International Municipal Lawyers Association
2012 Code Enforcement Seminar



Enforcing the Law against Grandfathers & Other Non-Conforming Use Issues



Attorney Daniel D. Crean

Overview and Introduction

- From the first day of a land use regulation course – or the first day on the job as a code enforcement officer – one perplexing issue that will arise is what to do about "grandfathered uses."
- Legal issues abound, but so also do practical issues –
  - and the occasional personal or political matter.

Topics

- Theoretical & Legal Genesis of NCU
  - Definitions
  - Dimensional v. Use NCU
- Continuation & "Amortization"
  - The policy of zoning v. the reality of life
- The Vexing Question
  - Change is a constant
- Examples from Case Law
- Changing the Battleground
  - Realistic treatment in the 21st Century

Theoretical & Legal Genesis of NCU

- Why this Protection Exists – or
  "Oh No, You Can't Take That Away From Me!"
- Zoning = police power
  - Constrained by Constitutional Protections for Property and Due Process
    - Takings Clause
    - *Ex Post Facto* Law Doctrine
    - Thus, the doctrine prevents



So, what is it? The text book says:

- A land use which precedes a zoning regulation but which became illegal under the subsequently effective ordinance (or amendment to an ordinance).
- A possible distinction:
  - Conditions v. Uses.
- Today, legislation may have changed the rules, at least to some extent.



More Components

- Statutory Compliance & Ordinance & Regulatory Framework
- Essential Requirements
  - Legally arose
    - How do *you* know? How do *you* find out?
  - The Same or similar, then and now?
    - Same Questions



Continuation and "Amortization"

- The policy of zoning v. the reality of life
  - Zoning law in virtually every state (to my knowledge) says something like
    - The policy of zoning is to gradually eliminate NCUs.
- Case law, statutes, and ordinances themselves may set a different reality.



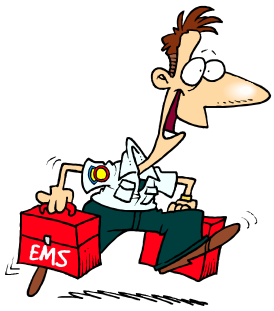
What the devil is amortization?

- NCUs can be abandoned – requires intent
- Hence, zoning developed unnatural death – i.e. amortization.

More life support

Extension and/or Expansion

To the Rescue!



The Vexing Question Change is a constant

- Previous issues may seem miniscule in comparison to Code Enforcement issues when it comes to what can be done with an NCU.
- After all, the value of property is not so much in its physical nature as in what can be done with it !
  - I.E., HOW CAN IT BE USED?



A Test for Change

- 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?
  - ***WHAT ARE YOUR TESTS?***

Permitted or Not – You Be the Judge



- Conversion of traditional penny arcade games to non-attended video games?
  - Does it matter where?
- Enclosing a previously open carport within the footprint of a nonconforming building?
- Conversion of rental apartments to condominium ownership?

A few more . . .

- Nonconforming livestock grazing land to a year-round feed lot?
- Replacement with a "better" use?
- Single-family dwelling on a lot of record?
- Converting a private campground to facilities for a motorcycle club?
- Junkyard or used car "dealership"?

Does a CEO's life really have to be this complicated?

- Some enforcement efforts – and perhaps even more so – attempts to provide remedy, remediation, or relief, (e.g., variance applications) seek to use an inappropriate vehicle.
- Regulations are not written in stone and actually CAN be updated!
- Keep records and consult them!



Practice Tips

- ✓ NCU problems might be lessened by drafting ordinances and amendments with due regard for present-day uses & future land use needs.
- ✓ A variety of sources exist for determining if a use was physically present at any given time.
- ✓ NCU status via a conditional permit can be lost if conditions not met.
- ✓ Abandonment may be more difficult to show today and amortization may face more scrutiny.

Practice Tips

- ✓ Code enforcement involving maintenance, repair, or other action that might "prolong" life of an NCU requires attention.
- ✓ Prior to instituting a code enforcement action against "changes" in an NCU, closely examine whether the change is allowed or barred in light of your jurisdiction's rules.
- ✓ AHF
  - ✓ ALWAYS HAVE FUN!

Changing the Battleground



Realistic treatment in the 21st Century

- Paper provides some ideas on making code enforcement more effective, such as:
  - Use of technology
  - Use of records & interchange of data
  - Communication with and among land use boards
  - Keeping up with legislation (state and federal) and court rulings

What Ideas and Suggestions Do YOU Have?

Thank You.

- Questions?
  - And maybe some answers.
- Contact Information:
  - Dan Crean
  - Crean Law Office
  - (603) 928-7760
  - creanlaw@comcast.net

