McGinty, Hitch, Housefield, Person,
Yeadon & Anderson, P.C.

MEMO

TO: GREGG GUETSCHOW, CITY MANAGER

FROM: THOMAS M. HITCH, CITY ATTORNEY

RE: NONCONFORMING USES WITHIN THE CITY OF CHARLOTTE

DATE: August 21, 2014

The purpose of this memorandum is to respond to your request for an opinion regarding the current nonconforming use ordinance (Section 82-453) as it applies to a specific commercial building within the City of Charlotte. According to your request, there exists a building that has a side yard set back much narrower than the current code allows. The owner wishes to demolish the structure and rebuild a new structure with exactly the same footprint. At Section 82-453(I)(2), it is provided that no structure may be rebuilt if it is nonconforming and if it would entail the replacement of more than 50 percent of the structure. You have questioned whether this provision is valid where the Zoning Enabling Act appears to contemplate that a city must use its condemnation powers to eliminate nonconforming uses. You have asked that I evaluate the current ordinance in light of this circumstance.

The present Michigan statute regarding nonconforming uses is set forth at MCL 125.3208, which provides:

> Sec. 208. (1) If the use of a dwelling, building, or structure or of the land is lawful at the time of enactment of a zoning ordinance or an amendment to a zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment. This subsection is intended to codify the law as it existed before July 1, 2006 in section 16(1) of the former county zoning act, 1943 PA 183, section 16(1) of the former township zoning act, 1943 PA 184, and section 3a(1) of the former city and village zoning act, 1921 PA 207, as they applied to counties, townships, and cities and villages, respectively, and shall be construed as a continuation of those laws and not as a new enactment.

(2) The legislative body may provide in a zoning ordinance for the completion, resumption, restoration, reconstruction, extension, or substitution of nonconforming uses or structures upon terms and conditions provided in the zoning ordinance. In establishing terms for the completion, resumption, restoration, reconstruction, extension, or substitution of nonconforming uses or structures, different classes of nonconforming uses may be established in the zoning ordinance with different requirements applicable to each class.

(3) The legislative body may acquire, by purchase, condemnation, or otherwise, private property or an interest in private property for the removal of nonconforming uses and structures. The legislative body may provide that the cost and expense of acquiring private property may be paid from general funds or assessed to a special district in accordance with the applicable statutory provisions relating to the creation and operation of special assessment districts for public improvements in local units of government. Property acquired under this subsection by a city or village shall not be used for public housing.

(4) The elimination of the nonconforming uses and structures in a zoning district is declared to be for a public purpose and for a public use. The legislative body may institute proceedings for condemnation of nonconforming uses and structures under 1911 PA 149, MCL 213.21 to 213.25.

Attached to this memo is a copy of the prior statute (MCL 125.583a), printed verbatim in *DeMull v City of Lowell*, 368 Mich 242 (1962). A review of that statute will demonstrate that the current statute is substantially similar to the prior nonconforming use statute.

In answer to your specific question, whether cities are limited to condemnation in order to eliminate nonconforming uses, the answer to that question is yes. That answer was provided in *DeMull, supra*, where the Michigan Supreme Court held that there was no legislative intent to provide otherwise and cities have no inherent authority to eliminate nonconforming uses other than as provided by the Legislature.

There is, however, another line of cases which stands for the proposition that zoning ordinances are not unlawful if they prevent the erection of new nonconforming buildings or additions to existing nonconforming buildings. In *South Central Improvement Assn v City of St Clair Shores*, 348 Mich 158 (1957), the Michigan Supreme Court held:

> This Court has held that the provision of a zoning ordinance permitting the continuation of a nonconforming use is designed to avoid the imposition of hardship upon the owner of property, but the limitation upon such use contemplates the gradual elimination of the nonconforming use and does not permit the erection of new nonconforming buildings or addition to existing nonconforming buildings.

The distinction between the holding in *DeMull* and the holding in *South Central* is based upon private versus public action. Where private action causes the destruction or elimination of nonconforming uses, there is no problem in refusing to allow the rebuilding of such nonconforming uses or structures. However, where municipalities seek to eliminate nonconforming uses, the municipalities may only condemn (or be liable for damages in an inverse condemnation action, if there is no formal condemnation proceeding instituted). The Courts find no conflict in these separate holdings based upon the cause of the elimination of the nonconforming use (either private or public action).

The Legislature, in both the former and current statutes, provided flexibility to the municipalities regarding how to manage nonconforming uses and structures. Both statutes (and in particular, the current statute) provide that cities may establish separate classes of nonconforming uses and structures, with separate requirements applicable to each. The drafters of the Charlotte Zoning Code incorporated that concept when they established Class A nonconforming uses and structures at Section 85-453(B).

The provisions for Class A nonconforming use include the making of improvements to nonconforming structures where, under the terms of the ordinance, "No useful purpose would be served by strict application of the provisions of this chapter."

The ordinance goes on to provide, at subsection (E), that all nonconforming uses or structures not designated Class A shall be designated Class B. The ordinance provides that Class B nonconforming uses and structures shall comply with all provisions of this chapter relative to nonconforming uses and structures. It appears that the intent of the ordinance, in designating all other nonconforming uses as Class B nonconforming uses and structures, is that the strict application of the ordinance is intended to apply to Class B uses and structures. On the other hand, Class A nonconforming structures would be regulated by the provisions as set forth in subsection (B), as noted above.

In reviewing this ordinance, it is my opinion that the strict requirement as set forth at 82-453(I)(2) would not apply to Class A nonconforming structures. It is my opinion that the purpose of establishing Class A nonconforming uses and structures is to recognize that in a number of circumstances, the mere nonconforming structure (made nonconforming by violation of area requirements, set back requirements or the like) are not necessarily structures that should be discontinued or eliminated. Under prior zoning ordinances, where uses were strictly segregated, such a policy may have made sense. It is my understanding that there is a change in zoning philosophy and that mixed uses where compatible are recognized as being appropriate and useful and should not necessarily be eliminated.

This determination can be made on a case by case basis by the Planning Commission through the process of determining whether the nonconforming use meets the requirements to be designated as a "Class A" nonconforming use or structure. In many instances, nonconforming structures may be improved so as to enhance the surrounding neighborhood. Strictly applying zoning

ordinances that would prohibit that may in fact discourage property owners from making improvements to their properties that would provide an overall benefit to the surrounding neighborhood.

It is my opinion that in this case, the owner of this land should make application to the Planning Commission in order to seek to be classified as a Class A nonconforming use and structure. Under the provisions of the current Zoning Ordinance, the newly rebuilt structure must meet the requirements as set forth at 82-453(C) so as to assure that the screening, lighting and exterior building materials comport with the surrounding area. If the Planning Commission determines that the Class A designation applies, the owner may rebuild the structure on the same footprint, without being precluded from doing so by Section 85-453(I)(2).

TMH:ddy
Enc.

The foregoing discloses definite holding by Judge Hoffius that plaintiff's precedently established business was lawful, that plaintiff had properly applied for and duly obtained a valid permit authorizing the carrying on of such business, and that plaintiff was entitled to relief as prayed subject only to the limitational effectiveness of quoted section 9A of the ordinance. The judge's opinion speaks for itself and fully warrants affirmance of that part of the entered decree which adjudges that plaintiff's said business constitutes a legally protectible nonconforming use. This disposes of defendants' cross-appeal.

We differ, though, as this ordained 3-year death sentence for nonconforming uses comes to fair scrutiny. Whatever the law may be in other States, law stemming as it does from specific and variant statutory zoning enactments and judicial construction thereof,* the fact remains that the cities of Michigan have not as yet been authorized, by requisite legislative act, to terminate nonconforming uses by ordinance of time limitation. The question is governed by PA 1947, No 272, amending our municipal zoning statutes by adding new section 3a, reading as follows (CL 1948, § 125.583a [Stat Ann 1958 Rev § 5.2933 (1)]):

"Sec. 3a. The lawful use of land or a structure exactly as such existed at the time of the enactment of the ordinance affecting them, may be continued, except as hereinafter provided, although such use or structure does not conform with the provisions of such ordinance. The legislative body may in its discretion provide by ordinance for the resumption, restoration, reconstruction, extension or substitution of nonconforming uses or structures upon such terms and conditions as may be provided in the ordinance. In addition to the power granted in this section, cities and villages may acquire by purchase,

* Judge Hoffius relied exclusively on cases decided in other States.

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condemnation or otherwise private property for the removal of nonconforming uses and structures: Provided, The property shall not be used for public housing. The legislative body may in its discretion provide that the cost and expense of acquiring such private property be paid from general funds, or the cost and expense or any portion thereof be assessed to a special district. The elimination of such nonconforming uses and structures in a zoned district as herein provided is hereby declared to be for a public purpose and for a public use. The legislative body shall have authority to institute and prosecute proceedings for the condemnation of nonconforming uses and structures under the power of eminent domain in accordance with the laws of the State or provisions of any city or village charter relative to condemnation."

It will be noted that section 3a includes no authorization for elimination of a nonconforming use by an ordinance of time limitation. The legislature did, in fact, carefully refrain from enactment of any such authorization, and the documented evidence of its pertinent intent appears in OAG 1947–1948, No 146, dated March 7, 1947. That opinion, prepared by Assistant Attorney General Clapperton, discloses that the senate, contemplating this same section 3a as then drafted and debated, formally requested an official opinion respecting the constitutionality of such initial draft. That body received prompt negative answer. The opinion starts:

"The senate has unanimously requested our opinion on the constitutionality of Senate Bill No 74 attached hereto. The question arose as to whether the bill might be invalid in that it would permit a city counsel to control if not seize and condemn property for the benefit of a certain class of people in the community, thus constituting class legislation. They also ask for comments on any other constitutional questions that may occur.