

## Pigs in the Parlor or Diamonds in the Rough? A New Vision for Nonconformity Regulation

By Arthur Ientilucci



All photos by Jon Remmel in Rochester, New York

*A functionally obsolete firehouse converted to a retail store that sells crafts.*

Most of us who have been involved in zoning administration for any appreciable time have virtually been brought up respecting the sanctity of separation of use and accepting it as an article of faith. After all, every planner and zoner has been well schooled in *Village of Euclid v. Ambler Realty Co.* (272 U.S. 365, 47 S. Ct. 114, 71 Ed 303 (1926)), the seminal case that established the constitutionality of use district zoning. The phenomenon of the nonconformity, born and bred in Euclidean zoning, has always been seen as anathema to this doctrine. And so the theory held that for comprehensive zoning to be successful nonconformities had to be eliminated.

Time and observation have led to the realization that in spite of clear legislative intent and judicial interpretation geared toward their elimination there is a seemingly never-ending inventory of nonconformities. In fact, I have to believe there has been little real progress in eliminating nonconformities in most cities. This has caused me to think anew about regulating nonconformities. Most recently, I have been intently involved in the rewriting of a 25-year-old zoning code and have concluded that the zoning of nonconformities should be approached much differently than it traditionally has been.

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## Origins of Policy

Let's take a step back. Euclidean zoning codes neatly prescribed the specific land uses that could be established in various districts throughout a community. Each and every land use would be compartmentalized and appropriately situated in a particular district where a single category of land use would be permitted. Typically, these districts were the basic three: residential, commercial, and industrial. Every residential use would be segregated into a residential zone with like uses—commercial uses with similar commercial uses and the same for industrial uses. Never the twain should meet. The main tenets of comprehensive zoning were the separation of uses for mutual protection, the preservation of property values, and the facilitation of planning efforts to achieve similar community goals. The fly in the ointment was the problem of the nonconformity.

Early drafters were concerned that the whole philosophical basis and justification for comprehensive zoning might be impaired if nonconformities were to be legitimized as part of comprehensive planning and zoning schemes. At the same time it was feared that if these nonconformities were eliminated immediately there would be

of use and building types, traditional codes worked primarily to restrict further investment in nonconformities and eventually to eliminate them. The validity of the comprehensive plan and the success of comprehensive zoning rested on their transformation to conformity or their gradual termination. Joseph Katarincic, an observer of early zoning, noted in 1963 in *Duquesne University Law Review* (Vol. 2, No. 1) that “one difficulty, and by far the most

To achieve conformity of use and building types, traditional codes worked primarily to restrict further investment in nonconformities and eventually to eliminate them.



*An aging mixed-use building in the heart of a residential area is now home to a popular upscale restaurant.*



*An abandoned gasoline service station converted to a bakery and coffee shop in a neighborhood preservation area.*

takings challenges and zoning would not be accepted by the body politic. So, the drafters of the first codes foisted a compromise. Inconsistencies were allowed to continue, but regulations were imposed that would cause them eventually to disappear. Restraints were placed on alteration, expansion, intensification, change of use, lapses of use, and restorations, all of which did not apply to permitted uses. The key words were limit, restrict, prohibit, disallow, prevent, discourage, eliminate, and terminate—all uniformly and synonymously negative. These kinds of restrictions are still found in most contemporary zoning codes. They reflect a rigidity in terms of reuse evident in both the directive to eliminate and also in the typical form of relief being the use variance, which, if approved, declassifies the nonconformity and results in its permanency.

Regulation of nonconformities has had the intention and the result of imposed uniformity. Conformity was sought as a means of avoiding potential conflict. The ultimate goal of most zoning codes has been to achieve uniformity of uses within each zoning district, which could only be accomplished by the elimination of those uses and structures that do not conform. Hence, to achieve conformity

serious, is the continuation of the nonconforming use without an effective provision for its elimination. Until some method is devised to permanently eliminate the nonconforming use from our cities and towns, effective city planning cannot be achieved.” In retrospect, it seems as though it was too often conformity for the sake of conformity.

In taking this route to purge districts “clean,” the restrictions have often been extremely harsh. For instance, many codes trigger abandonment of nonconforming uses when they are discontinued for a period of time, regardless of the intent of an owner or user not to abandon the use. When abandonment does occur, reuse of nonconformities is made difficult, and in many cases the use variance is the prescribed relief, with its demanding and difficult burden of proof. Flexibility in dealing with these “deviant” properties has been considered contrary to the purpose and intent of the zoning regulation and the comprehensive plan on which it is based. Homogeneity has been the goal, the purpose, and the mission.

As urban land-use controls evolved over the course of the 20th century, the players in the zoning game were continually concerned about the undesirable impacts of nonconformities. Along the way, the allowance of nonconforming uses has been characterized by the courts as a “grudging tolerance.” This characterization is reflected in the many regulations that

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prescribe that nonconforming uses, buildings, and structures should be eliminated as quickly as possible. In fact, the traditional viewpoint is clearly that nonconformities violate the spirit of zoning laws. It was thought that the existence of nonconformities would lead to lowered property values, affect the area's desirability, and result in physical deterioration. However, what has more often been the case is that traditional regulation has fostered vacancy, with buildings falling into disrepair due to their loss of marketability. Also, property value is diminished or destroyed while the property is effectively isolated from the market, tax revenue is lost, and there is difficulty in obtaining mortgage financing and insurance. Marginal uses are encouraged to continue while owners divest, knowing there is little hope of even approximating highest and best use. Reinvestment is inhibited and discouraged as is the creativity and innovation that is often needed to restore and reuse these types of properties. There is an unavoidable negative impact on the neighborhood, ironically as a result of the very regulations that have been put in place for its protection. But are nonconformities always the "pig in the parlor?" I think not.



*An obsolete industrial facility converted to loft apartments and office space near residential, commercial, and institutional uses.*

### **Changing Perspectives**

All the traditional theory and practice that have contributed to the severe restraint on nonconformities ostensibly served a purpose during the age of industrialism, where heavy, dirty industrial uses were rampant and needed to be restrained from having negative, obliterating impacts on residential areas. This was a time before the advent of comprehensive building codes, long before the information/high-tech revolutions and the advent of environmental consciousness and regulations at all levels of government. This traditional approach persisted through and fostered the era of suburbanization, with its belief system grounded in the separation of use, reverence for the single-family dwelling, and the canonization of the automobile. Zoning has sought to safeguard the future, in the expectation that time will repair the mistakes of the past. In doing so, particularly with respect to nonconformities, zoning has focused so much on protection from the undesirable that it has at the same time discouraged the activity, creativity, and vibrancy that diverse, mixed-use buildings impart to a community.

Times have changed. This is the day of efficient land use, of the reascendency of the urban form; of mixed use, high density, and diversity; of urban places complete with living, working, and recreating opportunities interwoven and designed with a focus on

the public realm rather than on introverted private property interest. Twenty-first-century zoning should no longer dwell on how best to separate uses in the quest for uniformity but how best to blend and mix uses in the interest of harmonizing diversity. Just as the rights to nonconformities have traditionally been restricted in order to protect the community's health, safety, and welfare, why can they not be embellished with more flexibility in using, reusing,

Nonconformities in reality are not inherently bad and should be considered as potential assets for any city neighborhood rather than as prima facie detrimental.

cultivating, and recycling them to protect and enhance that same public interest? What is needed is a new outlook with respect to nonconformities—an outlook that sees them as not violating the spirit of zoning and effective land use but rather as part of the heart and soul of the urban framework.

In a nutshell, instead of restraining and eliminating nonconformities based on the false dictum of use separation, the emphasis should be on their use, reuse, and adaptation to current needs and market expressions as contributing members of the neighborhoods in which they reside. This is by no means a legal prescription, nor is it a commentary on the body of law on nonconformities such as was so aptly presented here by Mark S. Dennison ("Change or Expansion of Nonconforming Uses," March 1997). Rather, as a practitioner of zoning, I am suggesting a new strategy for dealing with these zoning orphans, one that recognizes that nonconformities in reality are not inherently bad and that they should be considered as potential assets for any city neighborhood rather than as prima facie detrimental.

### **Judging in Context**

Whether a particular nonconformity is a negative influence on a neighborhood is much more of a contextual issue than one of inherent problems with the nonconformity itself. It has been acknowledged that, even though a nonconformity may be thought of as a nuisance, it may simply be the right thing in the wrong place. In a more contemporary view of what creates a sense of place, nonconformities may now be considered the right thing for many places. Hence, they should be dealt with on a case-by-case basis rather than by general requirements that seek to extinguish them. Selective removal rather than blanket elimination is a concept that should underlie nonconformity regulations if zoning codes are to evolve in the direction of promoting good urban form, diversity, activity, and creating quality mixed-use urban neighborhoods.

As long as zoning exists as a land-use tool, there will be nonconformities and the unique challenges they represent. As such, nonconformities should not be uniformly perceived as problematic and requiring elimination. Certainly, some nonconformities can be detrimental to surrounding properties and community goals and should be eliminated. The conventional wisdom on the treatment of nonconformities has begun to change through the acceptance of mixed-use development districts, overlay zones, allowances for residential uses in commercial districts, and loft-type residential

conversions. It is better understood than at any time in the recent past how essential mixed use is to a lively, vibrant urban environment. Trends toward form codes and emphasis on design in recognizing the benefits of recycling buildings rather than uses also bode well for the future constructive use and reuse of nonconformities. The affording of viable opportunities for adaptive reuse of some of our cities' older, albeit nonconforming, buildings is a recognition that these unique assets can make a strong contribution to a city's vitality and sense of place.

The regulation of all types of nonconformities—nonconforming uses as well as nonconforming structures—needs to be examined through fresh eyes. However, the nonconforming structure not designed for a use permitted in the district in which it is located, whether housing a conforming or a nonconforming use, is of particular interest. The nonconforming use in the structure designed for conforming use generally has viable reuse options and can more easily be readjusted to market alignment for the use and purpose for which it was originally designed. The truly nonconforming structure type, the very different structure in the midst of structures of alternative design and purpose, has posed the



*A former heavy service/industrial facility successfully adapted to a neighborhood retail use.*

greatest issue and holds the greatest promise. It is these types of nonconformities that can make significant contributions to a neighborhood and afford invaluable opportunities to express the diversity of use and form that best reflect the beauty of the urban tapestry.

If the “disease” associated with nonconformities has been spread by restriction, elimination, prohibition, and termination, then the prescription for health is harmony, diversity, variety, charm, historic conservation and focus on form—the harmony of diversity. Rather than being perceived as corruptively infectious, they must represent and give rise to an infectious enthusiasm and desire to adapt, revitalize, and reuse. Nonconforming structures provide an existing infrastructure readily capable of housing mixed-use opportunities and the diversity and interest they promote.

### **Process Issues**

Flexibility in relief is also essential. Processes for dealing with nonconformities must afford much more flexibility to deal with their irregularity and peculiarity. These processes must involve public participation and input in decision making and also must assure continued protection for the neighborhood. Traditionally, the use variance has most often been the prescribed means of

relief to overcome the myriad of restrictions on nonconformities. This is a difficult burden of proof for the nonconforming user and also serves to make the use permanent if granted. This dilemma often nullifies neighborhood acceptance over the valid concern with lifetime vesting and permanency of use rights.

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In the case of expansions, intensifications, and enlargements of nonconforming uses, it is preferable to employ the area variance as the means of relief. If granted, then the approval is to expand, intensify, or enlarge the nonconformity, but the use essentially remains nonconforming as modified. It is a vehicle through which the benefits to the user can be weighed against the potential detriments to a neighborhood. At the same time it does not declassify a use as nonconforming.

With respect to reoccupancy of nonconforming uses and structures, especially in structures not designed for conforming use, the special use permit is the most attractive option. The suggestion is that this technique be employed to restore nonconforming uses to their prior, original, or lesser intensity or to reestablish a different use of similar intensity. This inherently keeps the restored use at a level commensurate with the prior use of the building and avoids excursions into more intensive uses. Special use permits are typically not permanent, as are use variances, and they offer both greater flexibility and continued controls over reuse. Special use permits also can be readily conditioned to clarify the terms of reuse and to set operational constraints as necessary to protect adjacent properties. Time-limited special permit approvals also can be employed as a means of monitoring a use over a reasonable period of time to ensure that the conditions and operational limitations are in fact accomplishing their desired goal. Specific standards for this category of special permit can be adopted that allow reoccupancy for the accommodation of neighborhood walk-to-service uses, walk-to-work opportunities, live-work spaces, and the reuse of buildings with architectural or historic value. Using the special permit at once states a legislative intent that nonconformities are permissible, as is their continued use so long as in their particular location they are not detrimental to the surrounding neighborhood. This is a far cry from grudging acceptance.

Another situation with respect to discontinuance needs to be addressed. That is the case where the nonconforming owner or user is befallen by personal circumstances, or by market or other matters that contribute to the inability to reoccupy a nonconformity within the established time period to avert abandonment of use. These may be situations where the owner or user fully intends to continue the nonconformity and is willing to maintain it and to make further investments. However, due to circumstances beyond their control, they cannot meet the codified deadline for reoccupancy. In these instances, the zoning administrator, after public notice and opportunity for comment, should be authorized to extend the time frame for abandonment. If the particular nonconformity has been problematic for the neighborhood and it is discovered that the nonconforming user has been disingenuous in an attempt to

maintain and reoccupy, then the administrator can opt not to extend the abandonment period and let the nonconformity terminate. If there is reasonable supporting data to extend the abandonment period, then perhaps a vacant building (and its associated neighborhood impacts) can be avoided.

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### The Need for Old Buildings

Codes typically permit changes of use in nonconforming buildings as long as the replacement use is restricted to the same degree as the former nonconforming use. Equal restriction has



*A firehouse converted to a photography studio.*

often been adjudged in terms of being or not being regulated at the same level, in terms of use district, as the preceding use. What is needed is a more realistic and definite measure of intensity. Uses and technologies change over time, today more rapidly than ever. Calibration of intensity based on district hierarchy can be deceiving and can be an inaccurate measure. Specific criteria for measuring intensity of use such as traffic, parking, employee levels, deliveries, hours of operation, noise, and odors should be codified. This will promote re-occupancy within prior intensity limits, allow for flexibility, and at the same time protect neighborhood interests.

The whole idea of a more forgiving, more flexible, and progressive view of dealing with nonconformities is in line with the tenets of smart growth and efficient land use. Many nonconforming structures are old buildings and are readily adaptable for small-scale commercial and mixed uses. As Jane Jacobs wrote in *The Life and Death of Great American Cities*: “Cities need old buildings so badly it is probably impossible for vigorous districts and streets to grow without them.” Many nonconforming commercial and industrial buildings can be used for residential purposes and offer exciting loft-style designs marketable to a wide range of people. Nonconforming structures in neighborhoods can accommodate walk-to-neighborhood services and work

possibilities, live-work space, and more walkable, active, and interesting urban neighborhoods.

I suggest that comprehensive plans and neighborhood plans include a strategy for the use and reuse of viable nonconforming structures. Also, clearly articulated purpose statements should be included in zoning codes, enunciating a community’s policy for the regulation of nonconformities and relating that policy to a preconceived plan of action. A nonconformity management plan can serve to delineate and categorize those nonconformities that are capable of contributing in a positive way to the character and needs of the community and also cite those that are incapable of contributing and warrant elimination. Just as such plans are needed to create a vision for new development, they can be useful in establishing a blueprint for the rehabilitation and reuse of existing nonconforming buildings.

It is important to view the nonconformity supply of a city prospectively as having potential for reuse and added value. Planning and promoting accordingly will encourage private-market building decisions to factor in the potential of nonconformities with an eye toward creative, profit-yielding reuse and adaptation. This kind of planning effort lays the foundation for discretionary decision making and substantiates and supports selective treatment over categorical elimination. Processes used to employ regulations and facilitate plans associated with nonconformities should be flexible but also must afford a reliable measure of certainty.

In Rochester, New York, we have chosen to embark on a new approach to the regulation of nonconformities. It is based on many of the ideas expressed in this article and is evident in our 2003 zoning code. It is one that seeks to use our man-made urban resources most efficiently. I believe we are headed in the right direction and that time and experience will prove just how valuable these diamonds in the rough can be.

A copy of the Rochester, New York, nonconforming uses ordinance is available to *Zoning News* readers by contacting Michael Davidson, Editor, *Zoning News*, American Planning Association, 122 South Michigan Avenue, Suite 1600, Chicago, IL 60603, or send an e-mail to [mdavidson@planning.org](mailto:mdavidson@planning.org).

## NEWS BRIEFS

### Can D.C. Require a University to House Its Students on Campus?

George Washington University (GWU) and the District of Columbia’s Board of Zoning Adjustment (BZA) have been duking it out for years. An ever-increasing enrollment requires university students to look off-campus for their housing, most often in the nearby Foggy Bottom and West End neighborhoods. The BZA is concerned about protecting the residential character and stability of those neighborhoods and requires a special exception for a university use in areas zoned residential or special purpose.

The special exception process is a two-step review. The university is required to submit a campus plan that describes its general intentions for new land uses. After the plan is approved, the BZA reviews individual projects to determine whether they are consistent with the plan. The *Campus Plan 2000* was approved with several conditions that GWU challenged in federal district court. The conditions include a requirement that the university house its freshmen and sophomores on campus as well as providing on-campus housing for at least 70 percent of its students. Another condition imposed an enrollment cap tied to the university’s supply

of on-campus housing. After the court (*George Washington University v. District of Columbia*, U.S. Court of Appeals, D.C. Circuit, February 4, 2003, No. 02-7055 & No. 02-7060) ordered the BZA to revise some of the conditions, the BZA eliminated the enrollment cap but added a new condition that requires GWU to provide housing on campus or outside Foggy Bottom for 70 percent of its approximately 8,000 undergraduate students, plus one non-Foggy Bottom bed for every full-time undergraduate student over 8,000. GWU went right back to court, arguing that the housing requirements violated the university's substantive due process rights.

A substantive due process right requires that land-use regulations advance a legitimate governmental purpose (separate from procedural due process rights, which require the government to follow a fair process). However, before the D.C. Court of Appeals could even review the conditions the BZA had placed on the campus plan, it had to decide whether GWU has a constitutionally protected property interest, the threshold question. Did GWU have an expectation that a special exception would be issued, strong enough to qualify as a property interest? If it did, then the court would look at the conditions the BZA placed on the campus plan.

After examining how other circuits have determined the existence of a property interest, the court concluded that the BZA's procedures limit its discretion in granting or denying special exception permits, and thus GWU had a protected property interest in the permit. But did the board's requirement that GWU provide housing for its students away from the Foggy Bottom neighborhood rise to the level of egregious government misconduct, a violation of the university's substantive due process rights? Ultimately, the court said "no." GWU couldn't make a case that the BZA's condition reflects a hostility of the Foggy Bottom residents to its students—or a "group animus." Neither could the court find any irrationality in the BZA's requirement. "Given the [BZA's] concern that an excess of students in the Foggy Bottom area is negatively affecting the character of the neighborhood, it cannot be irrational for the [BZA] to adopt rules likely to limit or reduce the number of students in the area." The court also commented on the BZA's condition requiring GWU to house its freshmen and sophomores on campus by saying, "[a] city might reasonably consider the youngest college students to be the ones most likely to disturb residents in the surrounding communities, as well as most likely to need whatever shreds of parietal rules may subsist on campus." The court concluded that the BZA's conditions "merely require the university to house its students in a way that is compatible with the preservation of surrounding neighborhoods."

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## Court Finds Zoning Denial Discriminated Against Disabled

On January 23, a U.S. District Court in Connecticut found that the city of New London, in denying a local mental health care agency's attempt to move its vocational training facility to a new building, violated the American with Disabilities Act (ADA) and the Rehabilitation Act of 1973 by intentionally discriminating against persons with psychological disabilities. The case *First Step, Inc. v. City of New London* (2003 WL 678484 (D.Conn.)) is the latest in a growing number of cases where zoning decisions against similar institutional uses have been found to run afoul of these two acts.

First Step, which provides vocational training to people with psychological disabilities, sought to relocate its existing

New London training facility to a downtown location that had more usable space and was handicapped accessible. It applied for a special use permit as an "educational establishment for learning disabled or mentally retarded adults" as well as a "rehabilitation facility," and proposed amending the zoning ordinance to remove the former use's exclusion of "adults with mental illness."

The planning and zoning commission held four public hearings, at which neighbors expressed concerns about traffic impacts, their safety from First Step clients, drugs being brought into the neighborhood by those clients, and clients loitering in front of the facility, as well as about the mentally ill in general. The commission first denied the proposed ordinance amendment as unnecessary because First Step could apply as a rehabilitation facility, then denied a permit for that use. Stated reasons for the denial included the lack of a public safety plan, concerns about the safety of First Step clients who must walk up a narrow driveway from a van drop-off zone in the front of the facility to the main entrance at the rear, and concerns about traffic from the site onto a narrow, home-lined road to the rear of the site. Citing neighbors' concerns, the commission also stated that the site is "not the proper site for the intended use."

First Step successfully demonstrated violations of the ADA and Rehabilitation Act by showing that the mental disability of First Step clients was a significant factor in the commission's denial (ADA), or the sole reason for it (Rehabilitation Act), and that the city failed to make "reasonable accommodations" to avoid discrimination against First Step clients. The court found that the city's adoption of, and refusal to remove, the exclusion of mentally ill from the educational establishment use was evidence of discrimination. It also concluded that the commission's stated reasons for denial were merely pretexts for its discriminatory motives, finding that public safety concerns reflected "the misinformed and biased viewpoints" of opponents, that any pedestrian safety problem along the driveway was created by the commission's refusal to allow First Step vans to take clients to the main entrance at the rear of the facility, and that the facility would generate less traffic than the preceding use (a Department of Motor Vehicles office) or nearly any other potential use of the site. The court characterized the commission's labeling the site "improper" as "a thinly veiled adoption of the community's prejudice against the mentally ill." Furthermore, it noted that the city could have addressed the cited pedestrian safety concerns (which the court called "the only legitimate concern raised") simply by allowing vans to drop off clients at the main entrance at the rear of the facility, at no cost to the city or its regulatory scheme. Stephen Sizemore, AICP

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*Zoning News* is a monthly newsletter published by the American Planning Association. Subscriptions are available for \$65 (U.S.) and \$90 (foreign). W. Paul Farmer, AICP, Executive Director; William R. Klein, AICP, Director of Research.

*Zoning News* is produced at APA. Jim Schwab, AICP, and Michael Davidson, Editors; Barry Bain, AICP, Fay Dolnick, Josh Edwards, Sanjay Jeer, AICP, Megan Lewis, AICP, Marya Morris, AICP, Roberto Requejo, Lynn Ross, Reporters; Sherrie Matthews, Assistant Editor; Lisa Barton, Design and Production.

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