

TOWN OF NEW SCOTLAND PLANNING/ZONING BOARDS
COUNTY OF ALBANY

-----X
IN RE APPLICATION OF CATHERINE DONATO

CATHERINE DONATO,

Petitioner.

**ATTORNEY
AFFIRMATION OF
JEREMIAH F.
MANNING, II**

-----X
STATE OF NEW YORK)
SS)
COUNTY OF ALBANY)

I, JEREMIAH F. MANNING, II, an attorney admitted to practice law before the courts of the State of New York, and not a party to the instant matter, affirm the following to be true under the penalty of perjury pursuant to CPLR Section 2106:

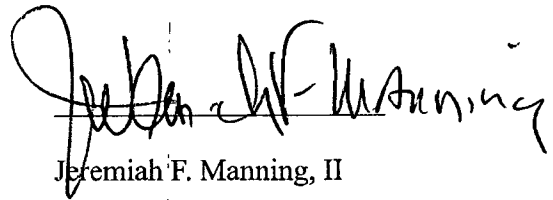
1. I am an attorney with offices at 49 Oldox Road, Delmar, NY 12054. I have represented members of the Donato family for over 50 years.

2. This affirmation is intended to present the black letter law of New York concerning whether a change of ownership of a nonconforming business affects the right to continue the use. New York law is clear: it does not. See New York Zoning Law and Practice Section 10:23, Page 10-52("[a] change in the ownership of a nonconforming business or structure does not affect the right to continue the use, as zoning deals with land use and not land ownership").

3. The Court of Appeals of New York addressed this issue when it considered a village ordinance that terminated the right to continue a non-conforming use. Village of Valatie v. Smith, 190 A.D.2d 17 (3d Dep't 1993), aff'd as modified, 83 N.Y.2d 396. The Court stated

that non-conforming uses run with the land and are not dependent on ownership. Id. See also Iazzetti v. Village of Tuxedo Park, Orange County, 145 Misc. 2d 78 (Sup.Ct. 1989); North Fork Motel, Inc. v. Grigonis, 93 A.D.2d 883 (2d Dep't 1983). While it recognized the right a town has to eliminate non-conforming uses over time, it required the town to achieve its goals by legal and constitutional means. Id.

4. I have attached a true and correct copy of the treatise pages referenced herein as Exhibit A for the Board's convenience.



Jeremiah F. Manning, II

Dated: August 11, 2020

EXHIBIT A

to

The August 12, 2020 Attorney

Affirmation of

Jeremiah F. Manning II

structure of the restaurant, and even though compliance would involve expenditure of about twice the amount paid for the restaurant itself.⁹

§ 10:24 Change in location of use.

A nonconforming use may be related to a particular location or building. The establishment of a nonconforming use in one building does not authorize a change of location and the establishment of the use in a different building.¹ A landowner who maintained signs on his land as a nonconforming use is not entitled to move such signs within 200 feet of a highway, in violation of a zoning ordinance.²

Condemnation proceedings sometimes work a hardship where a nonconforming structure must be moved. Accordingly, the administrative code of the city of New York provides that "any building legally in existence prior to its relocation shall retain its legal status without any alteration which might be required pursuant to provisions of law relating to the new site."³ This provision does not authorize the continuation of a nonconforming use if a new building is constructed by the displaced owner.⁴

§ 10:25 Change of ownership.

A change in the ownership of a nonconforming business or structure does not affect the right to continue the use,¹ as zoning deals with

⁹Off Shore Rest. Corp. v. Linden, 30 N.Y.2d 160, 331 N.Y.S.2d 397, 282 N.E.2d 299 (1972).

[Section 10:24]

¹Application of Furman Ave. Realty Corp., 275 A.D. 779, 87 N.Y.S.2d 693 (2d Dep't 1949), order aff'd, 299 N.Y. 768, 87 N.E.2d 676 (1949).

²City of New York v. Seel, 8 A.D.2d 964, 190 N.Y.S.2d 865 (2d Dep't 1959).

See Usherowitz v. Foley, 16 A.D.2d 700, 227 N.Y.S.2d 959 (2d Dep't 1962).

³Diaz v. City of New York, 23 Misc. 2d 419, 421, 198 N.Y.S.2d 756, 758 (Sup. Ct. 1959), citing New York City Administrative Code § 384.15.0 (6), in effect at that time.

⁴Diaz v. City of New York, 23 Misc. 2d 419, 198 N.Y.S.2d 756 (Sup. Ct. 1959).

[Section 10:25]

¹A change in ownership of a nonconforming use does not terminate the right of a nonconforming use. Iazzetti v. Village of Tuxedo Park, Orange County, 145 Misc. 2d 78, 546 N.Y.S.2d 295 (Sup. Ct. 1989).

Court reversed grant of summary judgment challenging on constitutional ground the facial validity of a village ordinance which terminated the right to continue nonconforming mobile home upon change of ownership; and remanded for further factual development. Village of Valatie v. Smith, 190 A.D.2d 17, 596 N.Y.S.2d 581 (3d Dep't 1993), aff'd as modified, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994).

The mere change of ownership to a condominium arrangement does not terminate a right of nonconforming use. North Fork Motel, Inc. v. Grigonis, 93 A.D.2d 883, 461 N.Y.S.2d 414 (2d Dep't 1983).

land use and not land ownership.² Thus, the purchaser of improved lots that did not conform to the zoning regulations, but that had been improved prior to the adoption of the ordinance, was entitled to maintain them as nonconforming uses.³ Where a veterans' organization enjoyed a vested right to use certain premises for club purposes, including conducting classes in music, voice, and ballet, a successor organization was entitled to continue such uses.⁴ Where a lot created before enactment of a zoning ordinance is rendered nonconforming by the subsequent enactment, a purchaser of the property will have the same rights as his vendor.

The common provisions prohibiting change of nonconforming uses are not intended to apply to a change in the ownership of a nonconforming use.⁵

Ordinances that undertake to terminate a nonconforming use upon a change of ownership are uncommon. While one lower court decision upheld such an ordinance where it did not impose a substantial loss on the landowner,⁶ the Appellate Division has ruled unconstitutional a zoning ordinance which reserved to the municipality the power to

See also *Biener v. Incorporated Village of Thomaston*, 85 A.D.2d 730, 445 N.Y.S.2d 808 (2d Dep't 1981), appeal dismissed, 59 N.Y.2d 750, 463 N.Y.S.2d 442, 450 N.E.2d 248 (1983).

²*Iazzetti v. Village of Tuxedo Park, Orange County*, 145 Misc. 2d 78, 546 N.Y.S.2d 295 (Sup. Ct. 1989); *Village of Valatie v. Smith*, 190 A.D.2d 17, 596 N.Y.S.2d 581 (3d Dep't 1993), aff'd as modified, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994).

³*Elsinore Property Owners Ass'n v. Morwand Homes*, 286 A.D. 1105, 146 N.Y.S.2d 78 (2d Dep't 1955).

A right to an established nonconforming auto repair shop may be transferred by sale, but no right may be transferred to a gas station if the gas station is maintained under an illegal permit. *Pete-Lor, Inc. v. Haber*, 66 Misc. 2d 309, 320 N.Y.S.2d 786 (Sup. Ct. 1971), judgment modified, 39 A.D.2d 40, 330 N.Y.S.2d 852 (2d Dep't 1972).

Annotation: Change in ownership of nonconforming business or use as affecting right to continuance thereof. 9 ALR2d 1039.

⁴*YM & YWHA of Mid-Westchester, Inc. v. Town of Eastchester*, 201 N.Y.S.2d 622 (Sup. Ct. 1960).

⁵*Elsinore Property Owners Ass'n v. Morwand Homes*, 286 A.D. 1105, 146 N.Y.S.2d 78 (2d Dep't 1955); *YM & YWHA of Mid-Westchester, Inc. v. Town of Eastchester*, 201 N.Y.S.2d 622 (Sup. Ct. 1960).

Where ordinance provision required a lot area of 6000 square feet, landowner of property at time of enactment of the ordinance with lot area of 2500 square feet had a vested right to a nonconforming use, and this classification remained intact upon transfer of the property to petitioner, a contract vendee. *Bexson v. zoning board of and Appeals, Town of Hempstead*, 28 A.D.2d 848, 281 N.Y.S.2d 569 (2d Dep't 1967), order aff'd, 21 N.Y.2d 961, 289 N.Y.S.2d 990, 237 N.E.2d 239 (1968). See also *Biener v. Incorporated Village of Thomaston*, 85 A.D.2d 730, 445 N.Y.S.2d 808 (2d Dep't 1981), appeal dismissed, 59 N.Y.2d 750, 463 N.Y.S.2d 442, 450 N.E.2d 248 (1983).

⁶An ordinance which terminates the right to maintain a nonconforming sign after a change of ownership is constitutional where its application does not impose a substantial loss on the landowner. *Taksen Liquor Store, Inc. v. Bonisteel*, 103 Misc. 2d 34, 425 N.Y.S.2d 252 (Sup. Ct. 1980).

invalidate a building permit upon a change of ownership.⁷ In *Rogers v. Association for Help of Retarded Children*,⁸ the controlling village zoning ordinance provided that a "change of ownership or tenancy shall not be deemed a discontinuance of a nonconforming use provided the subsequent use is identical with the nonconforming use of the prior tenant." The Court of Appeals upheld the substitution of a school for retarded children in lieu of a nonconforming home for cardiac children. The court did not comment on the validity of the limitation of the subsequent owner to identical uses. Actual limitations upon the right to transfer a nonconforming use are rare and of doubtful validity.⁹

§ 10:26 Change to more restrictive use.

Some municipalities have enacted less restrictive limitations upon the right of a nonconforming user to change the use of the land. Less stringent than provisions which prevent change are those that permit change from one nonconforming use to another of the same or a higher classification. A regulation of this kind may read as follows:

No conforming use shall be changed to another nonconforming use except that, within six (6) months after the cessation of a lawfully existing nonconforming use, the Board of Appeals, after notice and hearing, may grant a temporary conditional permit for a new nonconforming use within the same structure, provided that it shall find that:

- (a) The proposed new nonconforming use will be substantially more in keeping with the Comprehensive zoning plan of land use and development (Master Plan) and the character of the neighborhood than the former nonconforming use.
- (b) It will tend to facilitate the later conversion of the structure to a more conforming use.¹

A variety of limitations have been imposed upon the right to change a nonconforming use. Some limit change to uses of a more restrictive character,² to uses of the same class,³ to uses of the same general

⁷Weinrib v. Weisler, 33 A.D.2d 923, 307 N.Y.S.2d 603 (2d Dep't 1970), on subsequent appeal, 26 N.Y.2d 980, 311 N.Y.S.2d 22, 259 N.E.2d 490 (1970) and order aff'd, 27 N.Y.2d 592, 313 N.Y.S.2d 407, 261 N.E.2d 406 (1970).

⁸Rogers v. Association for Help of Retarded Children, 281 A.D. 978, 120 N.Y.S.2d 329 (2d Dep't 1953), judgment aff'd, 308 N.Y. 126, 123 N.E.2d 806 (1954).

⁹The Supreme Court of the state of Idaho held invalid an ordinance which terminated the right to a nonconforming use upon change of ownership, saying that there is no reasonable relationship between change of ownership and the purpose of the ordinance. O'Connor v. City of Moscow, 69 Idaho 37, 202 P.2d 401, 9 A.L.R.2d 1031 (1949).

[Section 10:26]

¹Zoning Ordinance, Village of Tarrytown, § 305-18 (1990).

²Ordinances, Village of Tarrytown § 305-18 (1990).