✓ ***Know What's What.*** Modern technology provides numerous tools that (without undue cost or effort) may assist in establishing baselines for identifying legitimate NCUs and those which ought not to have protected status. Some examples include: satellite imagery, computer data bases, and digital cameras. Low- or no-cost practices could include: indexing and cross-referencing property files (including exchange of assessment data) and creating "tickler" systems to assist in monitoring approval conditions and inspections.

- ✓ ***Understand Lots of Record.*** Language concerning lots of record may be imprecise in defining exactly what it is and in what can be done with it. Provisions that treat lots of record strictly should be read in conjunction with case law governing the limitations on substantial impacts on vested rights.

- ✓ ***Remember to Consider the Effects of Legislation.*** NCU law may constrain expansion rights. Where it does, the use still may possess some additional protections granted by state or federal laws, such as the Religious Land Use and Institutionalize Persons Act (but that particular law is a topic for another day!)