

MEMORANDUM

FROM: OFFICE OF THE CITY ATTORNEY
MIDDLETOWN, CONNECTICUT 06457

TO: Mayor Sebastian J. Garafalo

DATE: March 24, 1993

RE: Legal Opinion Request

QUESTIONS PRESENTED:

Does a nonconforming use continue to exist despite the fact that the property has been vacant for 12 months and is there any clear interpretation of what constitutes a change of use or is this an issue with which the Planning & Zoning Commission will have to deal on a case by case basis?

ANSWERS:

- 1) Abandonment of a nonconforming use requires both an intention on the part of the owner to permanently cease such use and an overt act or failure to act which evidences this intention.
- 2) As presently written, the Zoning Code does not permit any change of use from the original nonconforming use. The Connecticut Supreme Court has upheld regulations permitting a change from one nonconforming use to another more restrictive nonconforming use and regulations permitting the issuance of a variance to change from one nonconforming use to another less offensive nonconforming use.

ANALYSIS:

Section 14.01 of the Middletown Zoning Code provides as follows:

Non-Conforming Uses may continue to exist without any change. If the non-conforming use ceases for a time period of twelve months, for any reason, any subsequent use of each land shall conform to the regulations of the zone in which the land is located. Any use destroyed by fire or natural causes may be rebuilt within a time period of twelve months of destruction.

Zoning Code §14.01 (emphasis added).

Connecticut General Statutes §8-2 concerns zoning regulations and provides, in pertinent part, that "[s]uch regulations shall not prohibit the continuance of any nonconforming use, building or

structure existing at the time of the adoption of such regulations. Such regulations shall not provide for the termination of any nonconforming use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use." C.G.S. §8-2, as amended.

The Connecticut Supreme Court has held that:

[t]he word 'discontinued' in ordinances prohibiting the resumption of a nonconforming use which has been discontinued for a specified period has been held to contain the element of intention and to require more than mere suspension or temporary cessation of use . . . It has been considered equivalent in meaning to "'abandoned', and evidence of an intent by the owner permanently to cease to use [has been] required . . ." . . . In a case in which the owner had unsuccessfully tried to lease the premises during the specified period this court held that "[a] use . . . is not discontinued . . . by a mere temporary suspension for a reasonable time, for reasons beyond the owner's control, where there exists a manifested intention on the part of the owner to resume the nonconforming use as soon as a tenant can be obtained."

Magnano v. Zoning Board of Appeals of Westbrook, 188 Conn. 225, 228 (1982) (citations omitted).

Accordingly, if the owners of the property at issue can demonstrate to the Planning and Zoning Commission's satisfaction that they have been actively seeking a new tenant, then there is no intent on their part to abandon the nonconforming use.

The second part of the question concerns the determination of a change of use. Our Zoning Code is very restrictive on this point, mandating that "[n]on-conforming uses may continue to exist without any change." Zoning Code, §14.01. Therefore, the policy as established has left the Commission no room for discretion in this area.

The court cases addressing this issue mainly concern whether the challenged activity is an impermissible extension of the use or merely an intensification. See, e.g. Macaluso v. Zoning Board of Appeals of Windsor, 167 Conn. 576 (1975) (package store is expansion of drugstore liquor permit); Raymond v. Zoning Board of Appeals of Ridgefield, 164 Conn. 85 (1972) (automotive repair is expansion of gas station); Weyls v. Zoning Board of Appeals of Trumbull, 161 Conn. 516 (1971) (year-round use of summer cottage is expansion); Connecticut Sand and Stone Corp. v. Zoning Board of Appeals of Avon, 150 Conn. 439 (1963) (selling new product not an increase in volume of business but an expansion); Zachs v. Zoning Board of Appeals of Avon, 218 Conn. 324 (1991) (use of improved and more efficient technology is not an expansion).

An unauthorized change from the original nonconforming use to

another nonconforming use would appear to fit the criteria for abandonment: (a) an intention to abandon and (b) an overt act which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use. See T. Byrne, Planning and Zoning in Connecticut, Ch. 13 at 91, 99-100 citing Groshkin v. Zoning Board of Appeals, 26 Conn. Sup. 457 and Blum v. Lisbon Leasing Corporation, 173 Conn. 175, 181 (3rd Ed. 1982); T. Tondro, Connecticut Land Use and Regulation, §§3.E.2 and 3.E.4 (2d Ed.) 1992.

The Connecticut Supreme Court has held that a zoning regulation which permits the substitution of one nonconforming use for another is valid so long as the use is not extended or expanded. Point O'Woods Association, Inc. v. Zoning Board of Appeals of Old Lyme, 178 Conn. 364 (1979). The Court held that "[w]here such an ordinance is present, so long as the approval does not enlarge or extend the nonconforming use, the action of the board approving the change of one nonconforming use to another must be upheld." Id. at 370.

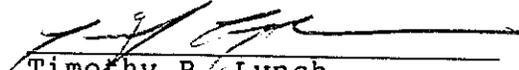
If the Commission desires to have this type of control over nonconforming uses, it may want to amend §14.01 to permit a change from one nonconforming use to another as approved by the Zoning Board of Appeals on conditions consistent with the Point O'Woods decision. The Old Lyme Zoning Regulation at issue in that case read as follows: "Old Lyme Zoning Regs. §13.1.1 No non-conforming use may be changed except to a conforming use, or with the approval of the Zoning Board of Appeals to another non-conforming use." Point O'Woods, supra, at 370, fn 2. A commentator has observed that the Connecticut Supreme Court allowed this regulation to stand because its application was limited to situations in which the proposed use was more restrictive than the prior nonconforming use which the property owner was giving up. T. Tondro, supra, §3.E.3 at 164.

The Connecticut Supreme Court has also upheld a situation in which a variance was given to a property owner to change from one nonconforming use to another. Adolphson v. Zoning Board of Appeals of Fairfield, 205 Conn. 703 (1988).

In Adolphson, the property owner was granted a variance to change the use of the property from a foundry to an auto body repair shop. Id. at 705-706. The Court upheld the action, finding that the change was to a "less offensive" nonconforming use. Id. at 708.

The Town of Fairfield had a nonconforming use zoning regulation similar to Middletown's which prohibited changes of nonconforming uses. Adolphson, supra at 716, fn 9. However this issue was not raised in a timely manner by those challenging the action of the Zoning Board of Appeals and therefore the Court declined to consider it. Id. at 716-717. Such a clear conflict between the zoning regulation and the action of the ZBA in granting the variance may have changed the outcome of the case. Therefore, a revision to §14.01 would be the better course of action if the

Commission wants to permit owners of nonconforming use properties to change to other nonconforming uses.


Timothy P. Lynch
Deputy City Attorney

TPL/es

cc: William Warner, AICP
Planning & Zoning Director

REQUEST FOR OPINION, ADVICE OR OTHER LEGAL SERVICE

(Submit to Mayor in Duplicate)

RECEIVED
23 MAR 11 11:10:02
CITY OF PITTSBURGH
MAYOR

TO: MAYOR'S OFFICE
FROM: William Warner, AICP Director of Planning
SUBJECT: Continuation of Non Conforming Uses

FACTS: (In brief Statement tell WHO, WHAT, WHEN, WHERE, WHY & HOW.)

Property at 68 Liberty Street has been a non-conforming use for an extended period of time. The last use was a Pizza Restaurant. The property was vacated sometime in 1989 and has remained vacant since. The applicant would like to lease the property once again. Section 14 of the Zonign Code states that if the use ceases for 12 months any subsequent use must be conforming. The applicant has indicated that they never intended to abandon the non conforming use and they have been activy seeking tenants. (See attached.)

RECEIVED
CITY ATTORNEY'S OFFICE
23 MAR 12 11:03:52

LAW: (Cite appropriate ORDINANCE, REGULATION, STATUTE, OR CASE LAW that you think applies to this Question.)

Section 14 of Zoning Code. (Attached)
Byrne's book page 99 (Attached)
Opinion of Atty. Richard Adams regarding previous non conforming issue before Planning and Zoning in 1982. (Attached)

QUESTION: (What, in your own words is the precise question you wish to have answered?)

Does the non conforming use continue to exist despite the fact that the property has been vacant for 12 months and is there any clear interpretation of what constitutes a change of use or is this an issue which the Planning and Zoning Commission will have to deal with by case basis?

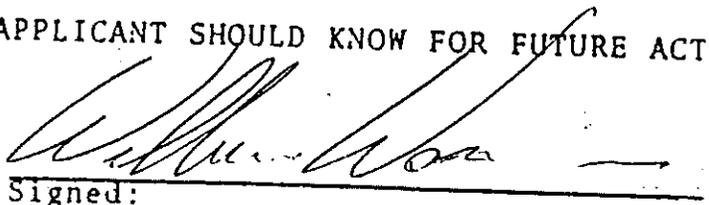
ESTIMATE OF PRIORITY:

EMERGENCY
 URGENT by March 23, 1993

Check one.

STANDBY FOR FUTURE ACTION
 APPLICANT SHOULD KNOW FOR FUTURE ACT

Date: 3-11-93


Signed: _____