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THE TERMINATION OF NONCONFORMING USES

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A major problem confronting city planners and zoning authorities today is that posed by nonconforming uses.[1] Such uses reduce the effectiveness of zoning ordinances, depress property values, and directly contribute to urban blight. They are "an admitted cause of residential and commercial slums, traffic congestion, and other indicia of urban obsolescence. . ." [2] The purpose of this article is to examine and evaluate the various measures that have been devised for terminating the nonconforming use.

The early zoning laws were, for three reasons, strictly prospective in operation: First, a municipality's zoning powers are limited by the state enabling act authorizing the zoning,[3] and in a number of jurisdictions the enabling act expressly prohibited the abatement of uses existing on the effective date of the zoning ordinance.[4] Secondly, in those jurisdictions lacking such an express prohibition it was feared that the courts—traditionally hostile to retroactive laws—would view any attempt

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1. A nonconforming use may be defined as a use of property in existence on the effective date of a zoning ordinance, which use does not comply with the ordinance. Young, *The Regulation and Removal of Nonconforming Uses*, 12 W. RES. L. REV. 685 (1961).

2. Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROB. 305 (1955).

3. "The basis for zoning rests ultimately in the exercise of the police power, but the cities derive their zoning powers from the state enabling acts. . ." *Id.* at 354.

4. Although this prohibition is less common than it used to be, as of 1959 the enabling acts of nearly half the states forbade all or certain municipal corporations from abruptly terminating uses in existence on the effective date of a zoning ordinance. Anderson, *The Nonconforming Use—A Product of Euclidian Zoning*, 10 SYRACUSE L. REV. 215 (1959).

to eliminate existing uses as an abuse of the police power. At first even prospective zoning rested on a tenuous constitutional basis, and there was reason to fear that the addition of a retrospective effect might cause the whole structure of zoning to crumble under the fourteenth amendment's due process clause.[5] In 1926 the case of *Euclid v. Ambler Realty Company*[6] settled doubts concerning the constitutionality of *prospective* zoning, but most authorities continued to assume, as before, that the owner's interest in an *existing* use was in the nature of a "vested right", which could not be constitutionally impaired without the payment of compensation.[7] Subsequent developments have shown that this assumption was not groundless, for in most of the instances where zoning ordinances have provided for the immediate cessation of existing uses the ordinances have, when tested, been held unconstitutional.[8]

Thirdly, it was originally believed that a well-ordered community could be achieved without resorting to retroactive measures. "Zoning," it was said, "looks to the future and seeks to stabilize and protect, not to destroy."[9] It was thought that a zoned area could endure its nonconforming uses for a few years without suffering any material disruption of orderly development and that such uses could be expected to gradually dwindle and disappear if the municipality employed certain nonretroactive measures. These measures—which are still extensively used—consisted of restrictions on: change of use, expansion, alteration, resumption following abandonment, and restoration following destruction.

Zoning ordinances would commonly forbid a property owner to substitute one nonconforming use for another.[10] Sometimes an exception would be made to permit a change to a use more restrictive in nature. However, the exception was usually conditioned on there being no structural alteration.

The owner of the building housing the nonconforming use was typically prohibited from expanding the structure or from making alterations except for specified purposes or to a specified extent.[11]

5. Comment, 57 NW. U. L. REV. 323 (1962).

6. 272 U.S. 365 (1926).

7. *Id.* at 326.

8. Note, 44 CORNELL L. Q. 453 (1959). Such ordinances have been rare.

9. *Id.* at 452.

10. Young, *supra* note 1, at 692.

11. Van Ausdall, *Regulation of Nonconforming Uses in Arkansas: Limitation and Termination*, 16 ARK. L. REV. 275 (1962). Sometimes a nonconforming use exists in a conforming structure. In this situation the ordinance would normally allow structural alterations of a kind that did not render the building nonconforming.

Frequently alteration would be permitted only for safety purposes. On other occasions the ordinance would impose a percentage-limit on the amount of alteration allowable.[12] For example, the aggregate expenditure permitted for alterations would be limited to thirty percent of the building's assessed value. The right to repair, as opposed to the right to alter, was normally not restricted, since it was generally assumed that the right to continue the operation of a nonconforming use included the right to make repairs.[13]

Ordinances often provided that when a nonconforming use was abandoned or discontinued for a given period it could not be resumed.[14] Similarly, if the building in which the use was operated were destroyed—either intentionally or accidentally—it could not be rebuilt.[15]

Since only those uses actually in existence on the effective date of the ordinance could qualify as nonconforming uses and thereby obtain the right to continue operation, some municipalities were able to impose an additional restriction on unwanted property uses by being punctilious in determining when a use antedated the ordinance, or in deciding what activities on the property were sufficiently well-established to classify as a "use". These municipalities obtained judicial holdings that one who at the time of the ban already has a building permit but has not yet begun construction or signed a contract with a builder does not qualify as the owner of a nonconforming use;[16] and that pre-existing activities of an essentially ephemeral character, such as the operation of a fair or carnival, are insufficiently permanent to be deemed a "use." [17]

Finally, a number of jurisdictions authorized acquisition of the nonconforming property by eminent domain. The enabling acts of a few states still expressly provide for this device.[18] However, eminent domain has never been successfully employed to eliminate nonconforming uses.[19] There are two reasons for this: First, use of the eminent domain power is limited by the requirement that the taking be for a public use, and for a long time there was doubt as to whether condemnation of a nonconforming use merely to effectuate the community's zoning program

12. Anderson, *supra* note 4, at 228.
13. *Id.* at 230.
14. Comment, 1951 WIS. L. REV. 687.
15. Comment, 4 VILL. L. REV. 422 (1959).
16. Osborn v. Town of Darien, 119 Conn. 182, 175 Atl. 578 (1934) and Call Bond and Mortgage Company v. Sioux City, 219 Iowa 572, 259 N.W. 33 (1935).
17. Durning v. Summerfield, 314 Ky. 318, 235 S.W.2d 761 (1951).
18. See Comment, *supra* note 14, at 696.
19. *Ibid.*

complies with the "public use" standard. Today it is clear that barring an atypically restrictive enabling act, employment of eminent domain for such a purpose meets the "public use" test.[20] Secondly, as a device for abating the nonconforming use, eminent domain is simply too expensive.[21] Occasionally, the termination of a particularly objectionable nonconforming use justifies the cost, just as circumstances in a few localities justify the expense of piping in and desalinizing sea water, but municipalities cannot afford to employ eminent domain on an extensive scale. For this reason the merits of this approach so often cited by writers—that it has the advantage of swiftness and that it imposes the cost on the community which will enjoy its benefits rather than on the nonconforming property owner, whose use of his property was originally innocent—are of no moment.

Notwithstanding the optimism of those who devised and adopted the above-discussed measures, experience has shown that nonconforming uses have no tendency to perish.[22] "Like the phoenix, nonconforming uses seem to rise from the dust of battle stronger than ever." [23] So far from dying, they commonly flourish more than formerly, because of the monopoly given them by the zoning laws.

Having gradually come to realize the inadequacy of the measures just discussed, municipalities in some jurisdictions have recently begun employing two other devices that seem more promising: amortization of nonconforming uses and a cautious expansion of the doctrine of nuisance.

Under the amortization approach the property owner is given a period of grace sufficiently long to permit him to amortize his investment. At the end of the alloted time the nonconforming use must be discontinued.[24] For substantial buildings of brick and steel the time limit typically ranges from twenty to one hundred years.[25] Less expensive structures, such as billboards, are normally given a much shorter time, commonly from six months to three years.[26] Although some property usually remains after the amortization period has passed, the owner

20. Anderson, *supra* note 4, at 239.

21. Note, *supra* note 8, at 453.

22. Comment, *supra* note 5, at 323.

23. Comment, *supra* note 15, at 423.

24. Comment, 10 SYRACUSE L. REV. 44 (1958). A common variation on this approach is to calculate the remaining normal life of the pre-existing use and to limit the use to this period. Note, *supra* note 7, at 453.

25. Comment, *supra* note 14, at 691.

26. *Ibid.*

cannot ascribe this property to the time antedating the zoning ordinance, and he is thus prevented from effectively arguing that the ordinance is retroactive in operation.[27] Amortization actually amounts to a compromise between summary abatement, which is generally considered invalid, and the orthodox approaches, which have failed to eliminate the nonconforming use.

Although there is a conflict of authority on the question of whether amortization is constitutional,[28] the device has gained a substantial measure of judicial acceptance and appears likely to gain more in the future. One writer predicts that this approach will shortly become "the most widely adopted solution to the problem of nonconforming uses." [29] The cases sustaining the validity of amortization have stressed two major points: First, the ordinance is constitutional only if the amortization period bears a reasonable relation to the amount of the property owner's investment. And secondly, an ordinance which does allow a reasonable time for amortization does not differ fundamentally from a zoning ordinance of the conventional type. That is, since all zoning has a retrospective aspect in that it applies to property already owned at the time of the ordinance's effective date, the difference between an ordinance restricting future uses and one requiring the eventual termination of present uses is merely one of degree.

Two well-known cases in which the first point was emphasized are *Harbison v. City of Buffalo*[30] and *Spurgeon v. Board of Commissioners of Shawnee County*.[31] The *Harbison* controversy arose when the City of Buffalo passed a zoning ordinance requiring termination of certain nonconforming uses within three years of its effective date. After the three years had expired Harbison, who owned a junkyard, applied to the city for renewal of his license. The application was denied, and Harbison thereupon brought a proceeding in the nature of a mandamus to compel the city to issue a license to him. The Special Term ordered issuance of the license, and the Appellate Division affirmed, but the Court of Appeals reversed and remanded the matter for a determination of whether the injury to Harbison would be so substantial that the ordinance would be unconstitutional as applied to the facts of his particular case. Said the court:

27. See Comment, *supra* note 15, at 417.
28. Anderson, *supra* note 4, at 237.
29. Comment, *supra* note 15, at 417.
30. 4 N.Y.2d 553, 152 N.E.2d 42 (1958).
31. 181 Kan. 1008, 317 P.2d 798 (1957).

> If . . . a zoning ordinance provides a sufficient period of permitted nonconformity, it may further provide that at the end of such period the use must cease . . . When the termination provisions are reasonable in the light of the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner, we may not hold them constitutionally invalid.[32]

In the *Spurgeon* case the owners of an automobile wrecking business challenged the constitutionality of a zoning resolution placing their property in a residential district and requiring that their business be discontinued within two years from the effective date of the resolution. The Supreme Court of Kansas affirmed a judgment sustaining the validity of the resolution, saying:

> The district court found that two years is a reasonable length of time within which to require a discontinuance of the prohibited uses . . . considering the nature of the use and the appellant's investment in improvements devoted to those uses . . . We may not substitute our judgment for that of the county on the two year period of limitation unless we find facts which demonstrate that the county departed from the realm of the reasonable and passed over into the realm of the arbitrary and capricious.[33]

Two cases which emphasize the second point (that amortization does not differ essentially from the orthodox zoning measures) are *Grant v. Mayor and City Council of Baltimore*[34] and *City of Los Angeles v. Gage*.[35] The former case was an injunction action to restrain the municipal authorities from enforcing a zoning ordinance requiring the removal of billboards from residential areas within a five-year tolerance period. Rejecting an argument that the effect of the ordinance was to deprive plaintiffs of property without due process of law, the Maryland Court of Appeals affirmed a judgment upholding the enactment. Said Judge Hammond:

> The distinction between an ordinance that restricts future uses and one that requires existing uses to stop after a reasonable time is not a difference in kind but one of degree, and in each case constitutionality

32. 4 N.Y.2d 553, 557, 152 N.E.2d 42, 47 (1958).
33. 181 Kan. 1008, 1116, 317 P.2d 798, 806 (1957).
34. 212 Md. 301, 129 A.2d 363 (1957).
35. 127 Cal. App.2d 442, 274 P.2d 34 (1954).

> depends on overall reasonableness, on the importance of the public gain in relation to the private loss. . . Every zoning regulation, because it affects property already owned by individuals at the time of its enactment, effects some curtailment of 'vested rights'. . .[36]

In the *Gage* case the city sued to enjoin defendants from using their property for the conduct of a plumbing business in violation of the zoning provisions of the Los Angeles Municipal Code. These provisions commanded the discontinuance of certain nonconforming uses within a five-year period. The California District Court of Appeals, Second District, sustained the zoning provisions as a valid exercise of the police power, saying:

> Zoning as it affects every piece of property is to some extent retroactive in that it applies to property already owned at the time of the effective date of the ordinance. The elimination of existing uses within a reasonable time does not amount to a 'taking' of property . . . Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements.[37]

As indicated earlier, a few courts have ruled that amortization is unconstitutional. As one would suppose, the ground upon which they have usually relied is that the device constitutes an exploitation of the police power and involves a taking of property without due process of law.[38] Two illustrative cases are *City of Akron v. Chapman*[39] and *City of Corpus Christi v. Allen.*[40]

The *Chapman* controversy was an injunction suit brought by the city to enforce compliance with a zoning ordinance. In 1922 the City of Akron passed a comprehensive zoning act which placed defendant's property in a residential district and which provided that a nonconforming use must cease when the city council decided that the use had been permitted to continue for a reasonable time. In January of 1950 the city passed another ordinance, declaring that on January 1, 1951, the defendant's nonconforming use of his property would have existed for a reasonable time and would henceforth have to conform to the zoning classification. When defendant continued to use his property for junk-

36. 212 Md. 301, 308, 129 A.2d 363, 370 (1957).
37. 127 Cal. App.2d 442, 452, 274 P.2d 34, 44 (1954).
38. See Note 67 HARV. L. REV. 1283 (1954).
39. 160 Ohio St. 382, 116 N.E.2d 697 (1953).
40. 152 Tex. 137, 254 S.W.2d 759 (1953).

yard purposes after January 1, 1951, the city sued to compel compliance. Reversing the judgment of the trial court, the Court of Appeals enjoined defendant from using the property for the operation of a junk business and ordered him to remove his materials from the premises within sixty days. But the Supreme Court of Ohio reversed the decision of the Court of Appeals and denied the injunction. Stated Judge Lamnick:

> Injunctions are asked . . . to uphold the provision of a municipal ordinance which in effect denies the owner of property the right to continue to conduct a lawful business thereon, which use was in existence at the time of the passage of the ordinance and has continued without expansion or interruption ever since . . . The right to continue to use one's property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time it was acquired it within the protection of Sect. 1, Art. XIV, Amendments, Constitution of the United States and Sect. 16, Art. I of the Ohio Constitution, which provides that no person shall be deprived of . . . property without due process of law.[41]

Although the court did not so indicate, its unsympathetic attitude toward the two ordinances may well have been produced by the fact that the "reasonable time" limitation of the 1922 ordinance was obviously too uncertain a standard to apprise Chapman of what to expect, and the "one year" limitation of the 1951 ordinance was too short to be fair.

In the *Allen* case the city brought suit against the operators of two automobile wrecking yards to restrain them from continuing their businesses in violation of an amendment to a municipal zoning ordinance. The relevant section of the enactment required automobile wrecking yards, among other businesses, to conform within one and one-half years of the amendment's effective date. The Supreme Court of Texas affirmed a judgment that application of the ordinance to existing automobile wrecking establishments was unconstitutional. Declared Justice Brewster:

> Since the nonconforming uses here sought to be enjoined are not shown to constitute nuisances, and do not appear to be harmful in any way to public health, safety, morals, or welfare, we conclude that to invoke petitioner's ordinance to compel respondents to cease operating their businesses or to move them to another district would be

41. 160 Ohio St. 382, 387, 116 N.E.2d 697, 700 (1953).

> an unreasonable exercise of petitioner's police power and would constitute a taking of property in violation of Art. 1, Sect. 17 of the Constitution of Texas (due process clause).[42]

The court did not ground its decision on the inadequacy of the amortization period, but one wonders whether the result might not have been different had the period of grace been longer.

The amortization device is considered by many to be the fairest method of reconciling the individual property owner's interest, in the free use of his property, with that of the public in a pleasant, well-ordered community.[43] This approach does not deprive the property owner of the use of his property immediately upon the passage of the zoning ordinance, but neither does it allow the nonconforming use to perpetually constitute a blemish on the area in which it is located. The period of tolerance allows the property owner to retire his original investment with profits enhanced by the monopolistic position granted him by the zoning ordinance, and any loss that he does suffer is cushioned by being spread out over a period of years. In addition, the grace period gives him time to make new plans for the future. It is for these reasons that amortization represents the most promising weapon for combating the nonconforming use.

Another device that has recently been adopted in a few jurisdictions is that of expanding the doctrine of nuisance sufficiently to encompass those nonconforming uses of an especially offensive character.[44] The law of nuisance has traditionally been available to an injured property owner only where the objectionable use constituted a clear hazard to the plaintiff's (or the public's) health, safety, or morals or caused a substantial interference with his peace or comfort.[45] This standard has normally restricted injunctive relief to those instances where the use has produced effects of a tangible, crude, and exceedingly distasteful nature.[46] Quoting PROSSER'S HANDBOOK OF THE LAW OF TORTS:

> But where it (the invasion) involves mere personal discomfort or annoyance, some other standard must obviously be adopted than the personal tastes, susceptibilities, and idiosyncracies of the particular plaintiff. The standard must necessarily be that of *definite offensiveness, inconvenience*, or *annoyance* to the normal person in the com-

42. 152 Tex. 137, 139, 254 S.W.2d 759, 761 (1953).
43. See Anderson, *supra* note 4, at 238.
44. See Note, 103 U. PA. L. REV. 1103 (1955).
45. 39 AM. JUR. *Nuisances* §§ 8, 9 (1942).
46. Norton, *supra* note 2, at 312.

> munity. . .[47] Each defendant is privileged, within reasonable limits, to make use of his own property or to conduct his own affairs at the expense of some harm to his neighbors . . . It is only when his conduct is *unreasonable,* in the light of its utility and the harm which results, that it becomes a nuisance.[48]

Since most nonconforming uses do not produce effects of such a distinctly offensive character, an orthodox application of the law of nuisance usually will not aid persons wishing to rid an area of such a use. However, by stressing the "general welfare" aspect of the police power, rather than the "health, safety, or morals" aspect upon which the doctrine of nuisance was based,[49] Some courts have recently been able to sanction the abatement of land uses having merely impalpable harmful effects on the surrounding area. Two illustrative cases are *Livingston Rock and Gravel Company v. County of Los Angeles,*[50] and *Hav-a-Tampa Cigar Company v. Johnson.*[51] The *Livingston* case was an injunction action by a cement batching company to restrain the county from enforcing zoning provisions permitting the regional planning commission to order the termination of plaintiff's operations. The provisions in question, which were passed shortly after plaintiff had begun its business, authorized the abatement of an existing use where it was "so exercised as to be detrimental to the public health or safety or so as to be a nuisance." The Supreme Court of California reversed the decision of the trial court, which had granted plaintiff an injunction, and sustained the action of the planning commission, which had found plaintiff's business to be a nuisance and had ordered its cessation within two years. Stated Justice Spence:

> Implicit in the theory of the police power . . . is the principle that incidental injury to an individual will not prevent its operation, once it is shown to be exercised for proper purposes of public health, safety, morals, and general welfare, and there is no arbitrary and unreasonable application in the particular case . . . Although plaintiffs admittedly did comply with smog and air pollution regulatory requirements, their plant might be still so operated 'as to be detrimental to the public health or safety, or as to be a nuisance'.[52]

47. PROSSER, HANDBOOK OF THE LAW OF TORTS 396 (1955).
48. *Id.* at 398.
49. Comment, *supra* note 5, at 325.
50. 43 Cal.2d 184, 272 P.2d 4 (1954).
51. 149 Fla. 1408, 5 So.2d 433 (1951).
52. 43 Cal.2d 184, 190, 272 P.2d 4, 10 (1954).

In the *Johnson* case the Hav-a-Tampa Cigar Company sued to enjoin the Chairman of the Florida State Road Department from enforcing provisions of a statute disallowing advertising signs within fifteen feet of the edge of a public highway or within one hundred feet of a public park, public playground, or state forest.[53] Ruling that the enactment was a constitutional exercise of the state's police power, the court declared:

> Nuisances caused by the possession or use of property may be abated... without violating organic property rights, when that remedy is necessary to protect the public welfare. . . The statute in this case is appropriate to accomplish a general public purpose and is not shown to be an arbitrary or unnecessary exercise of the police power of the state. . .[54] Relief of the eye from irritating color, movement, and motif should be as justified before the law as removing disagreeable odors from the nose or disagreeable noises from the ear.[55]

As our understanding of nuisance-causing factors in urban areas increases, through sociological, medical, psychological, and economic research,[56] employment of a judiciously-expanded doctrine of nuisance may enable municipalities to eliminate numerous nonconforming uses of an especially objectionable character. It would seem advisable, however, that this approach be pursued very cautiously, since any attempt to use the device to reach all nonconforming uses would doubtlessly encounter stiff judicial resistance and elicit outcries of "confiscation" from critical observers. Moreover, considerations of fairness surely dictate that any doctrine which subjects a property owner to the economic and psychological hardship of immediately closing or moving his business be used with restraint.

In conclusion, it is hoped that states and municipalities will increasingly utilize the devices of amortization and an expanded doctrine of nuisance to cope with the problem presented by nonconforming uses. The most progressive and well-drafted zoning ordinances are no more effective than their provisions concerning such uses.

53. This statute applied to signs already in place, as well as to those to be erected in the future. The signs already in use may be analogized to nonconforming uses even though the statute in question was not a zoning ordinance.

54. 149 Fla. 1408, 1412, 5 So.2d 433, 437 (1951).

55. 149 Fla. 1408, 1414, 5 So.2d 433, 439 (1951). This is from the concurring opinion of Chief Justice Brown.

56. See Norton, *supra* note 2, at 312.