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CITY AUTHORITY TO TERMINATE LEGAL NONCONFORMING USES

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LEGAL ISSUES RELATED TO TERMINATING LEGAL NONCONFORMING USES

During my last almost 40 years of practice, there has been a consistent trend in the direction of both the legislature and judiciary to protect individual property rights at the expense of local land planning efforts. Whether right or wrong, these responses are often based on perceived governmental overreaches. Examples include:

1. Municipal Annexation Act in 1963: Curbed unfettered involuntary annexations of many miles of land by some cities. An amendment to the statute in 2019 effectively banned unilateral annexations.
2. Texas Impact Fee Act in 1987: Enacted in response to some utility provider's practice of imposing exorbitant fees as a condition of providing service.
3. Vested Rights Statute in 1987: Passed in response to local governments changing the rules of the game in the middle of a development project in order to prevent or hinder those projects.
4. Anti-Moratorium Statute in 2001: Intended to stop cities from imposing moratoria on land development for minor reasons or no reason whatsoever.

The trigger is often a municipal practice with "bad facts" that can be cited to support the response. It is possible that the next possible response will be to municipal termination of legal nonconforming uses. Historically this has not been a significant political issue. For example, closing an environmentally dangerous lead smelter in west Dallas that had been in operation for 30 years had political support. *Murmur Corp. v. Board of Adjustment of Dallas*, 718 S.W.2d 790 (Tex. App.—Dallas 1986, writ ref. n.r.e.). Similarly, terminating a sexually oriented business following a three-year amortization period was not controversial. *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1961).

While there is judicial precedent for terminating nonconforming uses, cities for the most part have been circumspect about doing so. However, in recent years some cities have started to abuse this power by targeting typical business properties with significant investments.

A. What are legal non-conforming uses?

A city has the power to rezone property within its corporate limits on its own initiative so long as it follows the statutorily required procedures. Whenever the city imposes new zoning classifications on parcels of land, some of this property may have been developed with uses that are not permitted under the new zoning districts. These uses are classified as being legally nonconforming.

There are four varieties of nonconforming uses: (1) nonconforming buildings, (2) conforming uses of nonconforming buildings, (3) nonconforming uses of conforming buildings, and (4) nonconforming uses of land. While ordinances might permit a limited addition,

in the absence of a specific ordinance permitting it, a nonconforming use cannot be expanded. However, some courts will allow "normal" expansion of nonconforming uses. *White v. Zoning Board of Adjustment of Arlington*, 363 S.W.2d 955 (Tex. Civ. App.—Fort Worth, writ ref'd n.r.e. 1963).

In most cities, disputes about legal nonconforming uses are addressed by the city's board of adjustment. For example, both the City of Midland ordinance attached as Exhibit A and the City of Georgetown ordinance attached as Exhibit B allow a landowner to appeal nonconforming use issues to the board of adjustment ("BOA").

B. What are the ways to terminate a nonconforming use?

The means by which a nonconforming use may be terminated can be divided into voluntary and involuntary. The voluntary category would include an actual or conclusively presumed abandonment of a use. For example, these could include a voluntary change of the use of the property to a conforming use.

The category of involuntary causes resulting in the loss of the right to continue would include destruction of the premises used for the nonconforming purpose by fire, flood, tornado, hurricane, or other natural force, as well as government action to terminate the use.

1. Voluntary Change of Use

A landowner or tenant always has the right to change his or her nonconforming use to a permitted use in the zoning district. But one nonconforming use cannot transition to another nonconforming use. As stated in the City of Midland ordinance attached as Exhibit A: "Any nonconforming use may be changed to a conforming use, and once a change is made, the use shall not be changed back to a nonconforming use." According to the City of Georgetown ordinance attached as Exhibit B, a nonconforming building or land use shall not be changed to another nonconforming use regardless of the intent of the landowner.

2. Destruction of Structure or Use

Most ordinances allow repairs to a nonconforming structure. If not, courts may permit minor repairs to be made. *Adcock v. King*, 520 S.W.2d 418 (Tex. Civ. App.—Texarkana, no writ 1975). Such permission makes sense because there is a general policy, to ensure that buildings are in a good state of repair.

The legal analysis becomes more complicated when a nonconforming structure is partially or totally destroyed by fire, tornado or other unnatural event. Some cities allow a destroyed structure to be rebuilt, so long as it does not exceed the original footprint. For example, the City of Midland allows a destroyed nonconforming structure to be rebuilt so long as reconstruction commences within 12 months. Ordinances often provide that the destruction of all or a portion of a nonconforming use or structure terminates the privilege of continuing to use or structure.

Many cities prohibit reconstruction if the structure suffers a certain destruction percentage. In the City of Georgetown, a nonconforming use cannot be repaired, rebuilt or altered if the damage

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