

COURT ALLOWS EXPANSION OF NONCOMPLYING STRUCTURE

A recent Vermont Supreme Court case dealt with the issue of non-complying structures under zoning regulations. *In re Miserocchi*, No. 99-166 (January 28, 2000). The case involved a barn used as a single-family residence in the Town of Clarendon that violated the setback requirements. Agricultural uses and single-family residences are permitted in the district.

The Miserocchis applied to the Town for a change-of-use permit in order to make their residential use of the barn permanent (the Town previously had imposed a 10-year sunset requirement), and to add skylights and an addition to the rear of the building. After their application was denied at the local level, they appealed to the Environmental Court. That Court denied the application on the basis that residential use within the setback would increase the intensity of the use of the non-complying part of the barn.

On appeal to the Supreme Court, the Court considered the Clarendon zoning requirements concerning nonconforming uses. Since there were no separate local regulations on non-complying structures, the regulations on nonconforming uses controlled, even though it was difficult to apply them to structures. (Under the nonconforming use statute, 24 V.S.A. § 4408, noncomplying structures are also viewed as nonconforming uses. *Town of Winhall v. Kushner*, No. 90-410 (Entry Order, May 13, 1991)). Section 280 of the Clarendon zoning regulations provided:

§ 280. Any non-conforming use of structures or land except those specified below may be continued indefinitely, but:

1. Shall not be moved, enlarged, altered, extended, reconstructed or restored (except as provided below).
2. Shall not be changed to another nonconforming use without approval by the Board of Adjustment.
3. Shall not be re-established or restored without approval by the Board of Adjustment if such use has been changed to, or replaced by a conforming use.

The Supreme Court noted two problems with § 280. First, the Court said, it lacks standards by which the board of adjustment could decide whether to approve a change in nonconforming use. Without standards, the applicant is left uncertain as to what factors will be considered. A decision made without standards is “arbitrary and capricious” and denies the applicant due process of law.

Secondly, the Court said, § 280:

appears to prohibit all alterations of non-conforming uses, no matter how minor, but allows the board of adjustment to grant approval routinely for major changes, that is changes from one non-conforming use to another . . . Indeed, under the plain language of § 280, a non-conforming use cannot be altered at all unless it is changed to another non-conforming use or discontinued and then restored. This construction is simply not rational [emphasis added].

In other words, § 280 simply did not make sense to the Court. The Court therefore interpreted § 280 to only apply to a *change* to the nonconforming use. In this case, the nonconformity was the setback of the barn. Since the Miserocchis did not propose to change the setback at all, only to change from one permitted use to another (agricultural to residential), the Court ruled that they did not need any approval to proceed.

The Court also did not find significant the change of *intensity* of use from agricultural to residential. Since the local regulations did not address a change in intensity of use, an increase in intensity of use was not prohibited.

Finally, residential use could not be restricted to the part of the barn that complied with the setback.

The Court noted, “no case has been presented to us that limits a permitted activity to the complying part of a non-complying structure.”

Part of the confusion in this case arose because the local ordinance did not separate the concepts of nonconforming use and non-complying structure. The Court referred with approval to the Stowe zoning ordinance as one that does separate them. (For a copy of Stowe’s two-page section on “non-complying buildings” and “non-conforming uses,” contact the Law Center). The Court explained why the concepts should be separated:

This distinction is helpful because rules applying to non-conforming activities often cannot be easily applied to non-complying structures and vice versa. . . . Restrictions that specifically address structures are preferable because they provide clearer guidance to landowners, zoning boards and courts.

Several important lessons can be learned from this case. First, zoning regulations must be clear and understandable and they must contain *standards* for the board to base decisions on. As the Court noted, requirements without standards – giving broad discretion to the board to deny a particular permit – may deny due process to applicants. For example, if a change from one nonconforming use to another requires zoning board approval, how will the board decide whether to approve it or not? Your bylaws need to specify factors such as increased traffic, visual impacts, etc., etc. that the board must consider. Second, if your town wants to prohibit or regulate an increase in *intensity of use* of a non-complying structure, your regulations must be clear and specific, and again must contain standards if you require a permit. Finally, you should separate the concepts of *nonconforming use* and *non-complying structure* in your regulations. Clearly set forth the rules and standards that apply to each.

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