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Nonconforming use destroyed by fire

This informal opinion is written in response to a question which has been raised concerning nonconforming uses. Specifically, the question is whether the owner of a nonconforming use may rebuild his camp after it has been destroyed by fire. As will be discussed more fully below, unless an unconstitutional taking of property were to result, a nonconforming camp which completely burns may not be rebuilt as a nonconforming camp.

Statutes which terminate a nonconforming use that has been destroyed by fire (or other cause beyond the control of the owner, such as flood or hurricane) have by the great weight of authority been upheld as constitutional. Service Oil Co. v. Rhodus, 500 P. 2d 807 (Colorado, 1972); Boward v. County of Cook, 187 N. E. 2d 676 (Illinois, 1963). In a leading case, State ex rel. Covenant Harbor Bible Camp v. Steinke, 96 N. W. 2d 356, 361 (Wisconsin, 1959) the court stated that

> "...(e)vidently courts have considered that where a non-conforming use has been carried on in a building which has been accidentally destroyed in large measure, it is not unreasonable to compel the owner to conform to zoning requirements thereafter. The investment in an improvement which may not be readily adaptable to a conforming use has been taken away from him by the accident and not by the ordinance."

The court went on to reason that after the building is destroyed, the land will presumably have the same value for use in conformity with the ordinance as otherwise. Furthermore, it is in the public interest not to allow the nonconforming use be rebuilt.

It must be pointed out, however, that while these statutes and ordinances are not unconstitutional per se, they may be unconstitutional in their application to a particular piece of property, where their effect is to take property without due process

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of law. Each case must, therefore, be examined upon its own facts to determine if the police power has been exercised reasonably. See Palazzola v. City of Gulfport, 52 So. 2d 611 (Mississippi, 1951). If through a zoning statute an owner of land is deprived of the entire use value of his property, an unconstitutional taking has occurred.

There is some lack of explicity in the Land Use Regulation Commission statute on the issue of whether a nonconforming use is terminated when destroyed by fire. The second clause of 12 M.R.S.A. § 685-A.5 exempts certain structures from the permit requirements of § 685-B.1.

> "Year-round and seasonal single family residences and operating farms in existence and use as of September 23, 1971, while so used, and new accessory buildings or structures or renovations of such buildings or structures which are or may be necessary to the satisfactory and comfortable continuation of these residential and farm uses shall be exempt from the requirements of section 685-B, sub-section 1."

The interpretation that is properly given to this section of the statute is that a nonconforming camp totally destroyed by fire must comply with the permit requirement of § 685-B.1. This follows from the rule of construction, set out by the Supreme Judicial Court of this State, that is properly used when dealing with provisions concerning nonconforming uses.

> "Nonconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary. The policy of zoning is to abolish nonconforming uses as speedily as justice will permit. . . . Prior decisions in this State have recognized that effective zoning ordinances must be enforced with a view to future needs and that provisions which permit nonconforming uses are generally strictly construed . . . ." (emphasis added) Inhabitants of Town of Windham v. Sprague, 219 A. 2d 548, 552-53 (Maine, 1966).

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And the Court, in an excellent discussion of this issue, in Gagne v. Inhabitants of City of Lewiston, 281 A. 2d 579, 581 (Maine, 1971), stated in part that, "We have declared that public policy demands the strict construction of provisions in a zoning ordinance which concern the continuation of a nonconforming use."

It is important to note briefly that this interpretation is consistent and harmonious with the first clause of § 685-A.5 (which is a broad statement permitting nonconforming uses, as is constitutionally required) and with § 685-B.7 (which imposes further restrictions on nonconforming uses after the adoption of permanent standards and districts). See Hanbro, Inc. v. Johnson, 181 A. 2d 249, 251 (Maine, 1962)

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