

Memorandum

ATTORNEY CLIENT PRIVILEGE/CONFIDENTIAL

To: Dennis Goderre, ZEO, Town of Montville, Connecticut
Meredith Badalucca, Assistant Planner, Town of Montville, Connecticut
From: Michael P. Carey, Suisman, Shapiro, Wool, Brennan, Gray, and Greenberg 
Date: May 29, 2026
Re: Draft Motion and Outline of ZBA Procedures for Acting on Appeal from ZEO Order

Mr. Goderre:

The ZBA asked this office to prepare a draft motion for action on a pending appeal from the ZEO. I suggest the following:

I move to approve the appeal (#26 ZBA 1) by Thomas Demorro from the Cease and Desist Order ("Order") issued to him by Montville ZEO, Stacy Radford, dated January 13, 2006, and thereby to reverse said Order.

Please note that an "aye" vote on the suggested motion is in favor of the applicant, and the applicant must receive four "aye" votes to win the appeal and have the order overturned. If he receives three or fewer "aye" votes, the appeal loses and the order stands. This is because under General Statutes §8-7, "The *concurring vote of four members of the zoning board of appeals* shall be necessary to reverse any order, requirement or decision of the ... [ZEO]." (Emphasis added.) See also, Montville Zoning Regulations §20.6. (Copies of pertinent statutes and regulations are set out at pp. 4-5 of this memorandum.)

Factors to consider on claims of legal nonconforming uses and abandonment

- Whether the use cited by the Cease and Desist Order is allowed by the current zoning regulations or by a zoning permit or special use permit issued for the site.
- If the cited use is not permitted by the current regulations or by existing permit, does it qualify as a legal nonconforming use? To answer that question:
 - Determine the date when the nonconforming use originally began and whether at that time either there were no zoning regulations in effect or the use was permitted by whatever regulations were in effect.

- If the use was permitted at the time it commenced, was it made impermissible by the adoption or amendment of zoning regulations? If the answers to these questions are yes:
- Has the use been legally abandoned?

Elements of nonconforming use/abandonment claims

The person claiming a legal nonconforming use has the burden of proving the claim. A valid nonconforming use is "a use or structure [that is] prohibited by the zoning regulations, but is permitted because of its existence at the time that the regulations [were] adopted." *Adolphson v. Zoning Board of Appeals*, 205 Conn. 703, 710, 535 A.2d 799 (1988). For a use to be nonconforming, it must be:

(1) be lawful; and

(2) in existence at the time that the zoning regulation was enacted as to that use.

Once a nonconforming use is established, the only way it can be lost is through abandonment. (Some internal citations omitted.) *Corner Properties v. Thompson Zoning Board of Appeals*, Docket No. CV084006737S, 2009 Conn. Super. LEXIS 1094, at *6-7 (Super. Apr. 28, 2009).

Whether a nonconforming use has been abandoned is a question of fact. Abandonment requires a voluntary and intentional renunciation of a use. The mere discontinuance of a use absent intent to abandon is not enough. The intention by the owner must be to permanently relinquish and not to reestablish the nonconforming use. However, the intent to abandon need not be expressly declared, but may be inferred as a fact from the circumstances. *Garrity v. Town of Morris Planning & Zoning Commission*, 2021 Conn. Super. LEXIS 2026, at *19-20 (Super. Dec. 16, 2021), citing *Cummings v. Tripp*, 204 Conn. 67, 93, 527 A.2d 230 (1987); see also, *South Cove Rental, LLC v. Town of Old Saybrook Zoning Board of Appeals*, Docket No. MMX-CV-24-6041129-S, 2025 Conn. Super. LEXIS 1594, at *4-5 (Super. June 17, 2025).

When a claimed nonconforming use has existed on a property that has had more than one owner over the relevant time period, the question might arise as to which owner's "intention" would control. A relatively recent case involved a property on which there had been a structure containing four separate dwelling units in a zone that did not allow such a use. *Corner Properties v. Thompson Zoning Board of Appeals*, Docket No. CV084006737S, 2009 Conn. Super. LEXIS 1094, at *12-14 (Super. Apr. 28, 2009). At a time before the current owner

obtained title to the property, its then-owner, the Town of Thompson, demolished the building, and in various indirect ways disavowed any intention to reestablish the four-family use. However, the then-current owner claimed that it had never been its intention to abandon the nonconforming use and sought permits to rebuild a four-family building.

The court held that the intention of the Town prevailed, explaining:

A careful search of the record ... supports the ZBA conclusion that the use of the structure as a four-family had clearly been abandoned in spite of its remaining structurally as a potential four-family until razed by the town in 2005. *It appears clear also that it was the town's intent to discontinue any continued use as a four-family when it took out the demolition permit to raze the structure 2005 listing its use as a two-family.* Although the plaintiff [the current owner] stressed that it was never its intent to abandon the four-family potential use, *the intent of the town as the prior owner would be controlling.* In determining whether abandonment of a nonconforming use had occurred pursuant to zoning regulation, trial court was required to consider evidence of the intent of a prior owner to reestablish nonconforming use rather than of intent of present owner to do so; prior owner was the person who voluntarily discontinued the use. *Caserta v. Zoning Board of Appeals of City of Milford*, 41 Conn.App. 77, 674 A.2d 855 (1996). See also *Cumberland Farms, Inc. v. Zoning Board of Appeals*, 74 Conn.App. 622, 814 A.2d 396 (2003). (Internal quotations and some citations delete; emphasis added.)

Note that the reasoning of the court in *Corner Properties* is by its nature heavily based on the particular facts of that case.

PERTINENT STATUTES AND MONTVILLE ZONING REGULATIONS

CGS § 8-2(d) (4) (A). [Zoning regulations may not] Prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations; (B) require a special permit or special exception for any such continuance; (C) provide for the termination of any nonconforming use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use; or (D) terminate or deem abandoned a nonconforming use, building or structure unless the property owner of such use, building or structure voluntarily discontinues such use, building or structure and such discontinuance is accompanied by an intent to not reestablish such use, building or structure. The demolition or deconstruction of a nonconforming use, building or structure shall not by itself be evidence of such property owner's intent to not reestablish such use, building or structure;

REGULATIONS

1.3. USE, NON-CONFORMING: A previously existing use of a building or land or both, which does not conform to the applicable use regulations of these Regulations, either on its effective date, or as a result of subsequent amendments thereof. It may or may not involve any principal building or land use. These Regulations shall not terminate or deem abandoned a nonconforming use building or structure unless the property owner of such use, building or structure voluntarily discontinues such use, building or structure and such discontinuance is accompanied by an intent to not reestablish such use, building or structure. The demolition or deconstruction of a nonconforming use, building or structure shall not by itself be evidence of such property owner's intent to abandon such use, building or structure.

4.9.1. For the purposes of these Regulations, a non-conforming use shall be defined as a use of land and/or building which lawfully existed prior to the enactment of the Zoning Regulations or any amendment thereto, which does not comply with the uses permitted within the zoning district in which it is located and which has been maintained since the enactment of the Zoning Regulations without evidence of an intent to abandon such nonconforming use.

4.9.2. No non-conforming use of land or structure shall be enlarged, extended, expanded or altered except in changing the use to a use which is permitted in the District in which the use is located.

4.9.3. When a non-conforming use has been changed to a conforming use, it shall not hereafter be changed to any use not permitted in the District in which the use is located.

4.9.4. A nonconforming use, building or structure shall not be terminated or deemed abandoned unless the property owner of such use, building or structure voluntarily discontinues such use, building or structure and such discontinuance is accompanied by an intent to not reestablish such use, building or structure. The demolition or deconstruction of a nonconforming use, building or structure shall not by itself be evidence of such property owner's intent to not reestablish such use, building or structure.