But, It's Grandfathered! Six Common Myths about Nonconforming Uses

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The term "grandfathering" is heard regularly in local government. Planning boards, zoning boards of adjustment, building inspectors, selectmen, code enforcement officers—all may be called upon from time to time to determine whether certain land uses are allowed, whether they may continue, and in what form. Often, these officials are met with the assertion that a building or business or activity is "grandfathered" and must be allowed.

Is this true? If it is, what does that mean? Can local officials regulate a grandfathered use at all? Or, is it time to throw up our hands and walk away? In this article, we will try to provide an explanation of what grandfathering really is, and to dispel a few of the most common myths about how it works. Admittedly, many aspects of this subject are complex and have no simple solutions. There are far more questions than there are answers. However, a firm understanding of the basic meaning of grandfathering is a great place to begin.

Myth #1: There is a law somewhere saying "thou shall not touch a grandfathered land use."
Actually, no. It may be surprising, but the term "grandfathered" does not appear in any of New Hampshire's land use laws. Over time, it has evolved as a convenient way to refer to the legal concept of *protecting lawfully pre-existing nonconforming uses of land* from later-enacted prohibitions.

Grandfathering balances the private property rights of land owners against the public need to regulate land use. Both our New Hampshire Constitution and land use laws protect property owners by prohibiting the government from unreasonably depriving them of a vested right to use their property. See N.H. Const. pt. I, arts. 2, 12; *Hampton v. Brust*, 122 N.H. 463 (1982); **RSA 674:19**. When the government does unreasonably deprive an owner of a vested right, we say that a "taking" has occurred, and the Constitution requires the government to compensate the property owner reasonably for that loss. Quite understandably, governments would like to avoid this scenario if possible. Thus, the law provides that a "zoning ordinance adopted under **RSA 674:16** shall not apply to existing structures or to the existing use of any building." **RSA 674:19**.

In other words, zoning ordinances and land use regulations are not supposed to be retroactive; they ordinarily apply only to new or altered uses of land. However, this protection is not absolute. "A use of land which, at the time a restriction on that use went into effect, was established (or 'vested'), and has not been discontinued or abandoned, can continue indefinitely, unless it includes activity which is a nuisance or harmful to the public health and welfare; but the use cannot be changed or substantially

expanded without being brought into compliance." *Cohen v. Henniker*, 134 N.H. 425, 427 (1991).

The questions to ask are: (1) did the use lawfully exist at the time the restriction was adopted, and (2) has it continually existed since that time? See, for example, ***Seabrook v. Vachon Mgmt, Inc***., 144 N.H. 660 (2000); *Derry v. Simonsen*, 117 N.H. 1010 (1977). The nonconformity (the part of the use that would now be prohibited) might be the type of activity (residential use, pig farm, retail store) or dimensional factors (setbacks, size restrictions, frontage).

For example, assume Joe Smith built his home in 1995, 20 feet from the street. Local zoning required a minimum 20-foot setback, so he was in compliance. If the ordinance had been amended in 2005 to require a 25-foot setback from the front property line, Mr. Smith's home generally would have been protected from that tighter restriction because (a) the house met the setback requirement when it was built, and (b) it had continued to exist since that time. If either of those two pieces had been missing, however, the house might have been in violation of local zoning and not protected by grandfathering. If, say, Mr. Smith had built his house only 15 feet from the street, it would have violated the ordinance from the start. Since the house would not have been "lawfully existing" when the ordinance increased the setback to 25 feet, it probably would not be grandfathered. See *Quirk v. Town of New Boston*, 140 N.H. 124 (1995).

Myth #2: The owner of a grandfathered structure or activity can continue that use in any way he or she wants to.
Not necessarily. The right to a nonconforming use may continue for quite a long time in some cases, but there are at least two significant limitations.

First, if the use is *abandoned*, it may be lost. "Abandonment" happens when the owner (a) intends to abandon or relinquish the use, and (b) takes some overt act, or fails to act, in some way that implies that the owner neither claims nor retains any interest in that use. See *Lawlor v. Salem*, 116 N.H. 61 (1976). For example, a grandfathered pig farm was abandoned (and the right to use it as a pig farm was lost) when the farmer sold all his pigs (an overt act). ***Salem v. Wickson***, 146 N.H. 328 (2001). The use might also be abandoned if the structure is destroyed and the owner waits decades to replace it (fails to act). These are easy examples; most real-world situations are more complex and depend upon all the facts involved. The question can become quite difficult when the use is terminated involuntarily (such as when a building burns down) or only temporarily (a business is closed briefly but the owner intends to reopen after remodeling or obtaining additional financing).

In addition, some local ordinances include a specific time period within which a use must be re-established in order to avoid abandonment (a "use-it-or-lose-it" provision). The New Hampshire Supreme Court recently upheld a zoning ordinance under which a nonconforming structure would be considered abandoned if it were not replaced within one year after being destroyed. ***McKenzie v. Eaton***, 154 N.H. 773 (2007). However, in a separate opinion, one justice indicated that this sort of provision might constitute a "taking" for which an owner must be compensated, and that if the question were presented to the Court that way in the future, the result might be quite different.

Second, the idea of grandfathering is to permit property owners to keep what they have where they have it, but expansion or extension of that use is tightly controlled. **RSA 674:19** states that a zoning ordinance "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." For example, the footprint of a building that already violates setback requirements generally may not be expanded unless the owner obtains a variance. See, for example, ***Shopland v. Enfield***, 151 N.H. 219 (2004). Likewise, construction of additional floors on a nonconforming building may also be a prohibited extension even if there is no expansion of the building's footprint. *Granite State Minerals, Inc. v. Portsmouth*, 134 N.H. 408 (1991).

Closer questions may arise when an owner wishes to change from one nonconforming use to another. Even if the new use would be less nonconforming than the original use, if the zoning ordinance does not permit that use in that district, the change may not be allowed if the new use is "substantially different" from the original use. However, natural expansion of a nonconforming use may be allowed in some limited circumstances, if the owner can prove that the expansion is not so great that it really amounts to an entirely new use. Courts will look at whether or not (a) the expansion reflects the nature and purpose of the original nonconforming use; (b) the expansion is merely a different manner of exercising the same use and is not different in character, nature and kind; and (c) the expansion has a substantially different effect on the neighborhood. See ***Severance v. Epsom***, 155 N.H. 359 (2007).

The terms of the zoning ordinance are also very important. For example, in the *Severance* case, the Town's zoning ordinance did not distinguish between seasonal and year-round residential use. As a result, a grandfathered seasonal home could be converted into a year-round home. Zoning ordinances might also define what constitutes a "substantial change in use" of a grandfathered structure or use. The lesson? Zoning ordinances should be carefully drafted to reflect what the municipality really intends to do.

Myth #3: The owner of a substandard lot (smaller than current zoning allows) is grandfathered for every use allowed in that district.

This is not true. Remember from Myth #1, grandfathering protects lawfully pre-existing nonconforming uses. A vacant lot may have existed before zoning made it substandard, but it isn't being "used" yet. This means ordinary grandfathering does not protect the owner of this property. There are three ways an owner might build on a substandard lot. The first and most straightforward is if there is a "lot of record" savings clause in the zoning ordinance. These clauses exempt pre-existing lots from later-enacted frontage and/or lot size requirements, or in some cases, allow buildings on those lots by special exception. If there is a savings clause, then the owner can exercise whatever rights that clause gives the owners of substandard lots. (Here again, the terms of the ordinance are really important.)

If there is no savings clause in the ordinance, then the owner must obtain a variance from the zoning board of adjustment (ZBA), and a building permit and site plan approval (as the municipality requires), to build any structure on a substandard lot. The purpose of a variance is to protect the Constitutional rights of the owner by preventing

him or her from being deprived of the viable economic use of the property. However, even the Constitution does not provide that every lot, regardless of size, must support at least one single-family home. The ZBA must determine whether the variance is appropriate for that particular lot, taking into account all of the facts and circumstances. For example, an owner of a substandard shorefront lot was denied a variance for a seasonal home because there was no adequate place for a septic system. *Carter v. Derry*, 113 N.H. 1 (1973).

Third, the owner may still be able to build if the lot is part of a vested subdivision, which brings us to…

Myth #4: An owner with planning board approval is protected from changes in zoning ordinances or regulations.
This is only true if the owner meets some conditions. A lot that is (a) part of an approved and recorded subdivision, may be protected from later changes in local zoning if (b) "active and substantial construction" has begun on the project within 12 months after the approval, and (c) the project is "substantially completed" within four years after approval. **RSA 674:39**; *Chasse v. Candia*, 132 N.H. 574 (1989). These rights can also be passed on to subsequent owners of the lots. **Morgenstern v. Rye**, 147 N.H. 558 (2002). Of course, as with everything else involving grandfathering, it is slightly more complicated than that. If the subdivision plan was never recorded, as happens from time to time, then **RSA 674:39** does not protect the owner. Such an owner might find himself in limbo between **RSA 676:12** (protecting some applicants from proposed zoning changes) and **RSA 674:39** (protecting those who have received approval and have recorded the plan). In addition, even grandfathered properties are not protected from later-enacted or increased impact fees. **RSA 674:39**.

Myth #5: Grandfathered properties are immune from all other local regulation.
This is a very common misconception. Although a property owner generally may continue a nonconforming land use, there are several exceptions.

Local Approvals: We explained in Myth #2 that a grandfathered use might be allowed to expand in a few very narrow circumstances. However, even if expansion is allowable, the owner is still required to obtain all other local approvals that are required for that particular expansion project, such as site plan approval, a building permit, septic or driveway approval. See ***Bio Energy, LLC v. Hopkinton***, 153 N.H. 145 (2005).

State Fire Code: "There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community." ***Fischer v. NH State Building Code Review Board***, 154 N.H. 585 (2006). Unlike zoning ordinances and regulations, the State Fire Code applies to existing buildings, structures and equipment. **RSA 153:5**. Even a building which is grandfathered under local zoning may have to be modified within a "reasonable time" as determined by the State Fire Marshal to bring it into compliance with the fire code.

Driveway Regulations: Not even a grandfathered property owner has the legal right to maintain a driveway access that constitutes a potential threat to the integrity of a

public road or to the public safety. **RSA 236:13**, VI gives planning boards "continuing jurisdiction over the adequacy and safety of every existing driveway, entrance, exit, and approach to a [municipal] highway," whether or not the driveway ever received planning board approval. Property owners have continuing responsibility for driveway connections to municipal highways, including grades, culverts and any other related structures, whether or not they are located within the highway right of way. It may come as a surprise to property owners that the planning board has the authority to order the owner to make any repairs or otherwise modify a driveway if it "is or becomes a potential threat to the integrity of the highway or its surface, ditches, embankments, bridges or other structures, or a hazard to the safety of the traveling public."

Myth #6: Municipalities cannot regulate grandfathered junkyards. Yes, they can, and more importantly, they should. While there are many ways to define "junkyard," in this case we refer to a junkyard under **RSA 236:112**. Since 1965 this law has required municipalities to license junkyards, including motor vehicle junkyards and salvage yards, machinery junkyards and other similar collections of material (whether or not it is a business). (For more detailed information on municipal junkyard regulation, please refer to LGC's publication, *How to Regulate Junk and Junkyards: A Guide for Local Officials*.)

There are two parts to a local junkyard license: initial approval of the location, and ongoing approval of the operation. If a yard existed before 1965, it is generally grandfathered as to its location. **RSA 236:125**. However, regardless of when a yard was established, it must continue to comply with all other operational requirements under this statute, including, among other things, the Best Management Practices (BMPs) for junkyards established by the Department of Environmental Services. **RSA 236:115, :121**. Owners must obtain a license from the governing body and must renew it annually, certifying that they are in compliance with the latest BMPs and all operational conditions. In other words, a junkyard owner may have a vested right to continue the yard where it is, but not a vested right to any particular manner of operating the yard.

In addition, junkyards are also subject to local zoning regulation. Municipalities may prohibit junkyards through local zoning, but lawfully pre-existing junkyards are grandfathered in the same way as other pre-existing land uses, and expansion and modification of those junkyards are similarly limited. Difficult questions may arise when a junkyard owner is required to change its operations to comply with the ongoing local licensing conditions and the BMPs (for instance, building a structure to store certain hazardous fluids safely), but finds that local zoning prohibits such a structure in that location. As with all grandfathering issues, often there are more questions than answers in these situations.

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