|  |  |
| --- | --- |
|  |  |
| [**Nonconforming**](http://www.smithhartvigsen.com/resources/archive/nonconform.htm) **Uses**  *by J. Craig Smith & Scott M. Ellsworth*    **2 THE LAW OF NONCONFORMING USES**  **2.1 Identifying and Handling Nonconforming Uses**  **2.1.1 The Meaning of "Grandfathered" or Pre-existing Uses**  If property is in lawful use prior to the enactment of a restrictive zoning ordinance, and the new zoning ordinance prohibits the use (thereby rendering the use "nonconforming") the property is generally held to have a "grandfathered" or "vested" right to the nonconforming use.  As a general rule, three elements must be in place for a property to have a vested right in a nonconforming use:  1. The use must be in existence prior to the enactment of the restricting ordinance;  2. The use must have been lawful when begun;  3. The use must be of substantial nature so as to warrant constitutional protection of a property right.  This third element is actually the lynchpin of the entire doctrine of nonconforming uses, which is based upon the reluctance of the courts to give retroactive effect to zoning ordinances that would destroy substantial existing property rights, without due process of law."  Aside from constitutional prohibitions, a number of states, including Utah, have enacted statutes specifically protecting pre-existing nonconforming uses. (*See* Sections 10-9-408 and 17-27-407 of the Utah Code.) By definition, under Utah law, a nonconforming use is  . . . . a use of land that:  (i) legally existed before its current zoning designation;  (ii) has been maintained continuously since the time the zoning regulation governing the land changed; and  (iii) because of subsequent zoning changes, does not conform with the zoning regulations that now govern the land.  Once a nonconforming use is established, the right to continue it runs with the land; it is not confined to the particular person or entity that owned or operated the property or structure at the time the nonconforming use vested. Lawful existing nonconforming uses are not eradicated by a mere change in ownership."  **2.1.2 Expansion or Enlargement of Nonconforming Uses**  **2.1.2.1 The General Rule**  The well-settled, general rule is that a non-conforming use cannot be expanded or enlarged beyond that which existed at the time the right vested. *See, e.g.*, *Harper v. Summit County*, 2001 UT 10, ¶ 46, 414 Utah Adv. Rep. 21 (*citing* *Utah County v. Baxter*, 635 P.2d 61 (Utah 1981)) (Eyre, J., concurring & dissenting: noting that where "use of . . . property is a nonconforming use of land. . . . [it] may not be extended or expanded in any fashion.) The rationale behind this rule is that nonconforming uses should be discouraged and terminated at the earliest possible time through obsolescence or deterioration.  **2.1.3 Expanding the Nonconforming Use**  The Utah legislature has given local municipalities great flexibility in the drafting of local ordinances dealing with nonconforming uses. The law allows the local legislative body to provide by ordinance for the "establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses", and the sole provision regarding extension or expansion of nonconforming uses declares only that "a non-conforming use may be extended through the same building provided no structural alteration of the building is proposed or made for the purpose of the extension"  THAT’S IT RIGHT THERE……CASE CLOSED!!!! |