

Legal Non-Conforming Use



By Brian Madigan LL.B.

This is an issue under the zoning by-laws. It is important to note that all zoning by-laws are forward looking. They speak to the future and not the past. They regulate future uses of a property not existing ones. They are prospective not retrospective in nature. They are not retroactive.

So, if you have a present use which is legal, then it may continue forever. But, that entitlement applies to that property and that property alone, no others. If a new zoning by-law is enacted, it will apply only to other properties which do not have the existing and now prohibited use.

Let's say that the municipality does not want a parking lot in the area. It will first have to designate the area to which the new zoning will apply. Once the by-law is enacted, it will apply to every property in the area.

If any property had a parking lot in use at the time of passage of the by-law, then the owner will be able to demonstrate that this use is a "legal non-conforming" use. The activity predates the by-law. The use was a legal use at that time, and that same use has continued in an uninterrupted fashion since the by-law. It's not enough simply to show the start date, there must also be evidence that this particular use has not been abandoned. It has been continuous.

This continuous and uninterrupted use is at times difficult to prove. Let's take the example of a restaurant which is the only restaurant in an area that now excludes restaurants. What if the property closed down? What if the property were sold? How long can the property not be open to the public? What if it had a sign: "closed for renovations"? In all such cases, this is ultimately a matter for the Courts. For a vendor who wishes to ensure that such a use may continue, then legal advice should be sought in order to document the continuance of the use, particularly during lengthy periods of renovation and repair.

Property owners should not assume that the municipality will not seek to enforce its by-law. They have a very specific by-law BECAUSE they want to enforce it. There's no free ride here. Document the continued use! The lack of documentation is the precise reason why the legal non-conforming status is lost in most cases.

The building structure may no longer comply with the area requirements or the minimum setbacks. Generally, these properties may be repaired so long as the

new structure complies with the existing use, and the legal non-conformity is not extended.

You will often see a number of buildings with modest setbacks from the sidewalk, perhaps they abut the sidewalk or may be set back just a foot or two. You will often find a row of commercial stores constructed in the early part of the 20th century that follow this alignment. Then, every so often you will find one brand new store set back from the street line, on its own, by about 20 feet. Why is this? The reason is that the new setback requirement under the current by-law calls for 20 feet from the sidewalk. The prior building was probably demolished and then the owners submitted an application for a building permit. These buildings are typically 30 to 40 years old.

Since that time, builders have become a little smarter. They repair and renovate. They never demolish and reconstruct. No matter how bad the structure might be, it is always improved or shored up. It is never torn down and replaced. This allows the “new” building to be reconstructed over the old building and retain its right to abut the sidewalk.

This is a very valuable right and should not be lost through oversight. If you own a legal non-conforming property, be sure to document its start date, and its continuous use. Would you have the evidence available if the municipality claimed that the use was lost? It’s up to you to prove the legal non-conforming status. All the municipality needs to do is prove its current by-law. The onus to prove the right to non-compliance is upon the property owner. Paper the file!

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