



TOWN OF HOPKINTON

OFFICE OF BOARD OF APPEALS

TOWN HALL
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HOPKINTON, MASSACHUSETTS 01748-3209

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Supplemental Information for Pre-Existing Non-Conforming Uses and Structures

The undersigned hereby submits this additional information in support of its Uniform Application for Special Permit / Petition for Variance and/or Appeal of Administrative Decision.

Applicant /
Petitioner /
Appellant: _____ Address: _____

Owner of
Record: _____ Address: _____

Address of Premises: _____ Hopkinton, MA 01748

What is a "Pre-existing Non-conforming Use or Structure"?

Certain uses and structures are protected from subsequent zoning changes if they were lawfully in existence prior to first publication of notice of adoption or change in an applicable zoning by-law. These are called "protected pre-existing non-conforming uses and structures". The right to continue the nonconforming use is not confined to the existing user, but the right runs with the land. Derby Refining Co. v. City of Chelsea, 407 Mass. 703, 555 N.E.2d 534 (1990). However, such **protection is not unlimited**. Any change, alteration, or expansion of a protected use or structure requires a Special Permit from the Board of Appeals pursuant to the Hopkinton Zoning By-laws and Massachusetts General Laws Chapter 40A Section 6. The Board of Appeals is free to allow or prohibit such modification. In all matters concerned with nonconformities, the **burden of proof is on the property owner** to show "the requisite similarity between the current use and the original nonconforming use". The **test** for determining whether the current or proposed use of the property fits within the exemption granted to nonconforming uses is found in the leading case of Powers v. Building Inspector of Barnstable, 363 Mass 648 (1973): 1) whether the use reflects the "nature and purpose" of the use prevailing when the zoning by-law took effect; 2) whether there is a difference in the quality or character, as well as the degree, of use; and 3) whether the current use is "different in kind in its effect on the neighborhood." This is an extremely complicated area of the law and it is strongly recommended that any owner seeking to assert "grandfathered" rights consult with an attorney before filing with the Board of Appeals.

How can a Grandfathered Use or Structure be altered or changed?

A protected use or structure can only be lawfully altered or changed upon the granting of a Special Permit from the Board of Appeals. One of the main purposes of zoning is to stabilize use of property,

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and the advantages that owners of nonconforming property acquire by enactment of a zoning ordinance are not to be augmented unless permitted by the current ordinance. Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, 324 Mass. 433, 86 N.E. 906 (1949). Pursuant to Massachusetts General Laws Chapter 40A Section 6 and Hopkinton Zoning By-law 210-128, the Board of Appeals may only grant a Special Permit to alter or change a "grandfathered" use or structure upon a finding that the proposed change is not substantially more detrimental to the neighborhood and that one of four circumstances exist. These include that 1) the nonconforming use, building or structure is being changed to a similar or more restricted use, 2) the nonconforming use, building or structure is being enlarged in the same use to an extent of not more than 25% in volume or area, or special circumstances exist with respect to 3) existing lots or 4) off-street parking.

Can Grandfathered Protection be lost?

Most definitely. **Generally, preexisting non-conforming uses are to be given minimal tolerance.** Chilson v. Zoning Board of Appeals of Attleboro, 344 Mass. 406, 182 N.E.2d 535 (1962). A protected use may be lost if it is discontinued, or altered or changed without a Special Permit from the Board of Appeals. Pursuant to Massachusetts General Laws Chapter 40A Section 6 and Hopkinton Zoning By-law 210-129 to 131, a nonconforming use may not be resumed or changed to another nonconforming use after 1) abandonment of use for two years, 2) two years during which it has been neither used nor offered for sale, or 3) failure to resume use or to convert to another approved nonconforming use within two years of purchase. Also, once a nonconforming use reverts to a more restricted use, it may not return again to its original less restricted use. And, once a nonconforming use has been destroyed or damaged by fire, explosion or other catastrophe, it may be rebuilt or restored at the same location and again used as it previously was, provided that its owner shall apply for a building permit and start operations for restoring or rebuilding on said premises within 12 months after such catastrophe; and further, provided that the buildings as restored shall not exceed in volume or area the original nonconforming structure.

Where indicated, please place an "X" in the appropriate boxes (). Answer all questions.

Preliminary Questions

1. A. Is there a pre-existing non-conforming use on the property? Yes No
- B. Is the lot undersized not meeting existing area requirements? Yes No
- C. Does the lot fail to meet the existing frontage requirements? Yes No
- D. Do you claim that an unimproved lot is buildable because it has 50 feet of frontage and 5,000 square feet of area? Yes No
- If you answered Yes to B, C or D, do you claim that the lot is protected as a pre-existing non-conforming lot? Yes No
- E. Is there a structure on the lot that does not meet current set back requirements? Yes No
- F. Are you applying for a Special Permit to alter, change, or modify a Pre-existing Non-conforming Use or Structure? Yes No
- If No, consult with an attorney. A Special Permit may be required.

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If yes to Question 1 A,	complete Questions 2 to 4.
If yes to Question 1 B or C	complete Questions 5 to 7.
If you answered yes to Question 1 D,	complete Questions 8 to 11.
If you answered yes to Question 1 E,	complete Questions 12 to 18.
If you answered no to Question 1 F	complete Question 19 to 20.

Pre-existing Non-conforming Uses

2. Attach a statement that describes the protected pre-existing non-conforming use. Include within your comments the date the use began, and describe the “nature”, “purpose”, and “extent” of the use on that date. Attached? Yes No
3. Attach a statement that describes any changes to the protected pre-existing non-conforming use since its inception. Include within your comments how the “nature”, “purpose”, and “extent” of the use evolved, if at all. Attached? Yes No
4. Attach a statement that describes the proposed pre-existing non-conforming use. Include within your comments a description of the “nature”, “purpose”, and “extent” of the proposed use. Attached? Yes No

Pre-existing Non-conforming Lots

5. Has there ever been a previous use on the lot? Yes No
 If Yes, attach a statement that describes the previous use. Attached? Yes No
6. Has there ever been a structure on the lot? Yes No
 If No - You may not have a “buildable” lot. In addition to 7, answer Questions 8-11.
7. Is there now a use or structure on the lot? Yes No
 If Yes, attach a statement that describes the use and/or structure. If No, attach a statement that describes what happened to the previous use and/or structure, and why the protection afforded still is in existence. If there is no structure on the lot, specifically describe why the protection is not lost by abandonment, fire, explosion or other catastrophe pursuant to Zoning By-law 210-129 to 131. Attach to your statement, copies of plans from the Assessor’s Office or Registry of Deeds that support your position. Attached? Yes No

Pre-existing Non-conforming Buildable Lots

8. Is there currently a structure on the lot? Yes No
 If Yes – STOP. Go to Question 5.
9. At any time since its creation, has there ever been a structure on the lot? Yes No
 If Yes - STOP. Go to Question 5

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10. If a lot does not meet current area and frontage requirements, in order for a lot to be “buildable” it must have 5,000 square feet of area and have 50 ft of frontage and not be held in common ownership with any other lot during its existence as a “pre-existing non-conforming lot” **The burden of proving the issue as to non-common ownership is on the property owner.** Proof must be attached that the lot was not held in common ownership, which is generally an opinion from a Title Attorney who as has conducted a title exam at the Registry of Deeds. Proof Attached? Yes No

11. Attach a statement that describes when the lot was created and why it is protected as a pre-existing non-conforming buildable lot. Attach to your statement, copies of plans from the Assessor’s Office or Registry of Deeds that support your position. Attached? Yes No

Pre-existing Non-conforming Structures That Do Not Meet Set Backs

12. Attach a statement that describes the location on the lot of the protected pre-existing non-conforming structure(s). Include within your comments the date the structure(s) was (were) built and attach all plans that support your position. Attached? Yes No

13. Attach a statement that describes any previous alterations or changes to the protected pre-existing non-conforming structure(s) since its construction. Include within your comments the date the improvements were built and attach all plans that support your position. Attached? Yes No

14. Attach a statement that describes the proposed alterations or changes to the protected pre-existing non-conforming structure(s). Attach all plans that support your position. Attached? Yes No

15. Does your proposed alterations or changes stay within the “foot print” of the original structure(s)? Yes No

16. Complete the following for each structure. Use additional sheets if necessary.

	(A)	-	(B)	=	(C)
<u>Dimensional Requirements</u>	<u>Setbacks Under Proposed Structure</u>		<u>Setbacks Under Existing Structure</u>		<u>Difference</u>
Set Back from Street	_____		_____		_____
Set Back from Side Lot	_____		_____		_____
Set Back from Rear Lot	_____		_____		_____

** Note: the figure in column C will be negative if non-conformity is increased. **

17. Does your proposed alterations or changes increase any non-conforming set-back? Yes No
If Yes, Attach a statement detailing why you seek permission for additional non-conformity. Attached? Yes No
18. Attach a statement that describes the proposed changes to the structure(s) on the lot, including the reasons for the change and the uses proposed for the structure(s) and the lot in general. Attached? Yes No

Special Permit

19. Answer Question 19 and 20 only if you answered No to Question 1 F. Attach a statement that describes the reasons why no Application for Special Permit is filed with this form. Attached? Yes No
20. Did you consult with an attorney with regard to your answer to 19? Yes No

Certification and Required Signatures

I (We) hereby certify that the statements within my (our) Supplemental Information for Pre-Existing Non-Conforming Uses and attachments are true and accurate to the best of my (our) knowledge and belief.

x _____
1. Signature of Applicant/Petitioner/Appellant –Date Telephone Number
{Required Signature}

Fax Number e-mail Address

x _____
2. Signature of Owner of Record Date Telephone Number
{Required Signature}

Fax Number e-mail Address

Note -Signatures of Applicant / Petitioner / Appellant and Owner of Record are required.

If Applicable:

Name of Attorney for Applicant/Petitioner/Appellant