

## **Rick's Cafe Experiences Growing Pains**

Posted By [David Owens](#) On May 16, 2013 @ 5:04 PM In [Land Use & Code Enforcement](#)

A small restaurant on the edge of town has been in operation for many years. Rick's Cafe Carolinian was built in the 1940's by Vic and Ilsa Laszlo at a time when the surrounding land was only woods and fields. Residential subdivisions gradually grew up around their business. When the town adopted zoning in the 1970s, this entire area was zoned for residential use.

The café is now owned by Vic and Ilsa's grandson Sam. While the business has been stable over the years, Sam believes it needs to be substantially modernized to remain viable. He would like to do the following. First, he would like to build a modest addition to the side of the building to expand the café's small bar area. This would allow Sam to add the piano bar of his dreams. Second, he would like to convert a large unused back room into extra seating space for the café. This room has only been used for storage for decades. Some say that Sam's grandparents used this back room for an illicit gaming operation in the café's early days, but that is another story. Now, with some modest renovations, it could add 30% more seating space, helping to pay off the loans he needs to take out for his renovations. Finally, he would like to completely replace the building's wiring, plumbing, and heating/air conditioning systems, and while he is at it, replace all of his kitchen equipment with modern appliances. He knows this will cost a good deal, but he wants to make the building comfortable, more functional, and bring it up to modern code standards.

Sam ran these ideas by some of his regular Friday evening bar customers as several of them were builders and contractors knowledgeable about such things. One of the regulars happened to be Hank Strasser, a retired builder who is now the town zoning officer. Hank agreed that Sam's plans would be a great improvement for the café, but immediately saw a red flag. The building housing Rick's is structurally sound and meets all of the town standards regarding setbacks and the like. But the cafe is not allowed in this zoning district since the land is zoned for residential rather than commercial uses. Hank told Sam that he could always seek a rezoning, but that would be a long shot in this situation. The neighbors had vigorously opposed several prior proposals to rezone parcels for commercial use and the town's new land use plan calls for the entire area to stay predominately low density residential. Hank explained that since Rick's was a nonconforming use, the ordinance prohibits enlargement or expansion. "What, pray tell," says Sam, "does that mean for my plans to improve the café?"

The answers are not as certain as one might think, especially if the town ordinance only has the typical brief provisions regulating nonconformities. There are important policy implications to consider when framing limits on nonconformities, balancing the interests of the landowner, the neighbors, and the community. A local government should carefully consider these implications and make clear, explicit policy choices when the restrictions are adopted.

The general law on limiting nonconformities is fairly straightforward. If a land use, structure, or lot was lawful when created, the ordinance making it nonconforming is generally applied prospectively only. Preexisting conditions are allowed to continue. A common restriction on nonconformities though is that they not be expanded or enlarged. The courts have readily accepted that concept. The court noted over three decades ago that while zoning ordinances are "in derogation of the right of private property" and should be construed in favor of free use of property, "our courts have nevertheless limited the expansion of nonconforming uses with a view toward their eventual elimination." Atkins v. Zoning Board of Adjustment, 53 N.C. App. 723, 729, 281 S.E.2d 756, 759. More recently the court observed, "Prohibition of the expansion of a nonconforming use is lawful and consistent with good zoning practices." Huntington Properties, LLC v. Currituck County, 153 N.C. App. 218, 223, 569 S.E.2d 695, 699 (2002).

Sam has proposed three things: (1) a structural addition to enlarge his existing bar area; (2) an expansion of seating space within the building; and (3) an extensive renovation of fixtures within the building. Assume in our case the town's ordinance has a typical provision on nonconformities, such as, "A nonconforming use or structure may not be enlarged or expanded." Assume also that the ordinance does not further define those terms. Would any of these be a prohibited enlargement or expansion of Rick's Cafe?

## **1. Addition to Structure Housing Nonconforming Use**

The first question is whether Sam can add space to the building in order to expand his bar area.

Most ordinances prohibit increasing the size of a nonconforming building. These limits are clearly applicable when it is the structure itself that is nonconforming, such as a building that sits in a setback area. But in our case the structure housing the café is not in itself nonconforming. It is the commercial use of the structure that cannot be enlarged or expanded according to the ordinance. The question is whether a conforming structure can be expanded within the dimensional limits of the ordinance if it houses a nonconforming use.

Several cases have upheld limits on additions to structures that house nonconforming uses. Construction of a new pilot's lounge and airplane-storage building at a nonconforming airport in a residential district was prohibited in City of Brevard v. Ritter, 14 N.C. App. 207, 188 S.E.2d 41 (1972). The construction of a storage building to enclose a previously open storage area was held to be an unlawful enlargement of a nonconforming use in Cannon v. Zoning Board of Adjustment, 65 N.C. App. 44, 308 S.E.2d 735 (1983). The court upheld prohibiting construction of a four-story parking structure to replace a surface parking lot at a nonconforming hotel in Four Seasons Management Services, Inc. v. Town of Wrightsville Beach, 205 N.C. App. 456, 695 S.E.2d 456 (2010).

This is an area in which careful wording in a zoning ordinance is needed to clearly establish the governing board's intention. If the intent is to prohibit any structural

additions to a building housing a nonconforming use, that limitation should be specified in the ordinance so folks like Sam and his neighbors will not have to go to court to find out the scope of the restriction.

## **2. Intensification of Nonconforming Use**

What about Sam's proposal to convert a storage room into additional seating capacity for his café?

The majority rule nationally is that an increase in volume or intensity of a nonconforming use is generally not presumed to be prohibited. Several North Carolina cases have held an intensification of a nonconforming use within the footprint of the existing nonconformity is permissible unless expressly prohibited. In Stegall v. Zoning Board of Adjustment, 87 N.C. App. 359, 361 S.E.2d 309 (1987), *review denied*, 321 N.C. 480, 364 S.E.2d 671 (1988), the court allowed the owner of a nonconforming cemetery that contained only in-ground burial plots to add an above-ground mausoleum. The court ruled the mausoleum would be not an expansion of the nonconforming use but an intensification that was allowed by the terms of the ordinance. Similarly, the court in Stokes County v. Pack, 91 N.C. App. 616, 372 S.E.2d 726 (1988), *review denied*, 324 N.C. 117, 377 S.E.2d 246 (1989), allowed additional vehicles to be brought into a nonconforming salvage yard provided they only occupied the space actually being used for junk storage when the ordinance was adopted. In Clark v. Richardson, 24 N.C. App. 556, 211 S.E.2d 530 (1975), the court held that the enclosure of a porch on a nonconforming grocery store did not constitute enlargement or extension of the nonconformity.

Under this rationale, Sam's proposal to add seats within the existing building housing his nonconforming café could be viewed as a permissible intensification rather than an impermissible expansion of a nonconforming use.

Other cases have, however, upheld limits on increasing the scale of nonconforming uses even where that did not involve use of a larger footprint. In Kirkpatrick v. Village Council of Pinehurst, 138 N.C. App. 79, 530 S.E.2d 338 (2000), the petitioner owned a nonconforming campground for recreational vehicles. The ordinance provided that nonconforming uses must not be "enlarged or increased, nor shall any non-conforming use be extended to occupy a greater area of land" than occupied at the time it became nonconforming. The court held that this provision not only precluded expansion of the campground to portions of the parcel beyond the area originally occupied, it also precluded renovations that would add additional campsites within the portion of the site already being used. The court applied a similar analysis in Huntington Properties, LLC v. Currituck County, 153 N.C. App. 218, 569 S.E.2d 695 (2002), to find that only the spaces within a nonconforming mobile home park that were actually in use (as opposed the number of permitted spaces) constituted the existing nonconformity and that expansion beyond that number of spaces could be prohibited. If expressly stated in the ordinance, the courts will also uphold a prohibition on the expansion of space allocated to a nonconforming use within the same building. Fantasy World, Inc. v.

Greensboro Board of Adjustment 128 N.C. App. 703, 496 S.E.2d 825, *review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998).

Whether Sam's conversion of the storage room would be allowed then depends on the exact terms of the ordinance, not upon some general principle of state law. Clarity in the ordinance language defining impermissible expansion of a nonconformity is again the critical factor. If increases in the intensity of use are intended to be included within the prohibited expansion of a nonconformity, the terms of the ordinance must clearly include that restriction.

### **3. Modernization of Structure Housing Nonconforming Use**

What about Sam's proposal to upgrade his electrical, plumbing, and HVAC systems and to improve his kitchen equipment?

The general rule is that improvements required to maintain compliance with other laws are not a prohibited enlargement or expansion of a nonconformity. In re O'Neal, 243 N.C. 714, 92 S.E.2d 189 (1956), is the leading North Carolina case on this point. The petitioners had a nonconforming nursing home (an institutional use not permitted in the applicable residential zoning district). They needed to replace the existing frame building with a modern fireproof building in order to comply with updated building code requirements. The court interpreted the ordinance to allow reconstruction in order to comply with the building code, provided that the new building was limited to the same scale in terms of numbers of patients served. The court in MNC Holdings, LLC v. Town of Matthews, \_\_\_ N.C. App. \_\_\_, 735 S.E.2d 364 (2012), recently applied this concept to hold that alterations to a nonconforming medical waste incinerator, which was located in a residential zoning district, made to comply with environmental laws were permitted since the ordinance allowed alterations "when required by law."

So to the extent Sam's modernizations are needed to bring the café building up to code, they would almost certainly be allowed. The courts are particularly sympathetic when the owner is required by law to make the improvements.

His kitchen upgrades would probably be allowed as well, as long as they are not so extensive as to trigger the limits on repair versus replacement discussed in an earlier [blog post](#)<sup>[1]</sup>. But he should be aware that some cases have held it is not permissible to modernize equipment for a nonconforming use if that would result in a substantial increase in the impacts of the nonconforming use. In Malloy v. Zoning Board of Adjustment, 155 N.C. App. 628, 632, 573 S.E.2d 760, 763 (2002), the court held it would be an unlawful expansion if a nonconforming welding and gas supply business replaced a liquid oxygen storage tank with a substantially larger tank because that would increase the scope of the nonconforming business by allowing additional and faster service to its customers. Similarly, in APAC-Atlantic, Inc. v. City of Salisbury, 210 N.C. App. 668, 709 S.E.2d 390 (2011), the court upheld a determination that modernizing a nonconforming asphalt plant in ways that would allow a significant increase in its capacity and lower its operating costs was a change in the scope of the use and an impermissible enlargement.

Some courts might view Sam's kitchen proposal as a permissible intensification of the use. Other courts may view it as an impermissible enlargement. This is once again a point on which ordinance clarity can avoid confusion and litigation.

So what are the lessons for local governments? The main one is that clarity and specificity in drafting provisions regarding limits on nonconformities is essential. It would be nice if the ordinance could simply and only say "No enlargement or expansion of a nonconforming use or structure is allowed." There is great merit in such a clear, brief, and plain directive. But reality is too complex for such a simple directive. It leaves unanswered several critical questions that will invariably arise.

The prudent local government will anticipate these common situations, deliberate the policy to be applied to them, and explicitly provide the answers in the ordinance itself. [As time goes by](#) <sup>[2]</sup>, that extra work will make implementation of the ordinance simpler and fairer for all concerned, and will not force the courts to divine unstated intentions about the scope of limits on expanding nonconformities.

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[2] **As time goes by:** <http://www.youtube.com/watch?v=7vThuwa5RZU>

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