

## A Cautionary Tale To Owners Of Pre-Existing Nonconforming Uses And Structures

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In New Jersey, property owners have a right to maintain a use or structure that does not comply with current zoning if the use or structure is deemed to be a valid nonconformity. N.J.S.A. 40:55D-68. The right to maintain that use or structure, however, is limited under the statute which provides that a nonconforming use or structure “may be restored or repaired in the event of partial destruction.” *Id.* Total destruction, whether by the owner’s design or by accident, terminates the owner’s right to continue that use or maintain that structure. *S & S Auto Sales, Inc. v. Zoning Bd. of Adjustment*, 373 N.J. Super. 603, 619-20 (App. Div. 2004).

Although the statute provides protection in the event of “partial destruction” that phrase is not defined in the statute. Neither is the phrase “total destruction.” Case law has established that what comprises “partial destruction” depends on the facts of each case, and that a specific percentage delineation by ordinance is not authorized. See *H. Behlen & Bros. v. Mayor & Council of Kearny*, 31 N.J. Super. 30, 37-39 (App. Div. 1954). Because the phrases are not defined and because the issue rests upon the facts of each case there has been inconsistent application in various municipalities. Consequently, some of these matters are ultimately resolved in the courtroom.

In a recent Appellate Division decision entitled *Motley v. Borough of Seaside Park*, 430 N.J. Super. 132 (App. Div. 2013), the court found that a house that had been gutted to a shell to accomplish repairs was totally destroyed and so lost its status as a nonconforming use.

In *Motley*, plaintiff owned property located in a zone restricted to single-family uses. The parties agreed that the property is a nonconforming use, since the property contains two single family homes built in 1931 long before the municipality adopted its zoning ordinance in 1972.

In 2007, plaintiff was denied a use variance to renovate the front house and expand its loft area. Two years later, however, he obtained a zoning permit to replace the siding, shingles, some windows and an air conditioning unit. The zoning permit, however, specifically prohibited him from expanding the structure.

During the renovation project, it was discovered that the roof and the hot water system in the loft had leaked which caused part of the first-floor ceiling to collapse. After a building inspector determined that the entire structure needed to be removed, plaintiff demolished the house without contacting the zoning officer first.

A stop work order was issued after the zoning officer discovered the extent to which plaintiff had demolished the house. By the time the stop work order had issued, all four walls had been reframed, most of the floor beams had been replaced and a new plate had been installed in the foundation to replace a rotted one.

The zoning board upheld the zoning officer’s stop work order and plaintiff appealed.

The trial judge reversed and allowed plaintiff to continue with the renovation project subject to a restriction that the building dimensions not be expanded and the loft area remain unimproved. In permitting the limited work, the trial judge reasoned that it was “sounder policy to allow the renovation of debilitated non-conforming structures as long as there is no unlawful expansion of the nonconformity.”

The Appellate Division reversed noting that it is well-settled that New Jersey law disfavors the continuation of nonconforming uses and structures and municipalities may impose restrictions on nonconforming uses,

including prohibiting their expansion. The Appellate Division also agreed with the zoning board's position that plaintiff's removal of all of the walls of the building down to the foundation and footings exceeds any reasonable notion of a mere partial demolition.

This case will no doubt be instructive to the various municipalities hit hardest by Superstorm Sandy since the storm without question destroyed an untold number of nonconforming structures. As the statute is written today, however, owners of nonconforming structures are not entitled to simply rebuild what they had before the storm. If the local zoning officer denies a zoning permit based on a finding that the nonconforming structure has been more than partially destroyed, the owner may then appeal such a decision to the zoning board and/or alternatively, seek use variance relief. A zoning board would have the authority to limit or deny such an application.

In any event, before you start remodeling or renovating a nonconforming structure, you should make sure that you first obtain a zoning permit from the municipality otherwise you may find yourself in an untenable situation like Mr. Motley.

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