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Abstract

Accessory Uses of Land in New York State, by Jeffery B. Durocher, explains how local communities take different approaches to permitting accessory uses of land, using the test of whether the proposed use is incidental and customary to the primary use of the land. The article also explains that religious and educational uses are usually permitted in residential areas because they contribute to the general welfare.

Resource

Accessory Uses of Land in New York State

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I. Introduction

A. General

Comprehensive zoning creates districts within which the use of land is limited to appropriate activities that are designated as permitted primary uses. By designating one or more primary uses for each district, the local legislature determines what uses are compatible with one another in that portion of the community.

Local zoning allows accessory uses that are incidental to the primary uses and customarily associated with them.[1] The accessory use is a part of the primary use and permitted as of right. When accessory uses are limited to those that are customary and incidental, neighboring landowners, business owners, and residents are protected because such uses are not incompatible with the character of the district.

B. The Accessory Use

1. Definition

Accessory uses are those uses of land found on the same lot as the primary use and that are subordinate, incidental to, and customarily found in connection with the primary use.

In order to qualify as accessory, a use must be incidental. This means, first, that it is subordinate to the primary use.[2] Many local ordinances themselves require that the accessory use may be only a minor use of the land.[3] Second, any subordinate, incidental use

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[1] *See* Anderson, New York Zoning Law and Practice 427 § 9.21 (3d ed. 1984); Town of Plattsburgh Zoning Ordinance p. 3 Art. I § 1.1 (1969) (town ordinance defines a "lot as including one building and the accessory buildings or uses customarily incident to it).

[2] La Veccia v. Board of Standards and Appeals of City of New York, 26 Misc. 2d 39, 204 N.Y.S.2d (1960) (thirty-two lane bowling alley not accessory to a thirty-five room hotel in district where bowling alleys were only allowed as accessory uses).

[3] City of Buffalo, N.Y., Zoning Code p. 51105 § 511-4 (1996); Town of Montebello, N.Y., Zoning Code Article XVIII (1987).

must also be reasonably related, or "clearly incidental" to the primary use.[4] If there was no requirement that an accessory use have some connection with the primary use, any accessory use of the property would be sanctioned even if entirely unrelated to the primary use.[5] For example, a homeowner who attempted to establish accessory parking as a valid nonconforming use to his home was denied the right because the vehicle was commercial.[6] Even though parking the vehicle for a social visit would be acceptable,[7] parking of a vehicle for commercial purposes is not related or incidental to the primary use, a private residence. In commercial zoning districts accessory uses are limited to tenants, patrons or occupants of the commercial building to ensure that accessory uses remain incidental to the primary use.[8] The City of Cortland makes this goal clear in its ordinance.

> "Only the following accessory uses will be permitted: those accessory uses customarily incidental to the principal uses and including customary services *within the building*, *provided that such services are for patrons of the principal use of the building* and there is no external evidence of such services or signs advertising the same."[9]

Accessory uses that are a part of a commercial venture may not become in any way independent of that venture; otherwise they lose their incidental nature.[10]
Minor uses associated with the primary use are accessory when customarily found in connection with the primary use. In allowing a small beauty parlor in a residential district, the court found the use was customary, stating, "[d]own through the ages women have been occupied at home in improving their personal appearance and the personal appearance of other women."[11] The term customary within the accessory use context encompasses more than mere traditional activities that are considered ordinary. In New York, an accessory use must be both "well established" and customary.[12] Using a department store roof as a landing site for the company's helicopter, although not unique, was not sufficiently customary. The court admitted that the use of a helicopter for transporting executives was an efficient and useful business practice. In fact, helicopter use had increased in the area and had been sanctioned in an industrial district. However, the practice was not satisfactorily "well established" as an accessory use to a retail business. Even activities commonly found together are not necessarily "customary," particularly in the case of nonconforming uses.[13]

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[4] Verstandig's Florist Inc. v. Town of Bethlehem, 645 N.Y.S.2d 635 (3d Dep't 1996); Gray v. Ward, 74 Misc. 2d 50, 55, 343 N.Y.S.2d 749, 753-754 (1973) quoting Lawrence v. Zoning Board of Appeals of Town of North Branford, 158 Conn. 509, 512, 264 A.2d 552, 554 (1969).
[5] 140 Riverside Drive, Inc. v. Murdock, 276 A.D. 550, 95 N.Y.S.2d 860 (1st Dep't 1950).
[6] Facci v. City of Schenectady, 13 Misc. 2d 247, 176 N.Y.S.2d 827 (1957).
[7] Frampton v. Zoning Board of Appeals, 114 A.D.2d 670, 494 N.Y.S.2d 479 (3d Dep't 1985).
[8] *See* 9 N.Y. Comp. Codes R. & Regs. tit. 9, §§ 606.3(a)(2)(iv), 606.3(a)(2)(vi) (West 1996); Ambassador v. Board of Standards & Appeals of City of New York, 281 A.D. 342, 119 N.Y.S.2d 805 (1st Dep't 1953); 140 Riverside Drive, Inc. v. Murdock, 276 A.D. 550, 95 N.Y.S.2d 860 (1st Dep't 1950).
[9] Del Veccio v. Lalla, 136 A.D.2d 820, 523 N.Y.S.2d 654 (3d Dep't 1988) (emphasis added).
[10] *See* Ecker v. Dayton, 651 N.Y.S.2d 206 (Sup. Ct. 2d Dep't 1996) (an accessory farm stand must be limited to the products sold from the primary use, a truck garden).
[11] Wise v. Michaelis, 203 N.Y.S.2d 247 (Supreme Court Nassau Co. 1960), *aff'd* 12 A.D.2d 788, 210 N.Y.S.2d 980 (1961).
[12] Gray v. Ward, 74 Misc. 2d 50, 343 N.Y.S.2d 749 (1973).
[13] Village of Waterford v. O'Brien, 39 A.D.2d 490 (3d Dep't 1972).

Incidental uses, therefore, are accessory only if commonly, habitually and by long practice established as reasonably associated with the primary use.[14] Perhaps the most common example of this is vehicle parking for a residence or business.[15]

2. Origin and Purpose

Although the use of land in a zoned district may be regulated with exquisite detail, the range of acceptable uses that naturally accompany a primary use is exceedingly broad. By permitting uses customarily incidental and subordinate to the primary activity, zoning ordinances allow property owners additional beneficial use of their property. Accessory use provisions in zoning allow a range of incidental uses of property that owners expect to engage in when they purchase their property for its primary use. Nearby neighbors are not offended by these incidental, subordinate and customary uses since their existence was contemplated by them when they purchased their property. In one instance, for example, a separate guesthouse was permitted in a residential zone as an accessory use.[16] The use of a residence for business purposes, however, is generally prohibited.[17] The test in these cases is whether the use is truly accessory. An owner could not use a guesthouse as a boarding house for profit, but boarding guests when the practice is merely incidental and accessory to the residence was permitted.[18]

3. Zoning Provisions: Various Approaches

Some municipalities simply permit accessory uses that are both well established and customary without being more specific.[19] The uses that meet these qualifications cause no conflict with the neighborhood character. Landowners are permitted to establish these customarily incidental uses along with the primary use allowed in the district.[20] Other municipalities list specific accessory uses that are allowed in their zoning ordinances.[21] Still others list uses that are prohibited as accessory and then permit all others that are

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[14] Gray v. Ward, 74 Misc. 2d 50, 55, 343 N.Y.S.2d 749, 753-754 quoting Lawrence v. Zoning Board of Appeals of Town of North Branford, 158 Conn. 512, 264 A.2d 554.

[15] Buffalo Park Lane, Inc. v. City of Buffalo, 162 Misc. 207, 294 N.Y.S. 413 (Sup. Ct. Erie Co. 1937) (hotel had right to provide parking as a legitimate accessory use, for its guests); People v. Hasinsky, 51 Misc. 2d 218, 273 N.Y.S.2d 104 (1966).

[16] Baddour v. City of Long Beach, 279 N.Y. 167, 18 N.E.2d 18 (1938).

[17] *Id*.

[18] *Id*. at 174, 18 N.E.2d 20.

[19] Gray v. Ward, 74 Misc. 2d 50, 343 N.Y.S.2d 749, *aff'd* 44 A.D.2d 579, 354 N.Y.S.2d 591.

[20] Although an accessory use is properly considered a part of and dominated by the primary use, they have been considered separate for the purposes of tax exemption. Hewlett Associates v. City of New York, 57 N.Y.2d 356, 442 N.E.2d 1215, 456 N.Y.S.2d 704 (1982). A pool complex attached to a residence was considered accessory to and therefore separate from the primary use for purposes of calculating lot coverage. Mandell v. Nusbaum, 138 A.D.2d 597, 526 N.Y.S.2d 179. However, it must be noted that the language of the legislation will control these details.

[21] Town of Somers, Zoning Code, p. 17020.1§ 170-11 (1997); Town of Harrison Zoning Ordinance, p.3 § 235-4 (1995); City of Oneonta Zoning Code, p. 30.3 § 30.4 (1995); Village of North Tarrytown Zoning Code, p. 6206 § 62-4 (1994); Town of Stanford, Zoning Code, p. 4 § 164-8 (1991); *see also* Anderson, New York Zoning Law and Practice 427 § 9.21 (3d ed. 1984).

customary and incidental. A fourth approach is to provide a list of acceptable accessory uses that is not exclusive, but illustrative of the accessory uses that are permitted.

In some zoning codes, certain accessory uses are allowed by special use permit. Technically, these are not accessory uses, but uses allowed by special permit. The permit may be issued by a local agency if the proposed use meets the standards established by the legislature.

Under the first four approaches, the building inspector interprets whether a proposed accessory use meets the legislative definition contained in the ordinance. This interpretation can be appealed to and reversed by the Zoning Board of Appeals. Under the last approach the "accessory use" is not permitted as of right. Instead, an application for a special permit must be submitted to the appropriate agency.

4. Conflicting Interests

The accessory use, by design, serves to arbitrate competing interests of property owners and their neighbors. Since their expectations may not be uniform, there can be significant tension in determining what uses are truly customary, subordinate, well-established or incidental. The accessory use device, when implemented properly, resolves these competing interests in the best interests of the larger community.

C. Purpose of This Article

This paper analyzes New York State's law on accessory uses. It considers the origin of accessory uses, and its defining authority, including the various approaches and types of local ordinances that authorize or prohibit accessory uses. This background is then applied to the problems associated with accessory uses and the trends found in the case law. Accessory use problems arise over whether a use is customary or incidental. By grouping accessory use controversies into several contexts, the rules that define accessory use in New York State can be illustrated and examined. The courts tend to resolve accessory use controversies according to which of these contexts they arise from.

II. Legal Background

A. Origin of the Accessory Use

Soon after municipalities undertook comprehensive zoning, planners realized that use districts could not be limited to primary uses.[22] Permitting unobjectionable accessory uses (those incidental and customary), in addition to primary ones, created more flexible use districts yet preserved the basic character of zoning districts. The drafters of early zoning codes found it easier to enumerate and separate primary uses into districts than to specify among the countless uses that were customarily associated with each primary use. The approach was to permit all accessory uses that were customary in the district if they were incidental and subordinate to the primary use.

[22] Gray v. Ward, 74 Misc. 2d 50, 56, 343 N.Y.S.2d 749, 755.

From the inception, land uses were allowed as accessory when indispensable to the primary use.[23] Zoning districts evolved around existing uses and the accessory use device permitted those incidental and traditional activities that did not conflict with existing neighborhoods. For example, hotels, even before cars, provided hitching posts for guests, and today a parking lot is both a customary and incidental use to a hotel.[24] If a landowner has the right to run a hotel, so too may the landowner, as a matter of right, operate a parking lot in connection with the hotel.

B. Authority to Regulate Accessory Uses

1. Authority to Permit Accessory Uses

Local governments have authority, under state enabling statutes, to regulate land under the "police power." The police power is a broad authority designed to promote public health, safety, morals and general welfare.[25] Zoning laws that regulate accessory uses are valid so long as they promote these goals. The regulation of accessory uses promotes harmony of land use within regulated districts and is in furtherance of these goals. In so doing the legislature may permit some accessory uses, prohibit others, or impose conditions on them.[26]

The enabling acts also authorize local governments to divide land into districts.[27] Within these districts, local laws may dictate the details of acceptable uses, be they primary or accessory. The police power is the basis for land use regulations, including accessory use provisions, that control the use of land in a manner beneficial to the public.[28]

2. Limits on Authority

Although local legislatures need not permit accessory uses at all, it is a technique that creates more flexible use districts. This flexibility ensures that the ordinance is not unreasonable and arbitrary, and therefore unconstitutional.[29] Nonetheless, the authority to permit accessory use is limited in several ways.

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[23] Ambassador v. Board of Standards & Appeals of City of New York, 281 A.D. 342, 119 N.Y.S.2d 805. *See* People v. Hasinsky, 51 Misc. 2d 218, 273 N.Y.S.2d 104 (restaurant was permitted to operate a parking lot for its patrons because no such restaurant could be profitable without parking); *but see* Village of Great Neck v. Green, 8 Misc. 2d 356, 166 N.Y.S.2d 219 (Sup. Ct. Nassau Co. 1957) (where parking of cars on the premises was not an indispensable accessory use to selling them).

[24] Buffalo Park Lane, Inc. v. City of Buffalo, 162 Misc. 207, 294 N.Y.S. 413.

[25] N.Y. Gen. City Law § 20(24) (McKinney 1989); N.Y. Town Law § 261 (McKinney 1987); N.Y. Village Law § 7-700 (McKinney 1996).

[26] *See* Tartan Oil Corp. v. Board of Zoning Appeals of the Town of Brookhaven, 213 A.D.2d 486, 623 N.Y.S.2d 902 (2d Dep't 1995) (board may impose a special exception for certain accessory uses).

[27] N.Y. Gen. City Law § 20(25) (McKinney 1989); N.Y. Town Law § 262 (McKinney 1987); N.Y. Village Law § 7-702 (McKinney 1996).

[28] *See generally* Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[29] S*ee* Nectow v. Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928).

A use that violates specific provisions of the zoning code cannot be made legal on the theory that it is merely accessory. Accessory uses must meet all requirements in the zoning code, including setback[30] and lot area requirements.[31] Similarly, the owner's right to an accessory use cannot be extended into an adjoining district.[32] For example, a municipality could not permit a parking lot in residential district for trucks belonging to a bottling plant.[33] Even though the milk bottling concern owned the lot right next door to its plant, the accessory was not appropriate in that location because it was zoned residential.[34]

The milk bottling plant could not have obtained the accessory parking by variance either. A use variance may not be granted for an accessory use. The showing required for a use variance is excessive hardship and cannot be made for accessory uses. By definition, accessory uses are minor additions to a primary use. The owner could not show unnecessary hardship if the property could be utilized for its primary use. Accessory uses are therefore minor, dispensable uses of land.

C. Problems That Arise

Tension occurs when a landowner is denied beneficial use of his property because the building inspector rejects his application for a building permit to construct an accessory use.[35] Neighboring landowners may be concerned that the use, if permitted, will diminish the value or enjoyment of their land. In one instance, a pharmacy owner suffered special damages when a competing pharmacy was established across the street. The new pharmacy was not permitted, but its owner claimed it to be an ethical pharmacy[36] accessory to two dentist offices located in the same building. However, since the new pharmacy in fact catered to customers other than patients of building tenants, it was not a proper accessory use.[37] Although the accessory use device is intended to permit landowners to fully use their property, problems arise when the accessory use device is used to greatly expand the intensity of use, establish a unique or novel use, to expand a nonconforming use, or to change the use of a property when a variance cannot be obtained.

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[30] Buffolino v. Village of Westbury, 646 N.Y.S.2d 179 (2d Dep't 1996). *See also* Hohmann v. Thomsen, 32 A.D.2d 669, 300 N.Y.S.2d 781 (1969) (where setback requirements for a permitted radio tower could only be met by joining his lot with the neighboring lot belonging to his brother).

[31] Griffin v. Reville, 1 Misc. 2d 1045, 149 N.Y.S.2d 312 (Westcheser Co. 1956).

[32] Town of Brookhaven v. Spadaro, 182 A.D.2d 533, 612 N.Y.S.2d 175 (1994) (30-acre property was zoned residential with a small portion zoned for business and property owner wished to use the residential portion as a landing field). *See also* Bobrowski v. Feriola, 2 A.D.2d 708, 153 N.Y.S.2d 157 (1956).

[33] Bobrowski v. Feriola, 2 A.D.2d 708, 153 N.Y.S.2d 157 (1956).

[34] *Id*.

[35] For example, a homeowner was denied an accessory structure to houseboat. Porianda v. Amelkin, 115 A.D.2d 650, 496 N.Y.S.2d 487 (2d Dep't 1985).

[36] Distinguishable from a commercial pharmacy, an ethical pharmacy is one operated primarily to serve tenants and the patients of tenants in the same building. Cord Meyer Development Company v. Bell Bay Drugs, Inc., 25 A.D.2d 744, 269 N.Y.S.2d 67, 68 (1966) *rev'd on other grounds* 20 N.Y.2d 211, 282 N.Y.S.2d 259, 229 N.E.2d 44.

[37] *Id*.

The scale of a proposed accessory use can create a situation that is neither incidental nor customary.[38] Applications to establish accessory uses that are conducted at a large scale may effect a change or greatly expand the primary use. Attempts to circumvent the variance process when, for instance, a variance cannot be granted, will not succeed.[39] It may be difficult to draw the line, but at some level the activity becomes too intense to be considered incidental and customary.

Opposition to a novel accessory use might arise when a landowner introduces some incidental activity that is arguably not customary. Seen as unusual, these new uses are objected to on the basis that they are not customary. They may be incidental and customary despite their seeming novelty.[40]

Uses accessory to nonconforming uses are looked upon with disfavor because the primary use is incompatible with the surrounding district.

Special problems can arise regarding religious and educational uses that are deemed to contribute to the general welfare. These uses are generally permitted in residential areas, even though they may bring traffic and noise problems normally associated with commercial activity.[41] Because uses like schools and churches are often located in residential areas, surrounding landowners oppose the impacts of accessory uses such as soup kitchens or day care centers that may accompany them.

III. Implementation

A. The Process

Property owners begin the process of establishing an accessory use by applying to the municipality to add the accessory use to a developed parcel. The property owner may be seeking a special permit,[42] a building permit,[43] or an interpretation of what constitutes an accessory use.[44] In other cases the property owners try to prove a use is accessory as an alternative when a variance cannot be granted.[45]

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[38] Presnell v. Leslie, 3 N.Y.2d 384, 144 N.E.2d 381, 165 N.Y.S.2d 488 (1957) (forty-four foot radio tower); Incorporated Village of Old Westbury v. Alljay Farms, 64 N.Y.2d 798, 476 N.E.2d 315, 486 N.Y.S.2d 916 (1985) (commercial breeding of racehorses).

[39] Application to expand accessory uses to laundromat, to include a fitness room, tanning booth, pool table, and hot food service was properly denied. Baright v. Zoning Board of Appeals, 215 A.D.2d 555, 627 N.Y.S.2d 951 (2d Dep't 1995). Also, nonconforming uses that may be maintained shall not be expanded or changed. Verstandig's Florist, Inc. v. Board of Appeals of the Town of Bethlehem, 645 N.Y.S.2d 635 (3d Dep't 1996).

[40] Collins v. Lonergan, 198 A.D.2d 494, 575 N.Y.S.2d 330 (2d Dep't 1993).

[41] Commercial parking cannot be accessory to a residence. Facci v. City of Schenectady, 13 Misc.2d 247, 176 N.Y.S.2d 827.

[42] Gray v. Ward, 74 Misc. 2d 50, 343 N.Y.S.2d 749, *aff'd* 44 A.D.2d 579, 354 N.Y.S.2d 591.

[43] 7-11 Tours, Inc. v. Board of Zoning Appeals, 190 A.D.2d 486, 454 N.Y.S.2d 477 (2d Dep't 1982).

[44] Aim Rent A Car, Inc. v. Village of Montebello, 156 A.D.2d 323, 548 N.Y.S.2d 275 (2d Dep't 1989); 7-11 Tours, Inc. v. Board of Zoning Appeals, 190 A.D.2d 486, 454 N.Y.S.2d 477.

[45] Porianda v. Amelkin, 115 A.D.2d 650, 496 N.Y.S.2d 487 (2d Dep't 1985).

Initially, the building inspector interprets the accessory use language. If the new use is not specifically authorized as a primary use, it may be permitted by the building inspector as accessory.[46] If the use is customary and completely innocuous, there exists no conflict because it is merely a minor part of the primary use.[47] However, difficulties arise when the use is substantially different or conducted at a scale large enough to make the accessory use, arguably, a change in use. An adverse decision by the building inspector may be appealed to the zoning board of appeals. The board's decision can then be challenged in the courts with an Article 78 proceeding.[48] However, the zoning board's decision is normally given deference by the courts as to the interpretation of what constitutes customary and incidental use if supported by any reasonable interpretation of the facts.[49] The courts will uphold the zoning board of appeals' decision so long as it has a rational basis[50] or a reasonable explanation.[51]

B. Local Ordinance

Local ordinances regulate accessory uses in a variety of ways. Within the local zoning code, language regulating accessory uses may be found in the definitions of "accessory," "lot," or "use," in separate sections, or in the schedule of regulations for individual districts. One definition states that an accessory use must be so "necessary or commonly to be expected in conjunction therewith that it cannot be supposed that an ordinance was intended to prevent it."[52]

Some ordinances stipulate that an accessory use may be attached or detached from the principal building.[53] The Town of Montebello, New York defines accessory uses for its purposes in this way:

> "[A] building, structure or use which is clearly incidental or subordinate to, and customarily [used] in connection with, the principal building, structure or use and which is located on the same lot with the principal building, structure or use. Any "accessory" building or structure attached to a principal building or structure is deemed to be part of such principal building or structure in applying the bulk requirements to such building or structure. No use shall be considered "accessory" where such use requires a greater area of a lot or larger setbacks or yards or for which greater restrictions than for the principal use on the lot are imposed by this local law."[54]

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[46] Irwin v. Kayser, 112 A.D.2d 192, 491 N.Y.S.2d 418 (2d Dep't 1985), *app. den*., 66 N.Y.2d 604, 409 N.E.2d 256, 498 N.Y.S.2d 1023.

[47] For instance, a parking lot was a permissible accessory use because it was a reasonably necessary for the conduct of a restaurant. People v. Hasinsky, 51 Misc. 2d 218, 273 N.Y.S.2d 104.

[48] N.Y. C.P.L.R. § 7801 (Consol. 1996).

[49] *See* Collins v. Lonergan, 198 A.D.2d 349, 603 N.Y.S.2d 330.

[50] *Id*.

[51] Shopsin v. Markowitz, 130 A.D.2d 494, 515 N.Y.S.2d 77 (2d Dep't 1987).

[52] 83 Am. Jur. *Zoning and Planning* 197 § 224 (1992).

[53] Mandel v. Nusbaum, 138 A.D.2d 597, 526 N.Y.S.2d 179 (2d Dep't 1988) (accessory pool attached to house not part of the primary structure for calculating lot coverage). For a different approach, see infra, note 54; Town of Yorktown Zoning Code p. 90-39, § 90-13 (1993).

[54] Town of Montebello, N.Y., Zoning Code Article XVIII (1987).

This is one example of how local ordinances may regulate the details of accessory uses.

C. Five Regulatory Approaches

1. Customary and Incidental

An ordinance might not provide guidelines or expressly state what is or is not an accessory use.[55] The municipality, by simply permitting accessory uses, accepts those uses that meet these qualifications of customary and incidental as outlined above.

The use of a boarding house as an accessory to a hospital, for example, may be customary. In one case, a hospital owned two houses adjacent to its medical facility, in which it housed medical staff.[56] The local ordinance did not set out what is or is not accessory to a hospital, but hospitals customarily provide living accommodations for at least some personnel, thus it was permitted.

2. Listing Permitted Accessory Uses

An ordinance can permit certain accessory uses and prohibit all others.[57] As a matter of statutory construction, those uses not expressly permitted in the list are prohibited unless clearly stated otherwise. "It is a basic tenet of zoning jurisprudence that an ordinance which lists permitted uses excludes any uses that are not listed."[58] This is the most restrictive means of accessory use regulation, because the building inspector and the zoning board of appeals are limited to the legislature's list. This could result in denying the property owner a use that is otherwise naturally incidental and customary to the primary use of the land. In this situation, the property owner may be denied permission to conduct a use that is naturally incidental to and customarily found in connection with the primary use.

When an ordinance denies an owner the use of his land, the ordinance will be strictly construed.[59] In cases where an unenumerated accessory use is not permitted and is then litigated, the courts seldom deny the accessory use simply because it was not on the list. The courts may deny accessory uses because they were not incidental,[60] but when the court finds that the use is truly customary and incidental use, it may permit it regardless of its absence on the exclusive list.[61]

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[55] City of Oneonta Zoning Code, p. 30.3 § 30.4 (1995) (only defines what accessory off-street parking means).
[56] Demott v. Notey, 3 N.Y.2d 116, 143 N.E.2d 804, 164 N.Y.S.2d 398 (1957).
[57] *See* Town of Somers, Zoning Code, p. 17020.1 § 170-11 (1997); Town of Harrison Zoning Ordinance, Table of Use Regulations (1995); Village of North Tarrytown Zoning Code, Schedule of Regulations, Part I et. seq. (1994); Town of Stanford, Zoning Code, p. 4 § 164-8 (1991).
[58] Inc. Village of Old Westbury v. Alljay Farms, 64 N.Y.2d 798, 476 N.E.2d 315, 486 N.Y.S.2d 916 (1985).
[59] Exxon Corporation v. Board of Standards and Appeals of the City of New York, 151 A.D.2d 438, 542 N.Y.S.2d 639; Matter of Schwartz v. Chave, 53 Misc. 2d 1007, 1009 (Sup. Ct. Nassau 1967).
[60] Aim Rent A Car, Inc. v. Village of Montebello, 156 A.D.2d 323, 548 N.Y.S.2d 275; People v. Staszyn, 38 Misc. 2d 100, 237 N.Y.S2d 463.
[61] People v. Bacon, 133 Misc. 2d 771, 508 N.Y.S.2d 138 (2d Dep't 1986).

3. Prohibiting Certain Accessory Uses

A more flexible approach is to prohibit problematic accessory uses. This eliminates foreseeable problems with the listed uses while permitting all other accessory uses. The community is protected from potentially incompatible accessory uses yet property owners are not excessively limited in the use of their land.

A local ordinance may ban the parking of tractor-trailers in residential districts, however, parking a vehicle on occasional social visits is an accessory use.[62] Despite the prohibition, parking the tractor-trailer for these purposes is as acceptable as parking a family station wagon. If this particular accessory use became a problem, the legislature could prohibit the parking of tractor trailers as accessory uses in residential zones.

4. Nonexclusive Listing

To provide guidelines that can assist the building inspector and zoning board of appeals in interpreting what is an accessory use, a nonexclusive list of acceptable uses can be included in the code. This approach provides flexibility and guidance for the code's interpreters.[63] Since there are no cases that have been decided under this approach, it may be a useful method of resolving the tension inherent in accessory use disputes. Despite the rule of statutory construction that lists of permissible uses are exclusive, clearly stating that the list is not exclusive overcomes the rule.[64] One method of accomplishing this is to include on the list of permissible accessory uses, "uses customary and incidental to any principal use permitted by right."[65]

5. Special Use Permit

Imposing conditions on accessory uses is another approach that can minimize conflict with the neighborhood in which they are established. One way to accomplish this is to list some accessory uses that are only allowed by special use permit.[66] The legislature can permit the use subject to certain requirements. These legislative standards guide the permit granting authority to permit the accessory use so long as the conditions provide sufficient protection for adjoining property owners.[67] Other accessory uses can be permitted in the municipality using any of the other four approaches.

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[62] Frampton v. Zoning Board of Appeals, 114 A.D.2d 670,, 494 N.Y.S.2d 479 (3d Dep't 1985).
[63] Town of Fishkill Zoning Code, Table II, (1997); Town of Yorktown Zoning Code, p. 90-112 § 90-91(C) (1995); Village of Brewster Zoning Code p. 17022 § 170-6(B) (1991).

[64] *See* 9 N.Y. Comp. Codes R. & Regs. tit. 9, § 606.3 (West 1996) (listing six permissible accessory uses "among others"); compare Town of Greenburgh Zoning Code p. 28541 § 285-10(1) (1995) ("Other accessory buildings or structures, such as . . .").

[65] Town of Washington Zoning Law p. 61, Schedule of District Use Regulations (1991).
[66] *See* Matter of Schwartz v. Chave, 53 Misc. 2d 1007, 1009 (Sup. Ct. Nassau 1967).
[67] N.Y. Gen. City Law § 227-b (McKinney 1989); N.Y. Town Law § 274-b (McKinney 1987); N.Y. Village Law § 7-725-b (McKinney 1996).

D. Enforcement

The building inspector enforces the legislature's accessory use legislation when he makes routine inspections, or reviews applications for building permits. The building inspector has the authority to permit or decline applications for building permits based on his interpretation of the legislature's guidelines. The zoning board of appeals then has jurisdiction to review and reverse the building inspector's interpretation.

IV. Judicial Standards for Resolving Disputes

A. General Role of the Courts

The courts may review a decision by the zoning board of appeals regarding an accessory use in an action brought by a party aggrieved by that decision. Generally, courts affirm the board's decision unless it is found to be arbitrary and capricious. The court's view of what constitutes and arbitrary and capricious decision, however, may differ depending on the context of the problem.

B. Uses Accessory to Nonconforming Uses

1. Policy Against Expansion and Continuation

It is well established that a property owner may maintain a use accessory to a nonconforming use, or even an accessory use that has become nonconforming. Nonconforming uses are necessary to protect constitutional rights.[68] The right to continue the nonconforming use will persist so long as the use has not been abandoned.[69] Although uses existing prior to a prohibition may be maintained as valid nonconforming uses, there may be no change in the type of use. This rule applies equally to nonconforming accessory uses.[70]

Nonconforming uses are undesirable and, ideally, will be phased out. The disfavor that accompanies these incompatible uses extends to their accessory uses as well. If the accessory use constitutes an expansion of a nonconforming use, it will not be allowed. When the primary use is nonconforming, it is impermissible to change from one accessory use to another.[71] If the use is an inseparable accessory to a legal nonconforming use, however, it will be permitted as of right.

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[68] Village of Waterford v. O'Brien, 39 A.D.2d 490, 492 (3d Dep't 1972).

[69] A Hotel was operated as a valid nonconforming use throughout the years of prohibition. Its right to resume liquor sales was not abandoned because it was beyond the control of the user. Regardless, a hiatus from serving liquor from 1957 to 1963 did not constitute abandonment because the primary use was not abandoned. The bar was merely a permissible accessory and not an extension or separate use. Gauthier v. Village of Larchmont, 30 A.D.2d 303, 291 N.Y.S.2d 584 (2d Dep't 1968). *See also* Maloy v. Town of Guilderland, 92 A.D.2d 1056, 461 N.Y.S.2d 529 (3d Dep't 1983) (rock crusher not abandoned, even if not used continuously).

[70] Campbell v. Rose, 221 A.D.2d 527, 634 N.Y.S.2d 137 2d Dep't 1995).

[71] Garcia v. Holze, 94 A.D.2d 759, 760, 462 N.Y.S.2d 700, 703 (2d Dep't 1983) (public to private garage); A.C. Nurseries v. Brady, 278 A.D. 974, 105 N.Y.S.2d 933 (Sup. Ct. 2d Dep't 1951) (storage for flowershop to storage for

2. Expansion

In order to discourage the continuance of nonconforming uses, the courts will narrowly construe the definition of "accessory" disallowing any addition to a nonconforming use unless truly incidental.[72] For example the Third Department denied truck and trailer rental as accessory to a nonconforming gasoline station.[73] The court noted the "widespread existence" of the two enterprises together, yet this could not justify expansion of a nonconforming use.[74]

If the accessory use is truly incidental, it is not an expansion, but merely a part of the nonconforming use. Accessory uses that are not an expansion, but merely a part of the nonconforming use, are permitted. For example, a small accessory building used in conjunction with the operation of a nonconforming airport was not considered an enlargement and was permitted as of right.[75] Had the structure been designed to greatly increase the activity at the airport, it would have been an unacceptable expansion of the airport.
An application to use a nonconforming ski area during the summer for recreation and flea markets was denied as not accessory. Even though the use might have been customary, it was not incidental in the context of a nonconforming use because it constituted an expansion of the ski area.[76] What might be incidental in another situation can be considered an expansion of a nonconforming use in contravention of the basic policy of zoning.

3. Change in a Nonconforming Accessory Use

In some instances, zoning will prohibit specific uses that are accessory to nonconforming uses. Raising horses in a single-family neighborhood, for example, may be prohibited by zoning as the community becomes more suburban. This change renders the accessory use itself nonconforming. Although it may be continued after the raising of horses is prohibited, changing the use from one nonconforming use to another may not be permitted. Changing from the stabling of cows to stabling horses is an impermissible change in a nonconforming use.[77] This type of change might be permitted if the use were not prohibited in the district because the change would not result in any qualitative difference, however, nonconforming accessory uses are given a narrow interpretation.

C. Intensity of use

roofing business); People v. Giordi, 16 N.Y.S.2d 923 (Westchester Co. 1939) (carpentry to manufacture of cement blocks).
[72] Verstandig's Florist Inc. v. Town of Bethlehem, 645 N.Y.S.2d 635.
[73] Village of Waterford v. O'Brien, 39 A.D.2d 490.
[74] *Id*.
[75] Great South Bay Marine Corp v. Norton, 58 N.Y.S.2d 172 (Sup. Ct. Suffolk Co. 1945) *aff'd* 272 A.D. 1069, 75 N.Y.S.2d 304 (2d Dep't 1947).
[76] Lindstrom v. Town of Warwick, 225 A.D.2d 626, 639 N.Y.S.2d 447 (2d Dep't 1996).
[77] Coopersmith v. Murdock, 262 A.D. 1032, 30 N.Y.S.2d 317, (2d Dep't 1941).

A request to add an accessory use to a permitted primary use can be denied when its scale or intensity is too great. A pole, ten feet high, may be an acceptable accessory use to a residence for use in connection with a radio hobby.[78] However, if the tower were too large, it would no longer be accessory. For instance, a forty-four foot tall radio tower is an eyesore and misplaced in a residential district.[79]

Accessory uses must be limited to the level of activity that is incidental to the primary use. A business may operate an accessory parking lot, but only large enough to serve that business. Even though the municipality could not deny the accessory parking lot, it may deny the application for a lot that is too large.[80] "An accessory use that is too large for an property owner's proven needs ceases to be naturally and normally incidental to the premises' main use."[81]

While the intensity of an accessory use may affect whether it is incidental, intensity also influences whether the use is customary. The courts will consider factors like uniqueness and lot size in determining whether the use is customary.[82] In the case of a gas station, the owners are impliedly authorized to perform minor automotive repairs there, since such insignificant use is both commonly found with and incidental to the conduct of a garage and filling station.[83] Yet, a large advertising sign might not be considered an accessory use to a gas station.[84] A building permit was properly revoked when the defendant changed the sign from advertising the station to advertising Newport cigarettes. The 14 by 48 foot advertising sign was not incidental to and customarily found in connection with such a small automobile service station and thus was not considered an accessory use as defined in the zoning order.[85]

A measure used by the courts that indicates whether the accessory use has exceeded its incidental or customary nature is the presence of external indications of the use. In one instance, the use of a vending machine in the basement of an apartment building was allowed because there is no external indication and thus no neighborhood conflict.[86]

Home occupations are generally permitted accessory uses in a residential district. A limousine service is acceptable when the occupant merely receives telephone calls and drives his limousine to the airport in response to requests for transportation by customers

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[78] Irwin v. Kayser, 112 A.D.2d 192, 491 N.Y.S.2d 418 (2d Dep't 1985) *app. den*. 66 N.Y.2d 604, 489 N.E.2d 256, 498 N.Y.S.2d 1023.
[79] Presnell v. Leslie, 3 N.Y.2d 384, 144 N.E.2d 381, 165 N.Y.S.2d 488.
[80] Ames v. Palma, 52 A.D.2d 1078, 384 N.Y.S.2d 587 (4th Dep't 1976).
[81] *Id*.
[82] Gray v. Ward, 74 Misc. 2d 50, 343 N.Y.S.2d 749.
[83] Wike v. Herms, 187 Misc. 111, 61 N.Y.S.2d 244 (1946).
[84] Sievers v. City of New York, 182 A.D.2d 580, 582 N.Y.S.2d 722 (1st Dep't 1992).
[85] Sievers v. City of New York, 146 A.D.2d 473, 536 N.Y.S.2d 441 (1st Dep't 1989) *aff'd* Sievers v. City of New York, 182 A.D.2d 580, 582 N.Y.S.2d 722.
[86] Dellwood Dairy, 7 N.Y.2d 374, 165 N.E.2d 566, 197 N.Y.S.2d 719 (1960); *see also* Osborn v. Town of Colonie, 146 A.D.2d 838, 536 N.Y.S.2d 244 (3d Dep't 1989) (no external indication); People v. Bacon, 133 Misc. 2d 771, 508 N.Y.S.2d 138 (no change in basic nature of use).

and none of the customers arrived at or departed from the residence.[87] These uses remain incidental so long as there is no outside indication of the activity.[88] However, to ensure these uses remain incidental, some municipalities may require that the space dedicated to the occupation be limited in some way.[89] Also, the business may not be considered an accessory use if employees are expected to work on site.[90]

In a commercial context, accessory uses must be limited to the patrons of the primary business.[91] It may be customary for a hotel to rent automobiles as an accessory use.[92] When services are provided for the general public, the activity is not incidental; it is independent of the primary use. Therefore if the automobile rental agency derives only 20% of its business from the hotel, the rental agency is not an accessory use.[93]

The overriding principal that governs whether a use will be accessory is its compatibility with the permitted uses in the district. Accessory hairdressing and cosmetology may be permitted in a residential district when accessory uses, including professional offices and home occupations, are permitted by the code.[94] If the use is dedicated to a small part of the residence and no goods are displayed, there is little conflict created. If the petitioner alone conducts the business and the only external indication of the use is a small sign, conflict will be mitigated. A beauty parlor conducted at a larger scale (with employees, for example) would likely fail the customary and incidental test.

D. Novel Accessory Uses

If novel uses were not allowed as accessory uses because they are not customary, despite their incidental and subordinate nature, accessory uses would be limited to those that existed when the zoning was first adopted. Although accessory uses must be customary, new accessory uses can become established because of their similarity to accessory uses established by long tradition. A skateboard ramp constructed on a residential property, for example, is similar in effect to recreational uses that are commonly incidental and customary to a residence.[95] Skateboarding is a recreational use of the property akin to other commonly permitted accessory uses in a residential area, such as a swimming pool[96] or a tennis court.[97]

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[87] City of White Plains v. Deruvo, 159 A.D.2d 534, 552 N.Y.S.2d 399 (2d Dep't 1990).
[88] *Id*.; Osborn v. Town of Colonie, 146 A.D.2d 838, 536 N.Y.S.2d 244 (3d Dep't 1989).
[89] Osborn v. Town of Colonie, 146 A.D.2d 838, 536 N.Y.S.2d 244.
[90] Irwin v. Kayser, 112 A.D.2d 192, 491 N.Y.S.2d 418 (2d Dep't 1985) *app. den*. 66 N.Y.2d 604, 489 N.E.2d 256, 498 N.Y.S.2d 1023. Compare Wise v. Michaelis, 203 N.Y.S.2d 247 (Supreme Ct. Nassau Co. 1960), *aff'd* 12 A.D.2d 788, 210 N.Y.S.2d 980 (permitted home occupation with no employees).
[91] Aim Rent A Car, Inc. v. Village of Montebello, 156 A.D.2d 323, 548 N.Y.S.2d 275; 7-11 Tours, Inc. v. Board of Zoning Appeals, 190 A.D.2d 486, 454 N.Y.S.2d 477; Ambassador v. Board of Standards & Appeals of City of New York, 281 A.D. 342, 119 N.Y.S.2d 805; 140 Riverside Drive, Inc. v. Murdock, 276 A.D. 550, 95 N.Y.S.2d 860.
[92] Aim Rent A Car, Inc. v. Village of Montebello, 156 A.D.2d 323, 548 N.YY.S.2d 275.
[93] *Id*.
[94] Wise v. Michaelis, 203 N.Y.S.2d 247 (Supreme Ct. Nassau Co. 1960), *aff'd* 12 A.D.2d 788, 210 N.Y.S.2d 980.
[95] Collins v. Lonergan, 198 A.D.2d 349, 603 N.Y.S.2d 330.
[96] Mandell v. Nusbaum, 138 A.D.2d 597, 526 N.Y.S.2d 179.
[97] Crane v. Bitterman, 55 A.D.2d 669, 390 N.Y.S.2d 179 (2d Dep't 1976).

In 1960, a vending machine in the basement of an apartment building was a novel idea.[98] A court found a milk vending machine to be permissible as an accessory use because it was simply a modern replacement for the traditional milkman who visited the building.[99] Vending machines are incidental, in this context, when they give no external indication and do not serve the public.

If the accessory is not related to the primary use, it cannot be incidental. When the primary use is a dairy store a gas station is not incidental to it.[100] This is so despite a modern trend toward "stop and go" stores within gasoline stations.[101] In this case, a novel combination of uses was not permitted.[102] A convenience store, however, has been sanctioned as a qualified accessory use to a service station because the type of convenience store intended by the operator was commonly and customarily found in connection with, and incidental to the principal use of, an automotive service station.[103] As with all accessory uses, novel uses must be found to be incidental to the primary use.

E. Favored Accessory Uses

1. Public Policy

In contrast to nonconforming uses, certain uses hold a special status because they inherently contribute to the general welfare. Unduly restricting or excluding these uses "bears no substantial relation to the public health safety, morals, peace or general welfare of the community."[104] Because they advance the public welfare, religious and educational uses are generally permitted by the zoning code and, in fact, may not be prohibited from districts zoned residential.[105] Prohibiting religious and educational uses can only be justified by preventing substantial danger to public health and welfare.[106]

The favored status that religious and educational uses are given extends to their accessory uses as well. Accessory uses that are customary and incidental to the primary use contribute to the general public welfare. This fundamental police power policy leads to a liberal interpretation of what is accessory to a religious or educational use. If the accessory is not on a list of accessory uses specifically prohibited by local ordinance, and it furthers the religious or educational use, it is likely to be permitted as an accessory.[107]

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[98] People v. Page 36 Misc. 2d 840, 234 N.YY..S.2d 518 (City Ct. Kings Co. 1962).
[99] Dellwood Dairy, 7 N.Y.2d 374, 165 N.E.2d 566, 197 N.Y.S.2d 719.
[100] Genesee Farms, Inc., v. Scopano, 77 A.D.2d 784, 431 N.Y.S.2d 219 (4th Dep't 1980).
[101] *Id*. at 786, 431 N.Y.S.2d 221 (Callahan, J., dissenting).
[102] *Id.*
[103] Exxon Corporation v. Board of Standards and Appeals of the City of New York, 151 A.D.2d 438, 542 N.Y.S.2d 639.
[104] Diocese of Rochester v. Planning Board of Town of Brighton, 1 N.Y.2d 508, 526, 154 N.Y.S.2d 849, 136 N.E.2d 827.
[105] Diocese of Rochester v. Planning Board of Town of Brighton, 1 N.Y.2d 508, 526, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956).
[106] Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312, 319, 319 N.Y.S.2d 937, 947 (Sup. Ct. Nassau Co. 1971).
[107] People v. Firestone, 48 Misc. 2d 480, 265 N.Y.S.2d 179 (City Court of New Rochelle, 1965).

2. Religious Uses

The inherent benefits of permitting religious uses are particularly valued.[108] It is difficult to enforce zoning laws, which are based on protection of the general welfare, against religious uses.

Neighboring property owners sometimes object to the location of religious uses near their homes. These opponents, perhaps with good reason, contend that the noise and traffic are incompatible with the district. In addition to alleged conflict with neighborhood character, the diminution of property values and loss of tax base are offered as reasons for objecting to such accessory uses. Religious uses, however, are considered more important than taxes and receive tax exemption under the New York State Constitution.[109]

The favored status for religious uses extends to accessory uses related to the activities of a church or synagogue. When the conflict between religious uses and local zoning ordinances are irreconcilable, the religious use will prevail unless the activity is typically one that is banned[110] or is "so fraught with danger or peril [that] the detriment to the community …outweigh[s] religious consideration."[111]
Objections by neighboring property owners in most cases are limited to two arguments. First, they may contend that the use is not accessory.[112] If that fails, opponents are limited to the contention that the use is not religious. If the subordinate use were not religious, it would be unrelated and thus could not be permitted as an accessory use. "The constitutional protection is afforded only to religious uses, not to all uses instituted by a religious society."[113] A spiritual healing facility where residents paid a fee to stay for long periods with nursing care was neither a church nor a hospital.[114] The facility was not accessory to the church across the street because it was a separate organization and was in no way affiliated with the church.[115] Generally, however, the courts construe religious uses broadly. For instance, a church's charity in providing a homeless shelter constitutes an exercise of religion.[116] Also, the fact that most members served by the program did not belong to the

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[108] Matter of Westchester Reform Temple v. Brown, 22 N.Y.2d 488, 293 N.Y.S.2d 297, 239 N.E.2d 891 (1968).
[109] *Id*. N.Y. Const. Art. 16, § 1.
[110] A religious use could not be used as a pretense for establishing, for example, a slaughterhouse in a residential district. Bright Horizon House v. Zoning Board of Appeals of Town of Henrietta, 121 Misc. 2d 703, 469 N.Y.S.2d 851 (Sup. Ct. Monroe Co. 1983) (citing Gallagher v. Zoning Board of Adjustment, 32 Pa. D & C 2d 669) (1963) (disproportionate use).
[111] Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312, 319, 319 N.Y.S.2d 937, 947.
[112] Residents of a single-family residence constructed a barn and converted it to a public chapel. Although religious uses were permitted, the chapel constituted a second primary use. McMahon v. Zoning Board of appeals of Town of Wappinger, 121 A.D.2d 451, 503 N.Y.S.2d 142 (2d Dep't 1986).
[113] Diocese of Buffalo v. Buczkowski, 112 Misc. 2d 336, 446 N.Y.S.2d 1015 (Sup. Ct. Erie Co. 1982).
[114] Bright Horizon House v. Zoning Board of Appeals of Town of Henrietta, 121 Misc. 2d 703, 469 N.y.S.2d 851 (Sup. Ct. Monroe Co. 1983).
[115] *Id*.
[116] Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church, 146 Misc. 2d 500, 550 N.Y.S.2d 981 (Sup. Ct. N.Y. Co. 1989).

congregation was inconsequential.[117] The salutary benefits are conferred through the charity of religion just the same.[118]

Neighbors may bring nuisance suits alleging that an accessory use to a church damages their property values or inhibits their enjoyment. In order to prevail, a property owner suing in private nuisance must show that the accessory use substantially interferes with his or her property, otherwise there is an insufficient basis for restricting the socially beneficial use.[119]

3. Educational Uses

Similar to religious uses, educational uses are generally permitted in residential districts and may not be excluded on the basis that they would change the neighborhood character.[120] Educational institutions are presumed to serve a beneficial public purpose.[121] All accessory uses to educational uses not prohibited are permissible. Educational institutions are entitled to conduct accessory uses reasonably associated with their educational purposes.[122] For example, even though neighbors oppose the parking of school busses during nights and weekends for several months at a time, the parking of busses is incidental to the primary use as a school.[123] A school has a clear need to transport students and thus the right to park and store vehicles if the parking of private passenger vehicles is permitted.[124] If the repair of vehicles is expressly prohibited, however, the school may not repair the busses on the premises.[125]

The policy in favor of educational uses can save a nonconforming accessory use. Courts have allowed a change in nonconforming accessory use where it is educational in nature. A building previously used as a convalescence home for cardiac children had conducted schooling incident thereto.[126] The new owner established a school for mentally retarded children, essentially as a primary use, even though the home had been a nonconforming use. Although a narrow construction is usually given to nonconforming uses, the court overlooked this in light of the school's social benefits. It considered the new use a continuation of the prior nonconforming use.[127] Generally, an accessory use must be subordinate to a primary use.[128] Had the local ordinance specifically prevented the domination in area, extent or purpose, of the primary lawful use by the accessory,[129] the

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[117] *Id*. Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312, 319, 319 N.Y.S.2d 937, 947.
[118] *Id*.
[119] Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church, 146 Misc. 2d 500, 550 N.Y.S.2d 981 (Sup. Ct. N.Y. Co. 1989).
[120] Diocese of Rochester v. Planning Board of Town of Brighton, 1 N.Y.2d 523, 154 N.Y.S.2d 859, 136 N.E.2d 827 (where public schools were permitted in a residential district, parochial schools could not be excluded).
[121] Lawrence School Corp. v. Lewis, 174 A.D.2d 42, 43, 578 N.Y.S.2d 627, 628 (2d Dep't 1992).
[122] *Id*.
[123] People v. Firestone, 48 Misc. 2d 480, 265 N.Y.S.2d 179.
[124] *Id*. (school busses not considered commercial).
[125] *Id*.
[126] Rogers v. Association for Help of Retarded Children, 281 A.D. 978, 120 N.Y.S.2d 329 (2d Dep't 1953).
[127] Anderson, New York Zoning Law and Practice 254 § 6.28 (3d ed. 1984).
[128] Sinon v. Zoning Board of appeals of Town of Shelter Island, 117 A.D.2d 606 497 N.Y.S.2d 952 (2d Dep't 1986).
[129] *Id*. *See* City of Buffalo, N.Y., Zoning Code p. 51105 § 511-04 (1996).

court would have been unable to reach the same conclusion. Since this was not explicitly stated in the zoning code, the court was able to grant an exception to this general rule.

4. Residential Day Care

As an accessory to an educational or religious use, a day care center would be protected. As an accessory to a favored use, day care centers contribute to the well being of the community. A day care center as accessory to a church could not be inhibited by a local board without imposing on a church's freedom of religion.[130] Day care centers are clearly permissible accessory uses to religious or educational uses.

A day care center as accessory to a residential use may be permitted solely as a matter of public policy.[131] In one case, the defendant ran a day care center in her home, zoned residential, for three or four years.[132] The building inspector objected to the use because it was not an expressly permitted use for the district, and was therefore prohibited. The court found that "babysitting" is customarily incidental to a residence. The defendant had a permit from the State Department of Social Services to provide day care for children in a family home, meeting the state regulations.[133] In this case, the accessory use itself was favored. Statewide, there was a serious need for this type of day care services. Since the purpose of zoning is for the health and general welfare and there was no clear prohibition against day care facilities the court permitted the accessory use.

V. Conclusion

The accessory use is a device municipalities use to permit minor uses of property in addition to, but as a part of, the property's primary use. These inseparable uses are permitted as of right. Accessory uses should be permitted when they are incidental, customary uses reasonably related to the primary use. Incidental activities are those that are both subordinate and related to the primary use. The court will consider customary those uses established by long tradition. Qualified, accessory uses are compatible with the primary use district.

The power to undertake zoning, derived from the police power, is the authority for municipalities to regulate accessory uses. Permitting or restricting accessory uses must be in furtherance of the public health, safety, morals and general welfare. The approaches that municipalities take to accomplish this include the reliance on common law doctrine, listing accessory uses, and imposing conditions by special use permit. Each approach may have

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[130] Unitarian Universalist Church of Central Nassau v. Shorten, 63 Misc. 2d 978, 314 N.Y.S.2d 66.
[131] Unitarian Universalist Church of Central Nassau v. Shorten, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (Sup. Ct. Nassau Co. 1970); N.Y. Unconsol. Law § 8722 (McKinney 1996) (stating need for day care facilities, including residential facilities, to counteract the "serious shortage" of suitable facilities). *See also* Siegert v. Luney, 111 A.D.2d 854, 491 N.Y.S.2d 15 (2d Dep't 1985) (A playground and nursery school day care center was permitted use as a matter of right; when neighboring landowner opposed the use, the Zoning Board was without authority to place restrictions on the playground).
[132] People v. Bacon, 133 Misc. 2d 771, 508 N.Y.S.2d 138.
[133] N.Y. Unconsol. Law § 8722 (McKinney 1996)

differing practical effects, but the goal remains constant. Accessory use legislation sanctions incidental uses that, according to the legislature, are not in conflict with the zoning district.

Accessory use controversies arise in four contexts and judicial standards differ accordingly. The first of these is nonconforming uses, which are looked upon with disfavor because they are in conflict with the surrounding district. A use that is an acceptable accessory is more difficult to establish in this situation. When the primary use is nonconforming, the courts tend to construe narrowly the definition of accessory, permitting only those that are "truly incidental."

Accessory uses otherwise permissible form a second context when they are conducted at too large a scale or intensity. If a proposed accessory use is conducted at a scale that exceeds the owner's needs or manifests external indications, it may no longer be customary or incidental, and thus not accessory. In a commercial context accessory uses not limited to the patrons of the primary business will not be considered by the courts to be incidental.

A proposed accessory use that is clearly novel will not, per se, fail the customary test. An accessory use that is arguably not traditional may be permitted so long as it can reasonably be associated with some traditional accessory use. Although the use must be customary and incidental in scale and compatibility with the neighborhood, novel accessory uses may be established.

Religious and educational uses hold a place on the opposite end of the spectrum from nonconforming uses with regard to judicial treatment. These favored uses are considered inherently beneficial to the public welfare. Accessory use controversies that arise in this context will yield different results and the court will broadly interpret "accessory" in favor of the religious or educational use. This ensures that zoning laws, based on the police power, are not construed against uses that directly contribute to the goals of the police power.