

ANNEXATION OF NONCONFORMING USES

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1. Nonconforming Uses

A. Definition

A use of land that lawfully existed prior to the enactment of a zoning ordinance or annexation ordinance, and that is maintained after the effective date of the ordinance, despite the fact that it does not comply with the zoning regulations applicable to the district in which it is situated, is called a "nonconforming use."¹ A "nonconforming use" includes not only activities that are prohibited by local zoning regulations (for example, maintenance of fuel pumps in a district where such use is prohibited), but also structures that offend the zoning regulations (for example, a garage constructed within 3 feet of a lot line in a district where a 5-foot yard is required). It is important to recognize the distinction between a nonconforming building or structure and a nonconforming use of land in local zoning regulations and specify how each are treated, whether the same or not. For purposes of this paper, the term "nonconforming uses" refers to both nonconforming uses and nonconforming structures, except in those instances where they are distinguished. Uses established or maintained pursuant to a variance granted by a board of adjustment and special permits, special exceptions, or other devices authorized by the zoning regulations are not nonconforming uses. Nonconforming uses are frequently referred to as "grandfathered".²

B. Involuntary Termination/Amortization

There seems to be an eternal conflict between the interest of individual property owners and the interest of society when it comes to nonconforming uses, and this is especially true when amortization of nonconforming uses is concerned. Amortization provisions for nonconforming uses typically allow for a grace period for nonconforming uses to continue in existence, during which time money spent on the use can be recouped by the operator of the use before the use is terminated. However, such provisions raise issues concerning the individual's vested interest in property, the proper period for amortizing the use, and the whole process of weighing the individual's costs against society's benefits and state laws related to annexation.

In Texas, one of the leading cases on involuntarily terminating a nonconforming use is *City of University Park v. Benners*, 485 S.W.2d 773 (Tex. 1972). The Texas Supreme Court approved the amortization technique of University Park in terminating nonconforming uses and limited the grace period required for amortizing the nonconforming use to the time necessary for recoupment of the owner's investment in the structure (not the land) at the time of the zoning change. The Court in *Benners* cited cases from multiple jurisdictions as favoring the "prevailing view" that an involuntary termination of a nonconforming use through amortization that allows for recoupment of the investment does not amount to a constitutional taking.³ Specifically the Court stated:

There are strong policy arguments and a demonstrable public need for the fair and reasonable termination of nonconforming property uses which most often do not disappear but tend to thrive in monopolistic positions in the community. We are in accord with the principle that municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police power; and that property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classification once made.⁴

Of course, Chapter 245, regarding vesting, and Section 43.002, regarding annexation, of the Texas Local Government Code were both subsequently enacted in 1999.

The Texas Court of Civil Appeals, in *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.), cert. denied 444 U.S. 833 (1979), criticized the balancing of public benefit against private loss test in *Benners* on the ground that it resulted in unequal treatment to property owners and users similarly affected by the operation of an abatement ordinance, since such factors as public benefit, private loss, and abating period are not conducive to definitive and quantitative balancing by the courts. The court held that the reasonableness of the amortization period is premised on recoupment of investment in the structures, rather than on the recoupment of their market value.

2. Annexation Issues Related to Nonconforming Uses

The authority and procedures for Texas municipalities to annex new territory into the corporate limits are contained in Chapter 43 of the Texas Local Government Code. The procedures to follow in order to legally and properly complete an annexation are beyond the scope of this paper and the comments herein presume that a valid annexation has occurred. Counties in Texas do not enjoy the zoning powers conferred upon municipalities by Chapter 211 of the Texas Local Government Code. Newly annexed territory is not always vacant land. Many times newly annexed territory will contain an existing use that was legal when it existed in the county/extraterritorial jurisdiction prior to annexation. However, such property may not conform to the city ordinances and/or may contain a use not allowed in the zoning designation given to the property following annexation. In such cases a nonconforming use is created by the annexation and the city may want to involuntarily terminate the use through amortization procedures contained in its ordinances.

The provision of Chapter 43 of the Texas Local Government Code that makes amortization of a nonconforming use created by annexation problematic is § 43.002, which reads as follows:

§ 43.002. Continuation of Land Use

(a) A municipality may not, after annexing an area, prohibit a person from:

- (1) continuing to use land in the area in the manner in which the land was being used on the date the annexation proceedings were instituted if the land use was legal at that time; or

(2) beginning to use land in the area in the manner that was planned for the land before the 90th day before the effective date of the annexation if:

(A) one or more licenses, certificates, permits, approvals, or other forms of authorization by a governmental entity were required by law for the planned land use; and

(B) a completed application for the initial authorization was filed with the governmental entity before the date the annexation proceedings were instituted.

(b) For purposes of this section, a completed application is filed if the application includes all documents and other information designated as required by the governmental entity in a written notice to the applicant.

(c) This section does not prohibit a municipality from imposing:

(1) a regulation relating to the location of sexually oriented businesses, as that term is defined by Section 243.002;

(2) a municipal ordinance, regulation, or other requirement affecting colonias, as that term is defined by Section 2306.581, Government Code;

(3) a regulation relating to preventing imminent destruction of property or injury to persons;

(4) a regulation relating to public nuisances;

(5) a regulation relating to flood control;

(6) a regulation relating to the storage and use of hazardous substances; or

(7) a regulation relating to the sale and use of fireworks.

(d) A regulation relating to the discharge of firearms or other weapons is subject to the restrictions in Section 229.002.

Section 43.002 was added to the Texas Local Government Code in 1999, with amendments relating to firearm usage being made in 2005. The majority of Texas cases that discuss involuntary termination of a nonconforming use pre-date § 43.002.

A property owner claiming rights to continue a nonconforming use have the burden to prove a preexisting status.⁵ If the property owner is unable to prove a legal nonconforming use status exists for the property, a municipality should have an easier time enforcing its standards and requiring compliance with zoning ordinances.⁶ The language in § 43.002 plainly states that a

city can not prohibit the continued use of land after annexation if the use legally existed prior to annexation. Amortization is a method of forcing the land use to be discontinued. It appears that, at best, the validity of local ordinances that allow amortization of uses that are nonconforming as a result of an annexation is questionable. It could potentially be easier for a municipality to involuntarily terminate a nonconforming use if the property owner is unable to prove that the nonconforming use legally existed at the time the municipality annexed the property. For situations when the property owner can meet his/her burden that the nonconforming use legally existed at the time the property was annexed, the author finds it difficult to conjure up arguments as to why amortization should be allowed to occur.

In 2003 the Legislature added Subchapter G to Chapter 212 of the Texas Local Government Code. This legislation allows municipalities and property owner's to enter into a pre-annexation development agreement that can "specify the uses and development of the land before and after annexation, if annexation is agreed to by the parties; . . ." ⁷ If agreement regarding long-term use of the land, not to exceed 45 years, ⁸ can be reached prior to annexation, then the issue of involuntarily termination after annexation may be avoided.

A. Chapter 245/Vesting/Permitting

Section 245.002(a) of the Texas Local Government Code provides as follows:

(a) Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time:

- (1) the original application for the permit is filed for review for any purpose, including review for administrative completeness; or
- (2) a plan for development of real property or plat application is filed with a regulatory agency.

In 2005, Section 245.004(2), listing exemptions to Chapter 245's applicability, was amended to specify that "property classification" is not excluded from Chapter 245. Therefore, the author recommends that the initial zoning of property upon annexation should be a classification desirable to the municipality and/or in-line with a comprehensive plan, and not necessarily a classification that matches the existing use of the property. After the initial zoning, future attempts to rezone the property could draw an argument from the owner that Chapter 245 prevents such a change. Zoning the property a classification that the municipality can live with for the long term upon annexation can help avoid a need for rezoning and the issues that may be raised with rezoning.

B. Registration of Nonconforming Uses

Some local ordinances require registration of nonconforming uses. ⁹ The author believes that the requirement to register should be enforceable, as registering the nonconforming use is

completely different from being required to terminate the use. However, the penalty or enforcement provisions of registration requirements in local ordinances should be reviewed to determine if they conform to the requirements of § 43.002.

C. Using Eminent Domain over Property a Nonconforming Use

Municipalities often find that it is necessary to acquire property using the eminent domain powers found in Chapter 21 of the Texas Property Code, for any number of reasons, such as constructing a new road, widening an existing road, constructing water or sewer facilities, etc. Once property is condemned by a municipality, the use enjoyed by the prior owner ceases once the municipality is the owner. Section 43.002 literally says a municipality cannot prohibit a legal use from continuing after annexation. The author is concerned that property owners who are the subject of an eminent domain proceeding may attempt to use § 43.002 as a means of prohibiting the taking of their property if they have a legal nonconforming use on the property that was made nonconforming by an annexation.

Section 43.002 of the Texas Local Government Code makes no reference to Chapter 21 of the Texas Property Code. It could be argued that the two provisions are in conflict with each other in certain circumstances, such as nonconforming uses created by annexation. An appropriate response to such an argument would be that when interpreting statutes, a court should not give any particular provision a meaning that conflicts with other provisions of the law if the court can reasonably harmonize the provisions.¹⁰ In addition, being allowed to use § 43.002 as a shield from eminent domain would grant protections not afforded to owners of property that do not have a nonconforming use resulting from annexation, which would arguably be an absurd result and favor private interests over public interests.¹¹

3. Summary of Amortization Cases Across Country

The long history of case law across the country on amortization of nonconforming uses is summarized in the following chart:¹²

SUMMARY OF CASE LAW ON AMORTIZATION OF NONCONFORMING USES

Type of Uses	Type of District	State	Length of Period of Amortization	Upheld or Invalidated	Citation
<u>Open Storage</u>					
Junkyard	Residence	Illinois	3 years	Upheld	Village of Gurnee v. Miller, 69 Ill. App. 2d 248, 215 N.E.2d 829 (2d Dist. 1966).
Junkyard	Residential	Indiana	Three years	Invalidated	Ailes v. Decatur County Area Planning Com'n, 448 N.E.2d 1057 (Ind. 1983) (overruled by, Board of Zoning Appeals, Bloomington, Ind. v. Leisz, 702 N.E.2d 1026 (Ind. 1998)).
Junkyard	Residence	Kansas	2 years	Upheld	Spurgeon v. Board of Com'rs of Shawnee County, 181 Kan. 1008, 317 P.2d 798 (1957).
Junkyard	Residence	Maryland	3 years	Upheld	Shifflett v. Baltimore County, 247 Md. 151, 230 A.2d 310 (1967).
Junkyard	Residence	Michigan	3 years	Invalid	De Mull v. City of Lowell, 368 Mich. 242, 118 N.W.2d 232 (1962).
Junkyard	Residence	New Hampshire	1 year	Upheld	McKinney v. Riley, 105 N.H. 249, 197 A.2d 218 (1964).

Junkyard	Residence	New Hampshire	1 year	Upheld	Lachapelle v. Town of Goffstown, 107 N.H. 485, 225 A.2d 624, 22 A.L.R.3d 1128 (1967).
Junkyard		New York	3 years	Upheld	Town of Schroepfel, Oswego County v. Spector, 43 Misc. 2d 290, 251 N.Y.S.2d 233 (Sup 1963).
Junkyard	Residence	New York	3 years	Invalid	Town of Hempstead v. Romano, 33 Misc. 2d 315, 226 N.Y.S.2d 291 (Sup 1962).
Junkyard	Manufacturing	New York	Immediate	Invalid (mismatched)	Flax v. City of Rome, 57 Misc. 2d 905, 293 N.Y.S.2d 855 (Sup 1968).
Junkyard	Residence	Ohio	Reasonable time	Invalid	City of Akron v. Chapman, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953).
Junkyard	Light industrial	Texas	1 1/2 years	Invalid	Allen v. City of Corpus Christi, 247 S.W.2d 130 (Tex. Civ. App. San Antonio 1952), judgment aff'd, 152 Tex. 137, 254 S.W.2d 759 (1953).
Junkyards and similar open land	Whole town	Kentucky	2 years	Upheld	Gates v. Jarvis, Cornette and Payton, 465 S.W.2d 278 (Ky. 1971).

Cooperage	Residence	New York	3 years	Upheld	Harbison v. City of Buffalo, 4 N.Y.2d 553, 176 N.Y.S.2d 598, 152 N.E.2d 42 (1958).
Plumbing supply business and office	Residence	California	5 years	Upheld	City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (2d Dist. 1954).
Lumberyard	Residence	Missouri	6 years	Invalid	Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965).
Signs	City	Arkansas	Seven years	Upheld	City of Fayetteville v. McIlroy Bank & Trust, 278 Ark. 500, 647 S.W.2d 439 (1983). See also Hatfield v. City of Fayetteville, 278 Ark. 544, 647 S.W.2d 450 (1983).
Projecting neon signs		California	5 years	Invalid	City of Santa Barbara v. Modern Neon Sign Co., 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (2d Dist. 1961) (disapproved of by, Metromedia, Inc. v. City of San Diego, 23 Cal. 3d 762, 154 Cal. Rptr. 212, 592 P.2d 728 (1979)).

Off-site signs	Residential	Delaware	Three years	Upheld	Mayor and Council of New Castle v. Rollins Outdoor Advertising, Inc., 459 A.2d 541 (Del. Ch. 1983), judgment rev'd, 475 A.2d 355 (Del. 1984).
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Pole sign	Entire city	Illinois	Up to 7 years	Upheld	Village of Skokie v. Walton on Dempster, Inc., 119 Ill. App. 3d 299, 74 Ill. Dec. 791, 456 N.E.2d 293 (1st Dist. 1983).
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Residential

Fence around residence	Residential	Illinois	6 months	Upheld	Village of Glenview v. Velasquez, 123 Ill. App. 3d 806, 79 Ill. Dec. 319, 463 N.E.2d 873 (1st Dist. 1984).
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Billboards	Various	California	5 years	Upheld	Santa Barbara County v. Purcell, Inc., 251 Cal. App. 2d 169, 59 Cal. Rptr. 345 (2d Dist. 1967) (disapproved of by, Metromedia, Inc. v. City of San Diego, 23 Cal. 3d 762, 154 Cal. Rptr. 212, 592 P.2d 728 (1979)).
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Billboards	Various	Florida	5 years	Upheld	E. B. Elliott Adv. Co. v. Metropolitan Dade County, State of Fla., 294 F. Supp. 412 (S.D. Fla. 1968), judgment aff'd, 425 F.2d 1141 (5th Cir. 1970).
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Billboards	Various	Indiana	Immediate	Compensation required	General Outdoor Advertising Co. v. City of Indianapolis, Dept. of Public Parks, 202 Ind. 85, 172 N.E. 309, 72 A.L.R. 453 (1930).
Billboards	Various	Iowa	2 years	Invalid	Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843, 58 A.L.R.2d 1304 (1956).
Billboards	Residence	Maryland	5 years	Upheld	Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957).
Billboards	Residence	Minnesota	3 years	Upheld	Naegele Outdoor Advertising Co. of Minn. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968).
Billboards	Business	New Jersey	2 years	Invalid	United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 93 A.2d 362 (1952).
Billboards	Along a highway	Ohio	Immediate	Upheld	Ghaster Properties, Inc. v. Preston, 176 Ohio St. 425, 27 Ohio Op. 2d 388, 200 N.E.2d 328 (1964).

Billboards	Unspecified	Vermont	Immediate	Upheld	Kelbro, Inc. v. Myrick, 113 Vt. 64, 30 A.2d 527 (1943).
Flashing signs	Whole town	Pennsylvania	Short time	Invalid	Appeal of Ammon R. Smith Auto. Co., 423 Pa. 493, 223 A.2d 683 (1966).
<u>Residential</u>					
Rooming house	Residence	Illinois	5 years	Invalid	Village of Oak Park v. Gordon, 32 Ill. 2d 295, 205 N.E.2d 464 (1965).
Sanitariums	Residence	California	Immediate	Invalid	Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930).
Keeping of pigeons	Residence	New York	Immediate	Upheld	People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952).
Dog kennel	Residence	Nebraska	7 years	Upheld	Wolf v. City of Omaha, 177 Neb. 545, 129 N.W.2d 501 (1964).
Vegetative growth, and level of ground	Residence	Maryland	3 years	Part upheld, but part held invalid	Stevens v. City of Salisbury, 240 Md. 556, 214 A.2d 775 (1965).
<u>Commercial</u>					
Unspecified Business	Residential	Texas	25 years	Upheld	City of University Park v. Benners, 485 S.W.2d 773 (Tex. 1972).

Retail grocery	Residence	Louisiana	1 year	Upheld	State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929).
Drug Store	Residence	Louisiana	1 year	Upheld	State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929).
Check cashing office	Transitional residence-office	Maryland	18 months	Upheld	Eutaw Enterprises, Inc. v. City of Baltimore, 241 Md. 686, 217 A.2d 348 (1966).
Pool hall	Commercial	Idaho	Immediate, on change of ownership	Invalid	O'Connor v. City of Moscow, 69 Idaho 37, 202 P.2d 401, 9 A.L.R.2d 1031 (1949).
Heavy Commercial					
Filling station	Residence	Florida	10 years	Upheld	Standard Oil Co. v. City of Tallahassee, Fla., 87 F. Supp. 145 (N.D. Fla. 1949), judgment aff'd, 183 F.2d 410 (5th Cir. 1950).
Filling station	Residence	Kentucky	Immediate	Invalid	Standard Oil Co. v. City of Bowling Green, 244 Ky. 362, 50 S.W.2d 960, 86 A.L.R. 648 (1932).

Filling station	Residence	Texas	25 years	Upheld	Swain v. Board of Adjustment of City of University Park, 433 S.W.2d 727 (Tex. Civ. App. Dallas 1968), writ refused n.r.e., (May 7, 1969).
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Industrial

Repair of construction equipment	Residence	Washington	1 year	Upheld	City of Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602 (1959).
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Cement mixing plant	Light industrial	California	8 months	Upheld	Livingston Rock & Gravel Co. v. Los Angeles County, 260 P.2d 811 (Cal. App. 2d Dist. 1953), opinion vacated, 43 Cal. 2d 121, 272 P.2d 4 (1954).
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Planing mill	Residence	California	5 years	Invalid	City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762, 304 P.2d 803 (4th Dist. 1956) (disapproved of by, People ex rel. Department of Public Works v. Chevalier, 52 Cal. 2d 299, 340 P.2d 598 (1959)).
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Gravel pit	Industrial	California	60 days	Invalid	McCaslin v. City of Monterey Park, 163 Cal. App. 2d 339, 329 P.2d 522 (2d Dist. 1958).
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Gravel pit	Residence	Connecticut	3 years	Upheld	Town of Waterford v. Grabner, 155 Conn. 431, 232 A.2d 481 (1967).
Gravel pit	Residence	New York	Immediate	Invalid	Town of Somers v. Camarco, 308 N.Y. 537, 127 N.E.2d 327 (1955).
Gravel pit	Residence	New York	By agreement, including compensation if necessary	Upheld	Town of North Castle v. Windmill Farm Homes, Inc., 36 Misc. 2d 303, 232 N.Y.S.2d 551 (Sup 1962).

¹ Anderson's, Am. Law of Zoning § 6.1 (4th ed.); *City of University Park v. Benners*, 485 S.W.2d 773 (Tex. 1972).

² *Mixon*, Tex. Municipal Zoning § 8.000 (3rd ed.).

³ *Benners*, 485 S.W.2d at 777.

⁴ *Id.* at 778.

⁵ *City of Pharr v. Pena*, 853 S.W.2d 56 (Tex. App.-Corpus Christi 1993, writ denied).

⁶ *Mixon*, Tex. Municipal Zoning § 8.100 (3rd ed.) citing *Duke v. City of Texarkana*, 468 S.W.2d 483 (Tex. Civ. App.-Texarkana 1971, no writ).

⁷ See § 212.172(b)(8), Tex. Local Gov't Code.

⁸ Forty-five years is the maximum length of time authorized to be covered by such an agreement per § 212.172(d), Tex. Local Gov't Code.

⁹ See City of Frisco Comprehensive Zoning Ordinance No. 00-11-01, Article I, § 10.09; City of Kennedale Code of Ordinances, Chapter 17, Article VI, § 17-428(h).

¹⁰ *Dallas Cent. Appraisal Dist. v. Tech Data Corp.*, 930 S.W.2d 119 (Tex. App. 5th Dist. 1996, writ denied).

¹¹ See Chapters 311 and 312 of the Texas Government Code (Code Construction Act) for additional rules of statutory construction.

¹² Table from 6 American Land Planning Law § 124:6 (July 2007) and supplemented by author.