

Zoning
Grandfathering vs.
Statute of Limitations

Grandfathering

- **Pre-Existing Non-Conformities**
 - A use of land, structure, lot or parcel that does not conform to the present bylaws but was in conformance with all applicable laws, ordinances, and regulations prior to the enactment of the present bylaws, including one improperly authorized as a result of error by the administrative officer. 24 V.S.A. §4303(13)-(16).
 - Special considerations may be given to these properties within a municipality's bylaws pursuant to 24 V.S.A. §4412(7).

Phase Out Policy

- “The prime purpose behind zoning is to bring about the orderly physical development of a community by confining particular uses to defined areas. A goal of zoning is to gradually eliminate nonconforming uses because they are inconsistent with this purpose. The public interest in the regulation and gradual elimination of nonconforming uses is strong, and zoning provisions allowing nonconforming uses should be strictly construed.” Badger v. Town of Ferrisburgh, 168 Vt. 37, 39 (1998) (internal citations omitted).

Bianchi

- The Vermont Supreme Court in the Bianchi case in 1997 held that permit violations could affect the marketability of title to property.
- In response to concerns about the effects on the real estate market, the Vermont legislature established a statute of limitations for permit violations.

Statute of Limitations

“An action, injunction, or other enforcement proceeding relating to the failure to obtain or comply with the terms and conditions of any required municipal land use permit may be instituted under section 1974a, 4451, or 4452 of this title against the alleged offender if the action, injunction, or other enforcement proceeding is instituted within 15 years from the date the alleged violation first occurred and not thereafter, except that the 15-year limitation for instituting an action, injunction, or enforcement proceeding shall not apply to any action, injunction, or enforcement proceeding instituted for a violation of subchapter 10 of chapter 61 of this title. The burden of proving the date the alleged violation first occurred shall be on the person against whom the enforcement action is instituted.” 24 V.S.A. §4454(a).

Distinction Between the Two

A property that has a violation that occurred more than 15 years ago is not truly a “grandfathered” property. That is, if the property was in violation of an ordinance provision in 1997, for example, it remains in violation, and the violation does not become grandfathered, as the violating condition was not legally existing in 1997. This is simply a violation that cannot be enforced under state statute. In contrast, if a condition was legal in 1997, but the ordinance changed after that, the condition would be considered grandfathered.

Exceptions to the Statute of Limitations

Included within the types of zoning violations that continue to be enforceable are:

- Public health risks or hazards.
- 24 V.S.A. §4470(b).
- Use violations.

Public Health Risks or Hazards

- Unpermitted development typically characterized by dangerous conditions such as inadequate life safety features and/or lack of potable water or wastewater service.

24 V.S.A. § 4454 Does Not Limit Municipal Enforcement Authority Under Other Statutory Provisions

“(c) Nothing in this section shall prevent any action, injunction, or other enforcement proceeding by a municipality under any other authority it may have, including a municipality’s authority under Title 18, relating to the authority to abate or remove public health risks or hazards.”

24 V.S.A. §4470(b)

“A municipality shall enforce all decisions of its appropriate municipal panels, and further, the Superior Court’s Civil or Environmental Division shall enforce such decisions upon petition, complaint or appeal or other means in accordance with the laws of this state by such municipality or any interested person by means of mandamus, injunction, process of contempt, or otherwise.”

Environmental Court cases support that §4470(b) is an exception to the 15 year statute of limitations.

- No provision for penalties.
- Refers to violations of board decisions; therefore, notice has been provided by way of the decisions.
- Not modified under Act 115.

Use Violations

- The premise that the statute of limitations does not apply to use violations is supported by case law.
- Use violations are considered ongoing and create a new violation each day the illegal use continues.
- In contrast, a construction violation occurs at the time of construction and does not continue. So, as long as the use being made of that illegal construction is legal, that violation becomes unenforceable after 15 years (absent another exception—e.g., public health).

Tolling of The 15 Year Statute of Limitations

- “24 V.S.A. § 4454 does not require municipalities to complete all of their enforcement actions within the fifteen-year time period; rather, the statute only requires that such enforcement be “instituted” within this time period. In other words, as soon as a municipality begins an enforcement action, it can look back 15 years from the date of beginning that action, no matter how drawn out the subsequent proceedings are.” *In re Hale Mountain Fish and Game*, Nos. 149-8-04 and 259-12-05 Vtec, slip op. at 7 (Vt. Env'tl. Ct. Nov. 21, 2008) (Durkin, J.).

What Is the Effect?

- The CDO addresses non-conformities and “Bianchi” controlled uses, structures and lots in Article 5, Part 3.
- A pre-existing legal non-conformity (grandfathered condition) has an identified legal status with defined opportunities to change.
- A “Bianchi” situation is an unenforceable violation, not entitled to the protections/opportunities for legal non-conformities.
- The City has no legal duty to legitimize a “Bianchi” situation with a zoning permit or certificate of compliance. At the same time, it cannot enforce against that condition, absent one of the exceptions (e.g., public health concerns).

Differences : Discontinuance

- For a grandfathered situation, under state enabling legislation, a municipality can set a time for discontinuance so long as it is not less than 6 months. Burlington has generally set the time for discontinuance as one year.
- For statute of limitations, there is no statutory discontinuance timeframe set, however, the CDO sets it as 60 days.

Differences : Enlargement

- Some grandfathered situations may be enlarged within the limitations established in the CDO.
- Situations that are barred from enforcement by the statute of limitations may not be enlarged.

Differences : Ability to Use for Requirements

- Grandfathered situations may be counted toward requirements of a new application. For instance, if you have 4 parking space that are recognized as grandfathered, you may use them toward the parking requirement for a new application.
- Parking spaces that are not grandfathered, but rather are unenforceable zoning violations may not be used toward the requirements for a new application.

Differences: Burden of Proof

- In order to be grandfathered, evidence must demonstrate the condition has been continuous back to the point wherein the condition was legal.
- In order to be unenforceable under the statute of limitations, evidence must demonstrate the condition has been continuous for at least 15 years after the violation was known to the City.
- Burden of proof is on the property owner in both cases.

Why Are There Differences?

- Differences in the treatment of grandfathered and statute of limitation situations stem from the fact that grandfathered situations were legally existing at one time and the ordinances changed. Situations that benefit from the statute of limitations were never established as legal.

In Summary

- The City has a vested interest in achieving compliance with its zoning bylaws.
- Non-compliant conditions must be corrected.
- Status as a grandfathered condition or as an unenforceable violation may be achieved only after evidence satisfies the burden of proof.