

NONCONFORMING USES MAY BE EXTENDED

The Vermont Supreme Court recently held that nonconforming uses may be allowed to expand onto property not previously occupied by the nonconforming use nor previously owned by the owner or operator of the nonconforming use. *In re Appeal of Casella Waste Management, Inc.*, __ Vt. __ (2003).

Nonconforming uses are uses that were lawfully established and operated prior to the effective date of a zoning bylaw, that do not comply with current zoning bylaws, and that are allowed to continue subject to limitations on the right to change, expand, or recommence the use after abandonment. As a general rule, legislative and judicial policy favors the gradual elimination of nonconforming uses. 24 V.S.A. § 4408; *Hinsdale v. Village of Essex Junction*, 153 Vt. 618 (1990).

In re Appeal of Casella Waste involves an appeal from the Environmental Court's approval of the construction of an access road connecting a nonconforming solid waste transfer station to Route 7A in Manchester. A group of landowners appealed the Environmental Court's decision arguing that the access road constitutes an unauthorized extension of a pre-existing nonconforming use to an adjacent property. In support of their argument, appellants argued that the Manchester zoning ordinance does not allow the extension of a nonconforming use onto land not previously occupied by the nonconforming use and that the purpose of the Vermont Planning and Development Act, Chapter 117 of Title 24, is to eliminate nonconforming uses.

Despite its recognition "that there is a strong public interest in regulating the extension and undue perpetuation of nonconforming uses," the Court upheld the Environmental Court's decision allowing the expansion of the nonconforming use based on a plain reading of the Manchester zoning ordinance. *In re Appeal of Casella Waste Management, Inc.*, __ Vt. __ (2003).

The zoning bylaw in question provided that "[N]o nonconforming use shall be extended or expanded, except with the approval of the [ZBA], provided that the [ZBA] shall have found that such extension or expansion will have no adverse effect upon the public health, safety, convenience, and upon property values in the vicinity; and, in judging the application, the [ZBA] should consider the criteria that would apply to the use if it were in a zone in which the use is permitted." *Id.*

In upholding the Environmental Court's approval of the access road, the Vermont Supreme Court relied heavily on the fact that the bylaw in question was "permissive" because it did not completely prohibit the extension or enlargement of a nonconforming use and because it provided criteria for the ZBA to consider, criteria which did not specifically limit the expansion of a nonconforming use to its original location. *Id.*

Although the Vermont Planning and Development Act authorizes municipalities to regulate the extension and expansion of nonconforming uses, it does not mandate a specific method for doing so. As a result, Vermont courts "turn to the municipal regulation to determine how the municipality regulates nonconforming uses." *In re Miseroochi*, 170 Vt. 320 (2000). The methods Vermont municipalities employ to regulate the extension and enlargement of nonconforming uses range from completely prohibiting any expansion of the use to allowing the nonconforming use to expand to adjacent properties with zoning board approval.

In re Appeal of Casella Waste is important in that it affirms local control of land use by emphasizing that the Court will look to municipal zoning bylaws to regulate nonconforming uses. It also recognizes that 24 V.S.A. § 4408 provides municipalities with flexibility in determining the extent to which nonconforming uses will be allowed to expand and continue. Whether a municipality is “permissive” or “prohibitive” in its approach to regulating nonconforming uses depends, among other things, on the goals of the Town Plan, on local economic needs, and on the pervasiveness of nonconforming uses in the community.

If it is the intent of a municipality to prohibit the expansion of nonconforming uses, bylaws should clearly reflect this. Examples of such “prohibitive” bylaws include provisions clearly stating “nonconforming uses shall not be enlarged or extended.” Municipalities with “permissive” bylaws that allow nonconforming uses to expand generally require zoning board approval of the expansion. As this case makes clear, if it is the intent of a “permissive” bylaw to prohibit nonconforming uses from expanding onto property not previously occupied by the use, the bylaw must specifically say so.

- *Julie Fothergill, Staff Attorney, VLCT Municipal Assistance Center*

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