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Coates' Canons NC Local Government Law

What Do You Mean I Can't Start Up My Business Again?

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Rick Grimes is a sheriff's deputy residing in a crossroads community out in the county. For a number of years he has supplemented his income with a small business repairing RVs. He usually has three or four old RVs parked in his back yard where he fixes them on nights and weekends. A few years ago the county extended zoning to Rick's community. His home was placed in a single-family residential zoning district that does not allow commercial uses such as his RV repair operation. But the county zoning staff told him when zoning was adopted that he could continue his backyard business since he had all required permits and was in operation prior to adoption of the ordinance.

About eight months ago Rick was seriously injured in the line of duty. He spent two months in the hospital. After an additional few months of rehab he was able to return to work. Given his lack of stamina, however, he put his moonlighting RV repair work aside.

Rick is now feeling much better and recently decided to restart his RV repair business. He mentioned this in passing to the county planner in the courthouse parking lot yesterday as they were leaving work. She told Rick there might be space to open his business in an abandoned state prison the county had recently acquired and was converting to a small business incubator and start-up industrial park.

Rick, his meager savings already depleted by his hospitalization and recovery expenses, thanked her for the tip, but quickly said he preferred to pick up the work in his backyard. She reminded him that while his neighbors had been very supportive during his recovery, there had been

complaints before he got hurt about all the "junk" piled up in his yard. Some of the neighbors might well not welcome the reappearance of a half-dozen broken-down RVs in his backyard. She told Rick that re-starting the work at his home might not be allowed under the county zoning.

Could it possibly be true that Rick cannot resume his backyard business? Well, it depends.

Nonconformities

The first question is whether Rick's business qualifies as a lawful "nonconformity" under the county zoning. Nonconformities are those land uses, structures, or lots that were legal when established but that do not conform to the requirements of subsequently adopted regulations.

How an ordinance deals with nonconformities poses an important policy choice for local governments. The ordinance has to balance several legitimate interests. One interest is that of the landowner who did nothing wrong in creating what is now a nonconformity. There is the interest of the neighbors in receiving the benefits of the protections offered by the ordinance's current restrictions. Another interest is that of the community in having everyone abide by the same rules. Those crafting the ordinance should give careful thought as to how these interests should be balanced. The benefits to the neighbors and community from uniform compliance with current regulations have to be considered in conjunction with the burden on the owner of the nonconformity.

While not required by state statute in North Carolina, virtually all zoning ordinances allow for the continuance of nonconformities. In this instance, the county ordinance does allow for continuation of nonconformities. Since Rick's repair business pre-dates the application of county zoning restrictions to his property it was at the time of his injury a lawful nonconformity.

Virtually all ordinances, however, strictly limit nonconformities. An earlier **blog post** explored how these limits apply to proposed repair or replacement of a nonconformity. Rick's situation raises a second common limit on nonconformities. Zoning ordinances typically provide that nonconforming use status is lost if that use is inactive for a specified period, often six months or a year. After that, whatever use is resumed must comply with the zoning ordinance in effect at the time of resumption. The courts have upheld such limits on nonconformities, noting there is a legitimate governmental interest in eventually phasing out nonconformities. Williams v. Town of Spencer, 129 N.C. App. 828, 500 S.E.2d 473 (1998).

Limits Based on Inactivity

Assume the county ordinance provides that nonconforming use status is lost if there is a six month period of inactivity. Did Rick's RV repair business lose its lawful nonconforming status because it has been closed for the last eight months?

Whether this limit applies to Rick depends on the precise wording of the county ordinance. Different results may obtain depending upon whether the term used is abandonment, cessation of use, or discontinuance. Unless more specific definitions are provided in the ordinance, the courts have interpreted *abandonment* to mean that the use has stopped and that there is no intent to restart it in the future and *discontinuance* to simply mean that the use is not active, regardless of any intent to resume. The cases also explore just what is a *cessation of use*. This can involve an examination of situations where the work stops for repairs, securing new tenants, or there is inactivity but an ability to restart it on short notice is retained. Of course in all of the cases the courts are examining a specific ordinance and attempting to discern the underlying intent of the board that adopted it, as well as applying it to a particular set of facts.

The choice of which term to use is to some degree based on how the local government chooses to strike the balance noted above. Using "abandon" is most protective of the interests of the owner as it provides the nonconforming protection is not lost unless the owner intends to give it up. By contrast, using "discontinued" may speed removal of incompatible uses that harm the neighbors and community.

Abandonment

In many respects use of the term "abandonment" is the easiest of these terms to apply. When an ordinance uses the term "abandonment," this introduces an element of intent on the part of the owner. In Forsyth County v. Shelton, 74 N.C. App. 674, 329 S.E.2d 730, *review denied*, 314 N.C. 328, 333 S.E.2d 484 (1985), the ordinance provided that nonconforming status was lost if the use was abandoned, abandonment being defined as "the voluntary discontinuance of a use, when accompanied by an intent not to reestablish such use." The case involved a nonconforming commercial recreation facility in a residential zoning district. After the owner became ill, there was an extended period during which the facility was not open to the public. For a time the property was leased to others who ran the facility. It was then used for several years only by family and friends of the owner. The defendant contended that there had been no abandonment of the use,

citing several grounds—among them, the physical facilities had remained in place even if they were not actually in commercial use, illness had made the cessation of use involuntary, some recreational use had always been made of the property, and there had always been an intent to reopen. The court however found sufficient evidence to conclude that there was an intent to forgo use of the property as a commercial recreation business, thus losing its nonconforming status.

So in our case, if the county ordinance says nonconforming use status is lost if the use is abandoned, Rick would have a good case for being allowed to resume operations in his backyard. He would need to meet with the planner and show her evidence that he was out of operation due to his injuries, but that he had no intent to permanently close his business. This could include indicators such as retention of his tools, keeping the repair materials he had on hand, and the like.

Discontinuance or Cessation of Use

If on the other hand the county ordinance uses 'discontinued" or "cessation of use" rather than "abandonment," Rick may have a problem if he really wants to resume work in his backyard rather than relocating.

A typical case upholding a limit on resumption of a discontinued nonconformity is Dockside Discotheque, Inc. v. Board of Adjustment, 115 N.C. App. 303, 444 S.E.2d 451, *review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). Under the town's zoning ordinance, nonconforming status was lost if the nonconforming activity was discontinued for a consecutive period of 180 days or was discontinued for any period of time without a present intention of resuming that activity. The landowner had offered topless dancing on the site on an occasional basis from 1983 through 1989, the frequency ranging from once a week at times to once every two to three months. In 1990 the zoning ordinance was amended to remove adult entertainment from the zoning district involved. The court held that because adult entertainment had not been offered on site for a period of eleven months at the time the restriction was enacted, no valid nonconforming use was present. Likewise, in CG & T Corp. v. Board of Adjustment of Wilmington, 105 N.C. App. 32, 411 S.E.2d 655 (1992), a case involving an inactive oil refinery where oil storage continued while the refinery was inactive, the court ruled that as defined in the ordinance, the term "discontinue" was not synonymous with the term "abandon" because intent was not a factor to be considered in the discontinuance of a use. The court upheld a determination that the facility's use as an oil refinery had been discontinued, whereas its use as an oil storage terminal had been maintained.

In Rick's case, RV repair work was discontinued in the backyard for eight months. His intentions to resume do not matter, as this is just a factual question of whether or not any of the repair work continued at his home during the time in question. So if the ordinance used this terminology, it is probably time for Rick to take a close look at the old prison site or some other appropriately zoned location for his business.

The issue gets a bit more complicated if the term used in the county ordinance is "cessation of use." Flowerree v. City of Concord, 93 N.C. App. 483, 378 S.E.2d 188 (1989), illustrates the complexities this creates. The plaintiff owned a nonconforming duplex in a single-family zoning district. After tenants moved out and the units could not be leased, the owner took them off the market and renovated both units. Since the units were vacant for more than the time period allowed in the ordinance, the city contended there has been a cessation of use as a duplex. The court however held that occupancy alone could not be used to determine the use. As long as the owner was making an attempt to use the property as a duplex (as evidenced by advertisements and renovations), there was no cessation of use as a matter of law. In Diggs v. City of Wilson, 25 N.C. App. 464, 213 S.E.2d 443 (1975), the court similarly held a restaurant closed for renovations over a thirteen-month period had not been discontinued. Rick could also point to Southern Equipment Co. v. Winstead, 80 N.C. App., 342 S.E.2d 524 (1986), a case involving a nonconforming concrete-mixing facility. Because of a business slump the plant was out of operation for more than six months, but it was maintained throughout the period and could have resumed operation very quickly if any business materialized. The court held that even though no work was done on site, the use had not ceased. But here Rick had not stopped for renovations or repair. While he was incapacitated to a degree he could not have resumed RV repair work at any point during the six months limit for cessation of use. So it is not clear these cases will help his cause.

Conclusion

Whether Rick can resume this work at his home or must relocate his business depends on the exact wording of the ordinance and the details of his situation. In our case it is clear that Rick's RV repair business was not abandoned as he had no intent to permanently close it. But the use may well have been discontinued or even ceased to be used. So before he resumes his business, he needs to carefully review the exact language in the ordinance and go by the planner's office for a detailed review of his circumstances.

If he is fortunate, the ordinance will clearly spell out the intent of the local government on just what type of inactivity will result in loss of nonconforming use status. For example, does the inactivity require an intent not to resume? What about inactivity due to illness, bankruptcy or other financial difficulty? It is helpful if the intent of the limit is spelled out in the ordinance rather than leaving this to guess-work by the zoning administrator, the land owner, and the courts. While the courts can sort this out, there is no substitute for clarity in the ordinance itself.

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