

Doctrine of expansion of nonconforming use not applicable to use by special exception

Applicant may ask for a variance from one or more special exception requirements

[1808 Corporation v. New Ipswich](#) No. 2010-201, April 26, 2011

In 1998, the petitioner requested a special exception to allow an office building but because the foundation of exceeded the special exception limitation, the petitioner also sought a variance from the requirement that the building's foundation not exceed 1,500 square feet. The ZBA approved the petitioner's applications and discussed the ordinance limitations regarding foundations. The ZBA agreed to contact the Planning Board to determine the basis of the limitations and, then, voted unanimously to grant the petitioner the requested special exception and variance.

In 2008, the petitioner applied for site plan approval to convert the back of the building from storage to office arguing that such conversion did not need additional ZBA approval but was "a reasonable expansion of an existing [nonconforming] use." The planning board voted to defer its consideration of whether to accept the petitioner's plan for no more than 180 days while the petitioner pursued ZBA approvals. The petitioner appealed this determination to the ZBA. The ZBA denied the petitioner's appeal stating that (1) "[t]he previous [ZBA] . . . decision was specific concerning the use of the back portion of the building as storage by owner and tenants"; and (2) "[g]iven the significant change of use, the abutters and other interested parties are due the opportunity to participate in the due process offered through the variance and special exception application process." The petitioner appealed to Superior Court which upheld the ZBA and that decision was appealed to the Supreme Court.

*"A property owner was granted a special exception and a variance to use some of his existing building as office space and the remaining part of the building as storage space. Nearly 10 years later, he sought site plan approval to utilize the entire building for office space. The planning board determined that the property owner would need ZBA approval to increase the space used for offices. The property owner appealed the planning board decision to the ZBA, claiming that the use of the building entirely as office space was within the original ZBA approvals or, if not, it was a permissible expansion of a nonconforming use.*

*The ZBA determined that its previous decision was specific concerning the use of part of the building as storage space, and any change from that would require additional approvals from the ZBA after notice and public hearing.*

*The Court upheld the ZBA's determination, pointing out that although the original ZBA approval did not contain an express limitation on the square footage to be used for office space, representations made at the public hearing, and recorded in the meeting minutes, show that the applicant intended to use only a certain area of the building for office space.*

*It is important to point out that the decisions by the ZBA and planning board were made prior to the amendment of RSA 676:3, II, which now requires that all conditions of approval be included in the written decision. Where an application does not specify the scope of a proposed project, it is risky for a land use board to rely on statements at the public hearing. Limitations should be made clear in the written decision.*

*Next, the Court examined the applicant's contention that the ZBA should apply the doctrine of expansion of nonconforming uses to its plan to expand the use of office space within the building, which was originally permitted*

*by special exception. Valid nonconforming uses are permitted to expand to some extent. The Court pointed out that it has distinguished between nonconforming uses and special exceptions, noting that "the review standard appropriate to the scope of variances or nonconforming uses" does not apply to special exceptions. The Court rejected the applicant's claim, ruling that the doctrine of expansion of nonconforming uses does not apply to uses by special exception." New Hampshire Town and City, June 2011*