



# COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

## Appeals Court Examines Whether Alcohol Sales are a “Substantial Extension” of a Lawfully Operating Convenience Store

BY CHRISTOPHER MERCURIO • MAY 10, 2016

The Massachusetts Court of Appeals upheld a decision allowing the addition of alcohol sales at a convenience store in a neighborhood recently re-zoned as residential. In *Almeida v. Arruda* the neighbors of the convenience store in question argued that the addition of alcohol to the store’s selection would fundamentally change the character of the store, and, therefore the store would no longer be protected as a pre-existing nonconforming use under Section 6 of the Massachusetts Zoning Act. In ruling in favor of the store owners, the Court found that the sale of alcohol did not *per se* constitute a “change or substantial extension” of the existing use of the Property.

A lawfully commenced use of a property is generally protected from later zoning amendments that would prohibit the particular use. Such pre-existing use is permitted as a lawful “pre-existing nonconforming” use. However, property owners are not allowed to change or substantially extend a pre-existing nonconforming property’s use without zoning relief from the municipality’s permit granting authority.

In this case, the neighbors argued that the addition of alcohol sales constituted a substantial extension of the convenience store, citing fundamental changes in the nature and purpose of the use, the quality, character and degree of the use, and the effect on the neighborhood (*i.e.* increased traffic, litter and “safety concerns related to inebriated customers.”).

The Court concluded that a convenience store that sells alcohol is the same as the existing convenience store “just with the addition of beer and wine.” While the Court noted that increased traffic could be a legitimate consideration, it found no evidence that any increased traffic would result from such an expansion. The Court also found nothing in the record to support the neighbors’ assertions regarding increased litter and inebriated customers, noting that customers are unlikely to dispose of alcohol containers while in the parking lot and were unlikely to purchase alcohol while already inebriated.

The key to the Court’s decision was the finding that alcohol sales would blend seamlessly with the existing convenience

store, occupying only 12% of the store's space. As *Almeida* shows, commercial property owners seeking to expand the use of their pre-existing nonconforming properties should consider how best to integrate such expansions with their existing businesses.