
Coates' Canons Blog: How Much Repair is Too Much Repair?

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Hershel Greene runs a small animal hospital out on the edge of town. When the business first opened thirty years ago, he had a large billboard advertising the business installed out by the road. Herschel had been heavily involved with other pressing matters recently and the sign has fallen into considerable disrepair. Hershel had the local sign company come out to give him an estimate on fixing up the sign. They suggested that given the poor condition of the sign structure, he should consider scrapping it and replacing it with a modern sign. When Hershel called the city to ask about getting permits for a new sign, he was told that the city sign regulations that were adopted ten years ago no longer allow this type of billboard. The city staff then told him this was a “nonconforming” sign and that while he could fix it up some, replacement would not be allowed.

Can the city allow repairs but prohibit replacement of this sign?

Yes.

The first question is whether a new sign would be consistent with the city’s current sign regulations. In this case the answer is no. If there were no billboard already on the site, Hershel could not be issued a permit to erect one there.

But Hershel’s sign was lawfully put up before the sign regulation was adopted. In zoning terms this makes his sign a “nonconforming” sign. Nonconformities are those land uses, structures, or lots that were legal when established but that do not conform to the requirements of subsequently adopted regulations. While not required by state statute in North Carolina, virtually all zoning ordinances allow for the continuance of nonconformities. It is also very common for ordinances to strictly limit these nonconformities.

The concept of limiting improvements of nonconformities has a long heritage in North Carolina law. Early development regulations allowed nonconformities to remain but included restrictions designed to phase out the nonconformities through obsolescence. For example, in 1913 the court upheld a Lincolnton ordinance prohibiting the installation of metal roofs on wooden buildings in the fire district. The court acknowledged that a metal roof would provide greater protection from fire but also noted that it would prolong the life of a nonconforming wooden building and thus could be prohibited. *State v. Lawing*, 164 N.C. 492, 80 S.E. 69 (1913).

In *Elizabeth City v. Aydlett*, 201 N.C. 602, 161 S.E. 78 (1931), the landmark case upholding zoning in North Carolina, the court recognized the necessity of allowing the continuance of nonconforming uses if zoning was to work legally, politically, and practically. The court noted, “Unless the theory of nonconforming uses is practically applied it will be well-nigh impossible to zone the cities and towns of the State.” The court emphasized that zoning involves a balancing of the future needs of the public against the rights of the individual with a prior nonconforming use.

The vast majority of zoning ordinances now substantially restrict nonconformities to encourage eventual compliance with the ordinance. Typical restrictions are those prohibiting (1) the expansion or enlargement of nonconformities; (2) the repair or replacement of a nonconforming structure; (3) a change in a nonconforming use; and (4) the resumption of a nonconforming use if it is abandoned or discontinued for a specified period. Some ordinances also require certain nonconformities to come into compliance after a specified grace period. The courts have consistently upheld these limitations, provided they are stated clearly. If there is any doubt about the application of a particular restriction, that doubt is resolved in favor of the landowner.

A typical limitation, and the one confronting Hershel, is a provision that allows “repairs” but prohibits “replacement.” The

basis for this distinction is discussed in *Appalachian Poster Advertising Co. v. Zoning Board of Adjustment*, 52 N.C. App. 266, 278 S.E.2d 321 (1981). In this case the sign owner replaced two adjacent nonconforming billboards with a single new billboard that was placed where the two smaller signs had previously been located. The court noted that nonconforming uses are not favored by the law and that

[h]ere a new structure was substituted for an old one. If it is proper to do this once it will be proper to do it again and thus the life of the nonconforming structure will be indefinitely prolonged, and the whole purpose of the zoning ordinance will be defeated . . . [T]he right to make repairs has generally been limited to such as are merely routine or ordinary and which would not result in the extension of the normal life of the structure, and the replacement of a structure which has become unusable from natural deterioration has been held not permissible.

A key question then becomes defining the threshold between permissible repairs and impermissible replacement. In *Whiteco Outdoor Advertising v. Johnston County Board of Adjustment*, 132 N.C. App. 465, 513 S.E.2d 70 (1999), the issue was the application a limitation prohibiting repairs to nonconformities that exceed 50 percent of their value (without specifying in this section of the ordinance whether the "value" referred to original or present value). The court affirmed the staff's denial of approval for replacement based on a determination that the cost of repairs would exceed 50 percent of the original cost of erecting the signs. In *Appalachian Outdoor Advertising, Inc. v. Town of Boone Board of Adjustment*, 128 N.C. App. 137, 493 S.E.2d 789 (1997), *review denied*, 347 N.C. 572, 498 S.E.2d 375 (1998), however, the court held approval of the proposed sign improvements was improperly denied. The sign company proposed to substantially repair and modernize two signs that had been severely damaged in a winter storm. The town prohibited the work as "reconstruction" of a nonconforming sign. On appeal, however, the court ruled that since the billboard had been damaged but not destroyed, the proposed work was repair rather than reconstruction. As the ordinance allowed repair up to 50 percent of the market value of a structure, the court ruled the work permissible.

So what does all of this mean for Herschel? It means he can fix up and retain his old sign. But since the sign is inconsistent with current regulations, he is limited to making only the amount of repairs allowed by the ordinance and he cannot replace the sign with a new one.

There are also important implications for cities and counties that apply this type of limitation. The government needs to think carefully about how it want to balance the interests of landowners who must comply with the current regulations with the rights of those who put up signs some time ago in a completely lawful fashion. It must consider the impacts of the nonconformity on the interests protected by the current regulation. The government also needs to give particular attention to the details of implementation of these policy choices, particularly in defining exactly where the boundary is between repair and replacement. The ordinance needs to provide clear guidance to the staff and landowners as to how that is calculated. For example, if repairs are limited to those costing no more than 50 percent of the value of the nonconforming structure, is that 50 percent of the original construction cost, the replacement cost, the current market value, the tax assessed value, or something else? The ordinance needs to say so that Herschel, his neighbors, the zoning officer, and the public can know just what repairs are legal and when those repairs edge into impermissible replacement.