4. Changes and Expansions of Grandfathered Uses [or: 'Old Man, New Tricks']

Here's where the rubber really hits the road. Deciding whether a use or structure is "grandfathered" or not – complex though it is – is fairly easy, compared with having to decide whether grandfathered rights can be carried over to a proposed new or expanded use. It's in this arena of changes or expansions that the toughest legal questions arise.

A. The New London Land Use Assn. Case.

The case of *New London Land Use Assn. v. New London ZBA*, 130 N.H. 510 (1988) is still the most elucidating decision our NH Supreme Court has issued on the legal rules for when a nonconforming use can be changed or expanded. Lakeside Lodge owned a motel consisting of 17 housekeeping cottages. This was roughly double the unit density permitted by zoning and therefore was a nonconforming in scope. The motel was also a nonconforming commercial use in a residential district. Lakeside sought a special exception to construct a 17 unit condominium development, consisting of entirely new buildings with almost double the floor space of the existing motel. The issue was whether Lakeside could use its nonconforming density (17 units) for the new development. The Court held no.

> "Nonconforming uses may be expanded, where the expansion is a natural activity, closely related to the manner in which a piece of property is used at the time of the enactment of the ordinance . . . However, *enlargement or expansion may not be substantial and may not render premises or property proportionally less adequate* . . . We must also consider the extent to which the challenged use reflects the nature and purpose of the prevailing nonconforming use, whether the challenged use *is merely a different manner of using the original nonconforming* use or whether it constitutes a different use, and whether the challenged use will have a *substantially different impact upon the neighborhood* . . . "

*What **was** the nonconforming use? Dissent's view:* C.J. Brock, in his dissent in the case, said there were two nonconforming uses: the commercial nonconformity and the density nonconformity. In his view, Lakeside had a vested right to continue to uses its nonconforming density, even for its new project, since the number of units wasn't going to expand. *Majority view:* To the majority, however, the relevant question was basically this: At the time of the adoption of the ordinance, what did the owner have an investment backed expectation of? The answer was "a seventeen unit motel on a seventeen acre parcel," not an abstract interest in the number seventeen:

> "Absent a willing relinquishment of its nonconforming use, Lakeside may not substantially change the way in which the motel units were situated on the seventeen acre parcel when the nonconforming use was created . . . The changes which Lakeside proposes are not required for, nor are they reasonably related to, the continuation of the use that existed at the time the zoning ordinance was passed." (130 N.H. at 517)

In other words, a "nonconforming use" is the use as a whole, and the effect of that use as a whole can't be adequately analyzed by dividing it into its constituent elements. ***Lesson:*** *The essence of a nonconforming use often simply can't be reduced to math!*

B. Summary of Tests For legality Of Changes Or Expansions Of Nonconforming Uses:

The *New London Land Use Assn.* decision gives us the following tests for evaluating changes or expansions of nonconforming uses. (Confusingly, this is usually referred to as the "3-part test" even though there were actually *four* tests given in the case):

(A) Is the change required for the purpose of making the *already-existing* use more available or workable to the owner; or does it constitute a new and different use? In *Hurley v. Town of Hollis*, 143 N.H. 567 (1999), this prong was phrased as "whether the use at issue is merely a different manner of utilizing the same use, or constitutes a use different in character, nature and kind."

(B) Does the proposed change arise "naturally" (through evolution, such as new and better technology, or changes in society) out of the "grandfathered" use; In *Hurley*, this test was expressed as "the extent to which the use in question reflects the nature and purpose of the prevailing [i.e. pre-existing] nonconforming use."

(C) Will the change or expansion render the premises proportionally less adequate for the use, in terms of the requirements of the ordinance? (This is an especially important test for *dimensional* nonconformities; see § 8 below.)

(D) Will the change or expansion have a substantially different effect or *impact on abutting property or the neighborhood*? (This is often the pivotal issue, and one where there's plenty of room for personal judgment.)

The owner must carry the burden on *all* of these tests in order for any change or expansion of a "grandfathered" use to be lawful. ***Notice*** that the last prong of the test is only whether the change or expansion will have "a substantially different impact." *It doesn't really matter whether that impact is better or worse.* "A substantial change in the nature and purpose . . . will be prohibited, even if the proposed use is less offensive than the original use." (Peter Loughlin: 15 N.H. PRACTICE, LAND USE PLANNING AND ZONING at Section 8.06, quoting *Stevens v. Town of Rye*, 122 N.H. 688 (1982)). Your mindset should be that *all* nonconformities are adverse. The *New London* tests only protect those uses or structures which must nevertheless be allowed, because they are part of a justified investment-backed expectation pre-dating the ordinance.

C. Further Case Examples Of Changes Or Expansions.

The Court's tests, using words like "substantial" and "a natural activity," may seem about as easy to grab hold of as a greased pig. The best approach is to look further at decided cases:

> (i) ***New And Better Technology Allowed***: In *New London v. Leskiewicz*, 110 N.H. 462 (1970), the nonconforming use was for picnicking and tent camping, and the court said it could legally be

expanded to include camper trailers without a substantially different impact on the neighborhood:

> "The fact that improved and more efficient or different instrumentalities are used in the operation of the use does not in itself preclude the use made from being a continuation of the prior nonconforming use, provided such means are ordinarily and reasonably adapted to make the established use available to the owners and the original nature and purpose of the undertaking remain unchanged." (at 467, citations omitted)

(ii) ***Increased Intensity OK, But No Expansion In Area***: *Hampton v. Brust*, 122 N.H. 463 (1982) tells us that a nonconforming video arcade could replace its old pin ball machines with video games (again, new technology for same use), and could increase the number of machines in the same room, but could not expand them into another room in the same building, which had previously been a conforming gift shop:

> "*(W)here there is no substantial change in the use's effect on the neighborhood*, the landowner will be allowed to increase the volume, intensity or frequency of the nonconforming use. For example, a law firm in a building constituting a nonconforming use could increase its numbers of lawyers or clients, its internal and external use of its premises or amount of work activity. Similarly, a nonconforming restaurant could add more tables and chairs or serve more dinners." (at 469, italics added.)

(iv) ***Condominium Conversion Cannot Be Denied Unless There Is Change in Use.*** In *Cohen v. Town of Henniker*, 134 N.H. 425 (1991) it was held that the conversion of a grandfathered apartment complex to a condominium form of ownership, when the conversion entails no actual change in the use of the property, is part of its "grandfathered" rights, and is not an illegal expansion. This same ruling was reiterated in *Town of Rye Selectmen v. Town of Rye ZBA*, 155 N.H. 622 (2007), except that there it was based upon the prohibition of discrimination found in the Condominium Act (RSA 356-B). *Also see Dovaro 12 Atlantic, LLC v. Town of Hampton*, 158 N.H.222 (2009).

Again a condominium conversion must be permitted only *if the use does not change*. But there may be cases where, despite the lack of *physical* changes, the conversion itself does constitute a change in use. Consider, for example, the conversion of a campground serving transient guests to condominium units where each site becomes an individually-owned unit. In the *Dovaro 12* case (above) the Court said:

> "While a municipality may require a special use permit, special exception or variance for the [condo conversion] project, such a requirement may be denied only if the conversion *itself* would have an actual effect on the use of land . . . To determine whether the conversion would have an actual effect on the use of land, we examine the same factors that determine whether there has been a substantial change to a preexisting nonconforming use."

(iv) ***No Brand-New Buildings***. In *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239 (1992), a nonconforming marina wanted to build a brand-new boat storage building, claiming that it was a "natural expansion" of their marina business. Justice Johnson wrote:

> "We have never permitted an expansion of a nonconforming use that involved more than the internal expansion of a business within a pre-existing structure . . . (Here) the new building clearly has a greater aesthetic impact on the abutting property than the other five buildings . . . (hence) will have a "substantially different impact on the neighborhood."

(v) ***"Appropriateness" Is Irrelevant.*** In *Stevens v. Town of Rye*, 122 N.H. 688 (1982), the Supreme Court said a "grandfathered" auto garage couldn't change into a plumbing and bath supply shop, because that would be a substantial change in the nature and purpose of the use. The trial judge's finding that the bath shop was "better suited" to the neighborhood than the garage was held irrelevant.

(vi) *Ray's Stateline Market, Inc. v. Town of Pelham*, 140 N.H. 139 (1995). Ray's was a nonconforming convenience store in a residential district, with a coffee counter inside already. The new proposal was to relocate the coffee counter, without expanding the building, and also to replace an existing sign advertising Pepsi with a Dunkin' Donuts sign of the same dimensions. The ZBA said this was an illegal expansion, but the Court overturned the Board, and called this a "natural" expansion, citing the New London test and Hampton v. Brust. (***Query:*** Would the result have been the same if there were evidence that the switch to Dunkin' Donuts had caused a 4-fold increase in traffic and illegal parking?)

(vii) *Conforti v. City of Manchester*, 141 N.H. 78 (1996). The owner of a "grandfathered" movie house in a residential neighborhood started having live entertainment (rock concerts). The Court applied the New London tests and found that the live entertainment was an illegal expansion of the use because it had a "substantially different effect on the neighborhood," due to the noise.

(viii) ***"Grandfathered" Accessory Use Unlikely To Be Allowed To Become Primary Use.*** *Town of Salem v. Wickson*, 146 N.H. 328 (2001). Wickson's land had been a nonconforming farm. As part of the farm, chicken and pig manure had been stored, mixed with sand trucked onto the property, and sold as fertilizer. Later the farm operation ceased, but the owner kept trucking sand and other earth materials onto the property to stockpile it for sale. The question was whether the continuation of this use, without the underlying farm use, was a permissible change in a nonconforming use. The Court said it was not. The earth stockpiling was no longer subordinate and incidental to farming. Again, the heart of nonconforming uses is *investment-backed expectations*. The original use – in which there were such expectations – was farming, not stockpiling earth. There was also evidence of a much different impact on neighbors.

Note: There's at least one realm where changes and expansions are governed, not by the *New London* tests, but rather by statute - namely changes or expansions of pre-existing agricultural operations under

the so-called "Right to Farm" statutes (RSA 674:32a through :32-c). That topic is too detailed for this article, but see *Forester v. Town of Henniker*, _N.H._ (June 2015).

Adapted from the 2015 NHMA Law Lecture #1 - *Grandfathering: The law of Non-Conforming Uses & Vested Rights* by Bernie Waugh, Esquire, Gardner Fulton & Waugh PLLC and Adele Fulton, Esquire, Gardner Fulton & Waugh PLLC