

A builder purchased 10 acres of undeveloped land. He intended to construct five homes, and each home was to be constructed on a two-acre lot, which was the minimum size permitted under the zoning regulations. The builder employed an architect to design the basic plan for each home, but the builder was forced to shelve those plans due to a sudden downturn in the economy.

Six years later, the builder engaged a surveyor to subdivide the land into two-acre lots. He then discovered that the local zoning board had validly rezoned the area in which the 10 acres were located a year ago, increasing the minimum lot size to two and one-half acres for new residences. The zoning ordinance does not provide for special exceptions, and the builder cannot profitably construct only four of the five homes designed by the architect.

Can the builder proceed with his plans to build five homes on two-acre lots?

- A. No, because the ordinance does not provide for special exceptions.
- B. No, because the two and one-half acre restriction properly applies to the builder's land.
- C. Yes, because he cannot profitably construct only four homes on the 10 acres.
- D. Yes, because his rights with regard to the land vested when he purchased the land.

Explanation:

Nonconforming use

Existing nonconformance

Property owner's *existing* use of property that conflicts with new or modified zoning law can continue until:
use is enlarged, changed, or abandoned *or*
if provided by zoning law, amortization period passes or use not registered

Planned nonconformance

Property owner's *planned* nonconforming use of property can proceed if right to use has vested
Vested right exists if, at time zoning law or modification takes effect, property owner has:
secured any necessary permits in good faith *and*
made substantial progress toward achieving use

When a **zoning law** is enacted or modified, certain properties within that zone may not conform to the new requirements. Any **existing nonconforming uses** are "**grandfathered in**," meaning that they are allowed to continue in spite of the conflict. However, a property owner who has **merely prepared** for a nonconforming use when a zoning change occurs is **not allowed to proceed** with that use unless he/she has a **vested right** in the use.

A vested right will generally be found if, **at the time the zoning change takes effect**, the property owner has:

secured any **necessary permit** from the proper local authority in good faith (eg, building permit) *and*

made **substantial progress** toward achieving the nonconforming use (note that in a few states, securing a permit by itself is sufficient).

Here, the builder does *not* have a vested right in building five homes on two-acre lots because the above requirements had not been met at the time the two and one-half acre restriction took effect. Therefore, the restriction properly applies to the builder's land, and he cannot proceed with his plans **(Choice D)**.

(Choice A) A zoning law may recognize that certain *conforming* uses require a special-exception or special-use permit—eg, a gas station may require such a permit even in a commercially zoned area. But this has no bearing on whether the builder has a vested right to proceed with his *nonconforming* use.

(Choice C) The fact that the builder cannot profitably construct four homes on the 10 acres does not entitle him to build five homes on two-acre lots. However, had the zoning change

eliminated *any* economically viable use of the land, he may have been entitled to reasonable compensation under the Fifth Amendment [takings clause](#).

Educational objective:

A property owner may proceed with plans for nonconforming use after a zoning change if he/she has a vested right in that use. A vested right exists if, at the time a zoning change takes effect, the property owner has (1) secured any necessary permits in good faith and (2) made substantial progress toward achieving the use.

References

83 Am. Jur. 2d Zoning & Planning §§ 537–44 (2019) (nature and extent of nonconforming use).

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