

# Nonconforming Uses/Noncomplying Structures

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The Utah Land Use Institute

*The Office of the Property Rights Ombudsman has provided funding for the Utah Land Use Library from the 1% surcharge on all building permits in the State of Utah.*

## Introduction

“Nonconforming use” means a use of land that:

- a. Legally existed before its current land use designation;
- b. Has been maintained continuously since the time the land use ordinance governing the land changed; and
- c. Because of one or more subsequent land use ordinance changes, does not conform to the regulations that now govern the use of the land.<sup>2</sup>

Nonconforming use principles apply to pre-existing legal uses which do not now comply with current land use regulations. These legal rules do not necessarily apply to business licensing regulations, health rules, animal restrictions or other local ordinances.<sup>3</sup>

“Noncomplying Structure” means a structure that:

- a. Legally existed before its the structure’s current land use designation; and
- b. Because of one or more subsequent land use ordinance changes, does not conform to the setback, height restrictions, or other regulations, excluding those regulations that govern the use of land.<sup>4</sup>

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<sup>2</sup> UTAH CODE ANN. §10-9a-103(44) (LexisNexis 2021) (Municipalities); UTAH CODE ANN. §17-27a-103(38) (LexisNexis 2021) (Counties).

<sup>3</sup> PATRICIA E. SALKIN, AMERICAN LAW OF ZONING (5th Ed. 2008) §12:4.

<sup>4</sup> UTAH CODE ANN. §10-9a-103(43) (LexisNexis 2021) (Municipalities); UTAH CODE ANN. §17-27a-103(37) (LexisNexis 2021) (Counties).

Generally speaking, the provisions in the law relating to nonconforming uses also relate to noncomplying structures. Where provisions differ for either, they are noted below.

### **Standard of Review for Nonconforming Use Issues**

While the normal bias in applying land use ordinances is to resolve ambiguities in favor of the use of property, this is not so with nonconforming uses. There is a well-accepted premise in land use law that nonconformities should be eliminated over time.<sup>5</sup> While normally land use regulations are construed in favor of the use of property, the ordinances allowing nonconforming uses and restricting them are strictly construed against the nonconforming use.<sup>6</sup>

The burden of proof is on person whose use is not legal under the current ordinances to prove by a preponderance of the evidence the legal existence of a pre-existing non-conforming use.<sup>7</sup> However, once the non-conforming use is established, the burden of proof is reversed. It is then on the local government entity to prove that the property use violates the zoning ordinance by exceeding the established non-conforming use.<sup>8</sup> While not a binding opinion, the Utah Property Rights Ombudsman has determined that circumstantial evidence of what a land use ordinance provided for at some point in history is not sufficient to defeat a nonconforming use.<sup>9</sup> If it is claimed that the use was illegal under the ordinance, a copy of the ordinance must be produced.<sup>10</sup>

### **Establishment of a Nonconforming Use.**

Just as critical as defining what constitutes a nonconforming use is to clearly understand what is not a nonconforming use. A use that was never legal is not a nonconforming use.<sup>11</sup> A nonconforming use was once legal, but would not be allowed under the current land use regulations.

The establishment of a nonconforming use is a question of law, once the facts are known.<sup>12</sup> As such, there is no deference to local decision makers when reviewing whether or not the use is

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<sup>5</sup> *Rogers v. West Valley City*, 142 P.3d 554, 556 n.6 (Utah Ct. App. 2006) (Nonconforming uses should be restricted or eliminated because they “detract from the effectiveness of comprehensive land use regulation, often resulting in lower property values and blight.” *City of Glendale v. Aldabbagh*, 939 P.2d 418, 421 (Ariz. 1997) (quotations and citation omitted); accord *Toys “R” Us v. Silva*, 676 N.E.2d 862, 867 (N.Y. 1996); see also *Rock Manor Tr. v. State Rd. Comm’n*, 550 P.2d 205, 206 (Utah 1976). (“We are in accord with the State’s thesis that there is a trend increasingly looking with disfavor upon nonconforming uses.”).

<sup>6</sup> SALKIN, §12:7; Doubts are resolved against the nonconforming use “within the limits of fairness and justice.” *Jones v. County of Coconino*, 35 P.3d 422, 425 (Ariz. Ct. App. 2001). Biases in favor of property owners do not apply to nonconforming uses.

<sup>7</sup> *Fillmore City v. Reeve*, 571 P.2d 1316 (Utah 1977); *State Rd. Comm’n. v. Holts Estate*, 381 P.2d 724 (Utah 1963).

<sup>8</sup> *Reeve*, 571 P.2d at 1319.

<sup>9</sup> OFFICE OF THE PROP. RIGHTS OMBUDSMAN, Advisory Op. 140, *Central Bank and Saratoga Springs* (2014).

<sup>10</sup> *Id.*

<sup>11</sup> *Town of Alta v. Ben Hame Corp.* 836 P.2d 797 (Utah Ct. App. 1992).

<sup>12</sup> *Vial v. Provo City*, 210 P.3d 947, 950 (Utah Ct. App. 2009).

established. The appeal authority and perhaps the court are to review the record of the facts and decide if the use is established or not.<sup>13</sup>

Only the original legality creates a nonconforming use. An illegal use does not become a legal nonconforming use over time, except where the original illegality was not apparent to the current users, it has existed for a long period of time, and fairness and justice require its continuance.<sup>14</sup>

Following every detail in getting an approved use, such as obtaining site plan approval, is not needed to establish a legal nonconforming use if there is no statute or ordinance stating otherwise.<sup>15</sup> Normally a building permit or lack thereof is not a definitive means to establish a use.<sup>16</sup> Lack of records by the municipality limits its ability to challenge other evidence provided by property owner.<sup>17</sup> Ambiguity in the facts shown by municipal records is construed against the municipality.<sup>18</sup> Where documents are lost or not maintained, the lack of such imposes a burden on the local government entity to otherwise prove what the document would show.<sup>19</sup>

According to analysis by the Utah Property Rights Ombudsman, compliance with building codes and other ordinances unrelated to land use regulation is not a factor in determining whether the use was legally established.<sup>20</sup> Local ordinances adding a condition that a use be fully compliant with local ordinances are invalid.<sup>21</sup> The municipal or county code also cannot increase the burden of proof on a property owner, or add other conditions for eligibility, as the status of a nonconforming use is defined by state law.<sup>22</sup>

The determination of the existence of a nonconforming use is not related to whether some of the land involved in the use is within one municipality and some in another.<sup>23</sup>

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<sup>13</sup> *Id.* at 950, citing *Hugoe v. Woods Cross City*, 988 P.2d 456 (Utah Ct. App. 1999).

<sup>14</sup> *Daines v. Logan City*, 276 P.3d 1200 (Utah Ct. App. 2012) (finding decades of use does not constitute proof that the use was “legally established” as required by ordinance) (However, see extended discussion in Salkin at §12:9 regarding conditions justifying equitable remedies where the property owner and municipality had both assumed the existence of a legal use or legal nonconforming use for an extended period of time before discovering a flaw in the origin of the lot or use).

<sup>15</sup> *Hugoe*, 988 P.2d at 459.

<sup>16</sup> *Thompson v. Logan City*, 221 P.3d 907 (Utah Ct. App. 2009).

<sup>17</sup> *Id.*

<sup>18</sup> *Vial*, 210 P.3d at 952.

<sup>19</sup> SALKIN, §12:5.

<sup>20</sup> OFFICE OF THE PROP. RIGHTS OMBUDSMAN, Advisory Op. 68., *Scott Davidson and City of Provo* (2009).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Woods Cross v. Smith*, 2002 UT App 81 (Utah Ct. App. 2002).

A variety of evidence may establish a use, including the intent of the property owner.<sup>24</sup> The testimony of neighbors is relevant and admissible.<sup>25</sup>

Proof that local officials allowed a use to continue, even as a pattern of conducted for other similar uses in similar situations, was not sufficient to establish the use as legal and nonconforming where the ordinance never allowed the use.<sup>26</sup> Even decades of continuous operation of a sand and gravel operation did not establish that the use was either legal when it commenced or became legal over a lengthy time of operation.<sup>27</sup>

### **Zoning Estoppel**

Commonly, some who argue that an illegal use must be allowed to continue as a nonconforming use are making the wrong argument. Instead, they are really asserting a claim of “zoning estoppel”. This is indeed a viable legal doctrine, but separate and distinct from the law related to nonconforming uses. Zoning estoppel can be claimed when a person innocently relies upon official, affirmative acts by local government entities who wrongly approve a use or structure. The individual, based on that reliance, makes substantial changes in financial position. When those local government actions are later discovered to be mistaken or otherwise illegal, zoning estoppel protects a person who, again, innocently relied upon the error. In limited cases, a use commenced or a structure erected under such circumstances may be legally continued despite its lack of consistency with the relevant rules. Zoning estoppel is an equitable remedy to avoid manifest injustice, but is disfavored by the courts and rarely triggered. A detailed analysis of this doctrine is beyond the scope of our current discussion.<sup>28</sup>

### **Burden of Proof on Establishment.**

The property owner or person claiming that a non-conforming use exists normally has the burden to demonstrate, by substantial evidence, that the use was legal once even though it no longer is.<sup>29</sup>

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<sup>24</sup> *Thompson*, 221 P.3d at 912–13. Case involved basement apartment. Evidence showed details of the construction consistent with establishment of the use when the house was built in 1960. Two utility meters, testimony of owners,

<sup>25</sup> *Vial*, 210 P.3d at 953; *SALKIN*, §12:6.

<sup>26</sup> *Ben Hame Corp.*, 836 P.2d at 802 (Utah Ct. App. 1992). Overnight rentals which were allowed illegally in the county, were required to end when the property was annexed into a municipality where they were, as in the county, illegal. See also *Provo City v. Hansen*, 585 P.2d 461 (Utah 1978) – student housing.

<sup>27</sup> *LJ Mascaro Inc. v. Herriman City*, 428 P.3d 4 (Utah Ct. App. 2018).

<sup>28</sup> See *Salt Lake Cty. v. Kartchner*, 552 P.2d 136 (Utah 1976) and *Utah Cty. v. Young*, 615 P.2d 1265 (Utah 1980), as well as subsequent cases citing these cases; See also the excellent discussion at *SALKIN*, 12:9 (the most recent case discussing estoppel in the land use context is *Checketts v. Providence City*, 420 P.3d 71, 77–78 (Utah Ct. App. 2018)).

<sup>29</sup> *Daines*, 276 P.3d at 1204–1205; (failure by owner to establish that a use was legal under the ordinance at some time is fatal to a nonconforming use claim); see also *LJ Mascaro*, 428 P.3d at 9–11 and *Checketts*, 420 P.3d at 77–78.

This is provided for in state law, but the statute does allow local government to provide otherwise.<sup>30</sup>

## A Nonconforming Use May Continue

The right to continue a nonconforming use is a protected property right, subject to constitutional protections against taking without the payment of just compensation if the use is not allowed to continue in a manner prohibited by the law.<sup>31</sup>

A nonconforming use is related to the property, and not to the owner or tenant who conducts the use. It can be sold or leased just as other similar property interests may.<sup>32</sup>

In order to continue a nonconforming use, all activities associated with the use need not be conducted on the property where the use is nonconforming. Continued use of land to park, store and stage large trucks, for example, preserves a transfer company use even when the office of the business was not located on the property.<sup>33</sup>

Although a nonconforming use was originally to pasture steers, use of the land for milk cows was held to preserve the use. The same species of animals, in this case, was sufficient.<sup>34</sup> The nonconforming use can be limited to the number of animals.<sup>35</sup> To attempt to require a reduction in the number of animals from past levels would be an illegal limitation on the use, however.<sup>36</sup>

## Destruction by Casualty

Local governments may not prohibit the reconstruction or restoration of a noncomplying structure or terminate the nonconforming use of a structure that is involuntarily destroyed in whole or part due to fire or other calamity unless the structure or use has been abandoned.<sup>37</sup>

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<sup>30</sup> UTAH CODE ANN. §10-9a-511(4)(a) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510(4)(a) (LexisNexis 2021) (counties).

<sup>31</sup> *Rock Manor Tr.*, 550 P.2d at 206 (Utah 1976); *Gibbons & Reed v. N. Salt Lake City*, 431 P.2d 559 (Utah 1967).

<sup>32</sup> UTAH CODE ANN. §10-9a-511(1)(a) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510(1)(a) (counties); see *Gibbons & Reed*.

<sup>33</sup> *Hugoe*, 988 P.2d at 458–59; see OFFICE OF THE PROP. RIGHTS OMBUDSMAN, Advisory Op. 142, *Bob Mason and Centerville City* (2014).

<sup>34</sup> *Carlson v. Bd. of Adj.*, 287 P.3d 440, 448 (Utah Ct. App. 2012).

<sup>35</sup> *Id.*

<sup>36</sup> *Clinton City v. Patterson*, 433 P.2d 7 (Utah 1967).

<sup>37</sup> UTAH CODE ANN. §10-9a-511(3)(a) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510(3)(a) (LexisNexis 2021) (counties).

## **Voluntary Demolition by Owner**

If the property owner voluntarily demolishes a majority of a noncomplying structure or the building that houses the nonconforming use, without written agreement with the local government entity regarding an extension of the use, then the right to continue the nonconforming use and use of the noncomplying building is lost.<sup>38</sup>

## **Deterioration of Structure**

Notwithstanding the above, the right to continue the use of a noncomplying structure may be lost if the structure is allowed to deteriorate to a condition that it is uninhabitable and is not repaired or restored within six months after written notice to the property owner that the structure is uninhabitable and that the noncomplying structure or nonconforming use will be lost if the structure is not repaired or restored within six months.<sup>39</sup>

In a recent case, the right to preserve a nonconforming sign was lost when owner did not respond to notice that the barn upon which the sign was placed must be restored or demolished. Securing and vacating the barn not sufficient to preserve the use when owners did not respond to specific demands of ordinance to restore or demolish.<sup>40</sup>

## **Expansion of a Nonconforming Use**

Generally, an existing nonconforming use is not allowed to expand.<sup>41</sup> However, the Office of the Property Rights Ombudsman has concluded that such a nonconforming use may expand to the boundaries of the parcel upon which the nonconforming use exists.<sup>42</sup> For example, a nonconforming gravel pit may expand its operations beyond the boundaries in place when the use became non-conforming, but not beyond the boundaries of the parcel or parcels where the use existed when it became nonconforming.<sup>43</sup>

The eventual use of all the land that was integral to the use when it was established is not an expansion.<sup>44</sup> To increase the activity involved in the use beyond that which was legally allowed when the use was created is an illegal expansion.<sup>45</sup> A nonconforming use may be extended

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<sup>38</sup> UTAH CODE ANN. §§10-9a-511(3)(b)(ii), 4(c)(i) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §§17-27a-510(b)(ii); 4(c)(i) (LexisNexis 2021) (counties).

<sup>39</sup> UTAH CODE ANN. §10-9a-511(3)(b) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510(3)(b) (LexisNexis 2021) (counties).

<sup>40</sup> *Hodgson v. Farmington City*, 334 P.3d 484 (Utah Ct. App. 2014).

<sup>41</sup> *Harper v. Summit Cty.*, 26 P.3d 193, 202 (Utah 2001); see also *Bastian v. City of Twin Falls*, 658 P.2d 978 (Idaho Ct. App. 1983).

<sup>42</sup> OFFICE OF THE PROP. RIGHTS OMBUDSMAN, Advisory Op. 186, *Jay Harwood and Tooele Cty.* (2017).

<sup>43</sup> *Id.*

<sup>44</sup> *Gibbons & Reed*, 431 P.2d at 561–65 (finding that the sand and gravel operation could continue through entire property incidental to the original use, including abutting parcels).

<sup>45</sup> *Benjamin v. Lietz*, 211 P.2d 449 (Utah 1949) (holding that a planing mill expanded beyond maximum horsepower was allowed under old ordinance which once allowed it and the former hours of operation were also enforced).

through the same building, provided no structural alteration of the building is proposed or made for the purpose of the extension.<sup>46</sup> No expansion has occurred where substantial evidence shows that it has not.<sup>47</sup>

Where two nonconforming uses existed side-by-side, the commercial use was not allowed to expand to the residential use on the same premises.<sup>48</sup>

## Regulation of Nonconforming Uses

The Idaho Supreme Court famously stated that “nonconforming status is not a talisman from which all zoning controls must retreat. Rather, the public policy embodied in zoning laws ‘dictates the firm regulation of nonconforming uses with a view to their eventual elimination.’”<sup>49</sup>

The local city council or county council or commission may provide for the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set forth in the land use ordinance.<sup>50</sup>

Generally, when modifications are made to a nonconforming use or noncomplying structure, those modifications must comply with the regulations in place at the time of the modifications.<sup>51</sup> This is assuming, of course, that the regulations do not unduly burden the nonconforming use.<sup>52</sup>

A 2015 amendment to the statutes bars local government from imposing regulations by ordinance that require physical changes in nonconforming rental dwelling units except for specific life safety issues: smoke detectors, ground fault circuit interrupter protected electrical outlets, street addressing, egress windows, upgrades to a non-functioning or unsafe electrical or

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<sup>46</sup> UTAH CODE ANN. §10-9a-511(1)(b) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510(1)(b) (LexisNexis 2021) (counties); (the code specifically provides that the addition of a solar energy device to a building is not a structural alteration; UTAH CODE ANN. §10-9a-511(1)(c) (LexisNexis 2021); UTAH CODE ANN. §17-27a-510(1)(c) (LexisNexis 2021) (counties).

<sup>47</sup> *Haran v. Escalante City*, 2010 UT App 372 (Utah Ct. App. 2010) (finding that a neighbor’s appeal was denied in this case at all levels of appeal and the relevant ordinance allowed three years’ abandonment before the use would be lost).

<sup>48</sup> *Utah Cty v. Baxter*, 635 P.2d 61 (Utah 1981).

<sup>49</sup> 1 R. ANDERSON, AMERICAN LAW OF ZONING (2nd Edition) (1976), § 6.07, at 371; see *Cole-Collister Fire Protection Dist. v. City of Boise*, 468 P.2d 290, 293 n. 3 (Idaho 1970).

<sup>50</sup> UTAH CODE ANN. §10-9a-511(2)(a) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510(2)(a) (LexisNexis 2021) (counties).

<sup>51</sup> *Bastian*, 658 P.2d at 980–81 (holding when floor space was expanded under the pre-existing eaves of a shopping center, the then-applicable landscape and parking regulations were triggered).

<sup>52</sup> *Gibbons & Reed*, 431 P.2d at 562.

plumbing system,<sup>53</sup> hand or guard rails, or code-required occupancy separation doors. Other upgrades may not be required.<sup>54</sup>

The 2015 revisions also limit the ability of local government to require physical changes to an egress or emergency escape window in any one to four family detached dwelling or three-story townhome if the window or egress complied with the code at the time the bedroom was finished; is smaller than that which would be currently required and the change would compromise the structural integrity of the structure or could not be completed in accordance with current codes, including set-back and window well requirements.<sup>55</sup>

Local governments can regulate the style of windows in bedrooms, require that a bedroom window be fully openable, and prohibit the reduction in size of windows that are already smaller than required by current codes.<sup>56</sup>

Unreasonable and overly harsh regulations can result in a “taking” of protected property rights in violation of both the state and federal constitutions.<sup>57</sup> Regulation of a nonconforming use must take into account the realities of business.<sup>58</sup>

## **Nonconforming Billboards**

Even if the land use ordinances prohibit them, a municipality may permit a billboard owner to relocate the billboard within the municipality’s boundaries to a location that is mutually acceptable to the municipality and the billboard owners.<sup>59</sup>

If a relocation is required, and no mutual location can be negotiated, then the municipality will be subject to a statute with specific penalties, including the payment of just compensation to the billboard owner in an amount calculated by a formula included in the statute.<sup>60</sup>

Other extensive regulations related to local regulation of billboards are beyond the scope of this summary, but can be found at Utah Code Ann. §10-9a-513 (municipalities) or §17-27a-512

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<sup>53</sup> As determined by an independent state-licensed electrical or plumbing professional, not by the local building official; UTAH CODE ANN. §10-9a-511.5(2)(a)(i)(E) (LexisNexis 2021); UTAH CODE ANN. §17-27a-510.5(2)(a)(i)(E) (LexisNexis 2021) (counties).

<sup>54</sup> UTAH CODE ANN. §10-9a-511.5(2) (municipalities) (LexisNexis 2021); UTAH CODE ANN. §17-27a-510.5(2) (LexisNexis 2021) (counties).

<sup>55</sup> UTAH CODE ANN. §10-9a-511.5(3) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510.5(3) (LexisNexis 2021) (counties).

<sup>56</sup> UTAH CODE ANN. §10-9a-511.5(4) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510.5(4) (LexisNexis 2021) (counties).

<sup>57</sup> *Gibbons & Reed*, 431 P.2d at 561.

<sup>58</sup> *Gibbons & Reed*, 431 P.2d at 563–64.

<sup>59</sup> UTAH CODE ANN. §10-9a-511(3)(c) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510(3)(c) (LexisNexis 2021) (counties).

<sup>60</sup> UTAH CODE ANN. §10-9a-513 (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-512 (LexisNexis 2021) (counties).

(counties). The intent and result of these regulations is to make the regulation of nonconforming outdoor advertising very difficult.

## **Substandard Lots**

If a lot is legally created, it remains a buildable lot for the uses allowed in the current land use regulations.<sup>61</sup> This does not mean that it may be further subdivided in a manner that does not comply with the current ordinances.<sup>62</sup> Local ordinances may provide that a substandard lot must have “single and separate” ownership or face “mandatory merger” with other abutting lots owned by the same property owner. If provided by code, the owner of abutting substandard lots may be required to combine them into a larger lot, perhaps one that conforms to the current requirements of lot size, if possible.<sup>63</sup>

The rules that apply to the use of a substandard lot are those in effect when the building permit is applied for, not when the lot was created.<sup>64</sup>

## **Termination**

There are four ways to end a nonconforming use: 1) most commonly, when the use is abandoned for a period of one year or more; or 2) when the owner voluntarily contracts to give up the use; or 3) when the use is made subject of an amortization program by the municipality and phased out over time as explained below; or 4) the use is “taken” and just compensation is paid to the holder of the use for the loss of his or her property interest.

### **Termination – Abandonment**

Under the common law, nonuse would result in the abandonment of the use and its lapsing into illegal status.<sup>65</sup> Under Utah law, the city council or county council or commission may adopt land use regulations governing the abandonment of nonconforming uses, but these must not attempt to go farther than the state land use statutes allow.

The state law provides that any party claiming that a nonconforming use has been abandoned bears the burden to establish the abandonment.<sup>66</sup> Abandonment may be presumed to have occurred 1) if the use has been discontinued for a minimum of one year; or 2) if the primary structure associated with the nonconforming use remains vacant for a year or 3) if the primary

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<sup>61</sup> *Hatch v. Kane Cty. Bd. of Adj.*, 302 P.3d 146, 151 (Utah Ct. App. 2013).

<sup>62</sup> *Id.*

<sup>63</sup> SALKIN, §12:12 (if this issue is of interest, please read the extended discussion, which points out the nuances of such ordinances and inconsistent interpretations that vary from state to state. We know of no Utah law directly on point, so bear in mind the courts in Utah may come to a different conclusion than the majority of other states).

<sup>64</sup> *Stucker v. Summit Cty.*, 870 P.2d 283 (Utah Ct. App. 1994).

<sup>65</sup> *Judkins v. Fronk*, 234 P.2d 849 (Utah 1939).

<sup>66</sup> UTAH CODE ANN. §10-9a-511(4)(b) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510(4)(b) (LexisNexis 2021) (counties).

structure associated with the use has been voluntarily demolished without prior written agreement with the local government entity regarding extension of the nonconforming use.<sup>67</sup>

A presumption is rebuttable, and can be rebutted by proof of facts to the contrary. Where the abandonment has occurred, however, and where there is no showing of facts to disprove the abandonment, the use is terminated and no action or intent by the owner of the use is needed for that automatic termination. Since the statute does not refer to intent, but only facts, intention of the owner or the local government is irrelevant to whether abandonment has occurred or not.<sup>68</sup>

If abandonment is alleged, the property owner may rebut the presumption of abandonment. If one claiming abandonment meets his or her burden to establish the abandonment, the property owner has the burden to show that the abandonment has not in fact occurred.<sup>69</sup>

Abandonment only occurs, however, when the nonconforming use, as defined in the ordinance, has lapsed for a year. For example, where there were several activities defined as constituting the nonconforming auto salvage use, and where the ordinance described the activities as being “either/or” one activity or another, then continuing one of the activities preserved the right to reinitiate all of the activities listed as included in the use.<sup>70</sup>

In order to continue a nonconforming use, all activities associated with the use need not be conducted on the property where the use is nonconforming. Continued use of land to park, store and stage large trucks, for example, preserves a transfer company use even when the office of the business was not located on the property.<sup>71</sup>

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<sup>67</sup> UTAH CODE ANN. §10-9a-511(4)(c) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510(4)(c) (LexisNexis 2021) (counties) (the one year rule does not apply to schools and charter schools, apparently. Local government entities may set a different period of time for the abandonment of schools); UTAH CODE ANN. §10-9a-511(5) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510(5) (LexisNexis 2021) (counties).

<sup>68</sup> *Rogers*, 142 P.3d 554 (finding that property owner did not intend to abandon pasture use. Horses were relocated because a third party removed the fencing required to maintain the use. The use was abandoned because the facts result in the abandonment, not the intent of the parties involved); See also *Collins v. Sandy City Bd. of Adj.* 16 P.3d 1251 (Utah Ct. App. 2000) (finding where a nonconforming use of homes for overnight rentals was rejected by the Board of Adjustment. Where owner intended to restore use once a similar case before the courts proved it to have been legal, and where the similar use was held to be legal and nonconforming, Collins still lost their use because they were not parties to the litigation and quit the use. Intent was not relevant. If they wished to preserve the use, they needed to appeal the Board decision to court and preserve their rights).

<sup>69</sup> UTAH CODE ANN. §10-9a-511(4)(d) (LexisNexis 2021) (municipalities); UTAH CODE ANN. §17-27a-510(4)(d) (LexisNexis 2021) (counties).

<sup>70</sup> *Caster v. West Valley City*, 29 P.3d 22 (Utah Ct. App. 2001).

<sup>71</sup> *Hugoe*, 988 P.2d at 459.

Although a nonconforming use was originally to pasture steers, use of the land for milk cows was held to preserve the use. The same species of animals, in this case, was sufficient.<sup>72</sup> The nonconforming use can be limited to the number of animals.<sup>73</sup>

Changing a nonconforming use to another use which is sufficiently dissimilar to the original use terminates the nonconforming use after a year. In a specific case, a land use for the manufacture of burial vaults and septic tanks was changed to ice production. Even though the city allowed the change, and the property owner made significant investment in the ice business, a neighbor successfully challenged the decision and the nonconforming use was lost.<sup>74</sup>

The abandonment of a nonconforming use takes effect even if the property continues to be assessed based on continuation of the use on the property tax rolls.<sup>75</sup> Failure to obtain a business license has not been deemed to constitute abandonment.<sup>76</sup>

Once abandonment has occurred, continued use of the property must be in harmony with the current zoning regulations.<sup>77</sup>

### **Termination – Agreement of Owner**

A property owner may, by contract, give up the right to continue a nonconforming use. If a property owner enters into a contract that does not specifically provide for the right to continue a nonconforming use in a new development plan, the use is not preserved.<sup>78</sup>

### **Termination - Amortization**

The local city council or the county council or commission may provide for the termination of all nonconforming uses, except billboards, by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of his investment in the nonconforming use, if any.<sup>79</sup>

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<sup>72</sup> *Carlson*, 287 P.3d at 448.

<sup>73</sup> *Id.*

<sup>74</sup> *Harris v. Springville City*, 712 P.2d 188, 188–89 (Utah 1984).

<sup>75</sup> *Morrison v. Horne*, 363 P.2d 1113 (Utah 1961).

<sup>76</sup> SALKIN, §12:4.

<sup>77</sup> *Caster*, 29 P.3d at 23–24.

<sup>78</sup> *Coventry Cove & Wilkinson v. Morgan Cty. Bd. of Adj.*, 2007 UT App 253 (Utah Ct. App. 2007).

<sup>79</sup> UTAH CODE ANN. §10-9a-511(2)(b) (LexisNexis 2021) (municipalities) ; UTAH CODE ANN. §17-27a-510(2)(b) (LexisNexis 2021) (counties).

In a Provo case, amortization of student housing in single family residential area was upheld.<sup>80</sup> In that situation, it was unreasonable for a property owner to demand an infinite amortization period where the property owner intentionally rented the units at a less than market rents.<sup>81</sup>

### **Who May Challenge a Nonconforming Use.**

Clearly, local government entities may regulate land uses within their jurisdictions and bring action to enforce the rules related to nonconforming uses. The courts have also held that nearby neighbors also have standing to challenge nonconforming uses.<sup>82</sup> A neighbor may have standing when a legally cognizable, distinct, and palpable injury giving rise to a personal stake in the outcome of the dispute exists.<sup>83</sup> Their damage must be “over and above the public injury [that] may be caused by the violation of the zoning ordinance.”<sup>84</sup> Thus, to challenge a land use decision or enjoin a zoning violation, a party must have some sort of damage that differs in kind or is substantially more than the injury to the general community.<sup>85</sup>

Some courts have held that while neighbors have standing to challenge the alleged existence, abandonment, and expansion of nonconforming uses, competitors of the use do not.<sup>86</sup>

### **Conclusion**

Those involved in enacting, administering, and conducting the business of life under our land use regulations should use wisdom and a balanced perspective with regard to nonconforming uses and noncomplying structures. We should hesitate before declaring any large number of buildings or uses as nonconforming, realizing that regulatory overburden involved in both using and administering those uses in the future will be dramatically increased by doing so. But where significant issues of public concern compel us to do so, a well-considered and fair process for the management of nonconformities can benefit all concerned.

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<sup>80</sup> *M&S Cox Inv. v. Provo City*, 169 P.3d 789, 795 (Utah Ct. App. 2007).

<sup>81</sup> *Id.*, at 796–97.

<sup>82</sup> *Harris*, 712 P.2d at 191 (It is to be noted, however, that local remedies must be exhausted before legal action is commenced); UTAH CODE ANN. 10-9a-801 (LexisNexis 2021) (Municipalities); UTAH CODE ANN. 17-27a-801 (LexisNexis 2021) (Counties).

OFFICE OF THE PROP. RIGHTS OMBUDSMAN, Advisory Op. 214, *R. Paul Evans and City of Provo* (2019).

<sup>84</sup> *Specht v. Big Water Town*, 172 P.3d 306, 308–09 (Utah Ct. App. 2007).

<sup>85</sup> *Id.* (internal citations omitted).

<sup>86</sup> SALKIN, §12:8.