AMORTIZATION: A METHOD OF ELIMINATING NONCONFORMING USES

INTRODUCTION

After *Euclid v. Ambler Realty Co.*[1] firmly established the validity of zoning ordinances in 1926, legislators and planners faced the problem of ordered communities achieved through comprehensive plans for control of land use. Necessarily, however, there already existed uses which were incompatible with the desired plan. It was hoped that these uses, termed "nonconforming," would be eliminated by the passage of time and by restrictions proscribing their expansion. This hope, unfortunately, has proven false. The general regulation of future uses and changes has put nonconforming uses in an entrenched position, often with increased value resulting from the artificial monopoly given it by the law.[2] Indeed, there is general agreement that a fundamental weakness in zoning laws is the inability to eliminate the nonconforming use.[3]

A nonconforming use within the meaning of zoning regulations has been defined as "the use of a building or land that does not agree with the regulations of the use district in which it is situated."[4] Several methods of eliminating nonconforming uses have been utilized by municipalities, including (1) condemnation through the power of eminent domain; (2) invoking the law of nuisance; (3) prohibiting or limiting extensions or repairs; (4) offering inducements to move; and (5) amortization.[5]

Amortization is defined as a method requiring the termination of a nonconforming use at the expiration of a specified period of time.[6] The qualifying factor is that an extension of time is a definite one, after which time the nonconforming use must be terminated. Under this method the owner of a nonconforming use must, within the stated period of time, eliminate it either by termination, removal, or appropriate modification.

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1 272 U.S. 365 (1926).

2 Consider, for example, the fortunate location of a grocery store in a large, primarily residential neighborhood.

3 *See, e.g.*, Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950); Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957); Lachapelle v. Goffstown, 107 N.H. 485, 225 A.2d 624 (1967).

4 Appeal of Haller Baking Co., 295 Pa. 257, 259, 145 A. 77, 78 (1928).

5 METZENBAUM, LAW OF ZONING (2d ed. 1955).

6 Annot., 22 A.L.R.3d 1137 (1968).

Shortly after *Euclid* the Supreme Court of Louisiana, in the first cases decided in this area, sanctioned the elimination of nonconforming uses by amortization.[7] The court, using a theory of nuisance law, sustained an ordinance with a one year amortization provision as applied to a retail grocery store and a drug store in a residential district. It was not until the building boom, brought on by post-war prosperity, however, that the amortization method of terminating nonconforming uses received a fair measure of judicial consideration.

Municipal adoption of the amortization theory has developed, of necessity, within the sphere of the grant of power from the state legislature. The majority of states have delegated general power to municipalities to enact zoning ordinances without making any reference to the status of nonconforming uses.[8] This, however, has not been considered a denial of such power. It is frequently stated that a general grant of zoning power carries with it an implied power to provide for amortization.[9]

The scope of this comment is to review amortization statutes by comparing New Jersey's treatment of the problem of nonconforming uses with that of other states.

TESTS FOR VALIDITY

Where amortization statutes have been upheld, they have conformed to varying tests or standards of reasonableness. The courts have expressed a willingness to protect private investment up to the point where it is outweighed by public benefit.[10] In attempting to reach this balance the courts have considered two interrelated factors: size of investment and length of time. A full review of these factors is essential to an understanding of the problem faced by the courts.

Size of Investment

Although not involving an amortization statute, the New York court in *People v. Miller*[11] raised the issue of size of investment. It

7 State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, *cert. denied*, 280 U.S. 556 (1929); State *ex rel.* Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929).

8 *See* Katarincic, *Elimination of Non-conforming Uses, Buildings, and Structures by Amortization-Concept Versus Law*, 2 DUQ. L. REV. 1 (1963), for a list of states which have enacted such statutes.

9 *See* Note, *Elimination of Non-conforming Uses*, 35 VA. L. REV. 348 (1949).

10 *See, e.g.*, Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950); Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957); Lachapelle v. Goffstown, 107 N.H. 485, 225 A.2d 624 (1967).

11 304 N.Y. 105, 106 N.E.2d 34 (1952). Here the defendant was convicted of harbor-

held that existing nonconforming uses acquire the status of a vested right only if the enforcement of the ordinance would, by rendering valueless substantial improvements on businesses built up over the years, cause serious financial harm to the property owner, and also that the enforcement of a zoning regulation against a prior nonconforming use will be sustained where the resulting loss to the owner is slight and insubstantial.[12]

In *Harbison v. City of Buffalo,*[13] the same court upheld the test applied in *Miller,* but it decided on remand that the plaintiff's investment was sufficiently large to prevent application of the statute.[14] Likewise, in a case where plaintiff's investment amounted to $28,000 and the cost of relocation would have been $20,000, the court upheld the test but found that it did not apply in this particular instance.[15]

The leading case in the United States upholding the size of investment test is *Grant v. Mayor and City Council of Baltimore.*[16] The issue here was the discontinuance of billboards in residential areas within five years. Although other factors were involved,[17] the determinative issue was the amortized value of the billboards. The billboard owner's accountant testified that he regularly used, for income tax purposes, a depreciation period of five years for all billboards.[18] Thus the owner would have been hard put to argue that legislative reliance on that same premise had taken from him substantial property without compensation by banning the further use of these billboards. It was the court's opinion that the only useful method of eliminating nonconforming uses is to determine the normal useful remaining economic life of the structure devoted to the use, and prohibit the owner from using it for the offending use after the expiration of that time.[19] The rationale appears to be that since the property is theoretically valueless there is no taking without due process.

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ing pigeons in violation of a zoning ordinance enacted after his use had become established.

12 *Id.* at 108-09, 106 N.E.2d at 35-36.

13 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958). The amortization statute here called for the termination of all junkyards in residential areas within three years.

14 Harbison v. City of Buffalo (Sup. Ct. Erie Cty., Sept. 26, 1958).

15 Town of Hempstead v. Romano, 33 Misc. 2d 315, 226 N.Y.S.2d 291 (Sup. Ct. 1962). The ordinance involved here called for the discontinuance of any automobile wrecking business located in a residential area at the expiration of three years.

16 212 Md. 301, 129 A.2d 363 (1957).

17 The court denied such undesirable side effects of billboards as fire hazards, bugs attracted by lights, and adverse effect on property values.

18 Grant v. Mayor and City Council of Baltimore, 212 Md. at 311, 129 A.2d at 372 (1957).

19 *Id.* at 312, 129 A.2d at 373.

Length of Time

Logically the size of investment must bear some reasonable relationship to the length of time allowed before a nonconforming use must be eliminated.[20] Thus, where a nonconforming use of land is involved, the period provided for amortizing may be relatively short.[21] In *Harbison,* the owner of a business of reconditioning and storing used steel drums was confronted with a zoning ordinance allowing him three years in which to discontinue his operation. The court held this to be a reasonable period of time.[22] Various courts have upheld zoning ordinances requiring the amortization of junkyards and automobile wrecking operations in three years or less.[23]

Except for *Grant,* the cases discussed have involved nonconforming uses with little or no investment in buildings. When one considers, however, the possibility of a large capital investment in a building which houses a nonconforming use, it becomes apparent that an arbitrary amortization period of three years or less would be woefully inadequate. The solution, then, would lie in determining a reasonable amortization period for the structure. In *Harbison,* the court suggested that valid termination periods for structures would be those based upon their amortized life.[24] The period is calculated by measuring the time required for depreciating the structure as a cost of doing business, thereby permitting the owner to recoup his investment.[25]

It has been held that amortization of a nonconforming building within five years was invalid where the structure had an estimated remaining economic life of twenty-one years and a present value of $43,000.[26] The court did not invalidate the ordinance, but reasoned

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20 *See, e.g.,* Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir.), *cert. denied,* 340 U.S. 892 (1950); Spurgeon v. Board of Comm'rs, 181 Kan. 1008, 317 P.2d 798 (1957); Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957); Lachapelle v. Goffstown, 107 N.H. 485, 225 A.2d 624 (1967); City of Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602 (1959).

21 *See, e.g.,* Village of Gurnee v. Miller, 69 Ill. App. 2d 248, 215 N.E.2d 829 (1966), holding a three year termination provision valid as applied to an automobile junkyard; City of Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602 (1959), where a one year provision was upheld in its application to a tenant who used a vacant lot for the repair of construction equipment.

22 4 N.Y.2d at 561, 152 N.E.2d at 47, 176 N.Y.S.2d at 604.

23 *See* cases cited note 21 *supra.*

24 4 N.Y.2d at 561, 152 N.E.2d at 46, 176 N.Y.S.2d at 604.

25 *See* LOS ANGELES, CAL., ORDINANCE 1223 (1946) for examples of amortization statutes providing for termination within periods of forty, thirty or twenty years according to the type of structure being restricted. *See also* PORTLAND, ORE., ORDINANCE 6-2201 (6) (1950) and WICHITA, KAN., ORDINANCE 2804, 170(2).

26 City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762, 304 P.2d 803 (Dist. Ct. App. 1956).

that the amortization provisions were arbitrary, unreasonable and discriminatory as applied to the particular individual involved.[27]

Thus it appears that in jurisdictions recognizing the amortization technique as a means of eliminating nonconforming uses, the amortization provisions will be upheld as a valid exercise of the police power provided the ordinance affords a reasonable amortization period.

PUBLIC GAIN V. PRIVATE LOSS

Although impliedly sanctioned by the United States Supreme Court as early as 1929,[28] it was twenty-one years before a court again ruled on amortization provisions.[29] In holding that a ten year period of amortization for a service station was valid, the court considered for the first time the issue of public gain versus private loss.[30] In upholding the statute, the court reasoned that considerations of financial loss or "vested rights" in private property are insufficient to outweigh the necessity for legitimate exercise of the police power of a municipality.[31]

The leading case enunciating this concept of public gain versus private loss was *City of Los Angeles v. Gage*.[32] There the defendant's plumbing business in a residential area eventually became a nonconforming use and its termination was required within a period of five years. To aid in its decision the court admitted evidence showing the amount of revenue received each year, the expenses of relocation, and the disturbance caused by the use involved. The court found that any loss that might be suffered would be spread over a period of years and, while the cost of moving would have been $5,000, this represented less than 1% of defendant's minimum gross business for five years. The court stated:

> Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. As a method of eliminating existing nonconforming uses it allows the owner of the nonconforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer. The loss he suffers, if any is spread

27 *Id.* at 770, 304 P.2d at 808.

28 *See* State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, *cert. denied*, 280 U.S. 556 (1929).

29 Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950).

30 *Id.* at 413.

31 *Id.*

32 127 Cal. App. 2d 442, 274 P.2d 34 (Dist. Ct. App. 1954).

> out over a period of years, and he enjoys a monopolistic position by virtue of the zoning ordinance as long as he remains. If the amortization period is reasonable the loss to the owner may be small when compared with the benefit to the public. Nonconforming uses will eventually be eliminated. A legislative body may well conclude that the beneficial effect on the community of the eventual elimination of all nonconforming uses by a reasonable amortization plan more than offsets individual losses.[33]

Amortization provisions can produce beneficial and harmonious community development without unjust consequences, where each case is determined individually and measured on the scale of public gain versus private loss.

CONSTITUTIONALITY

It has been argued by opponents of amortization statutes that they are necessarily invalid, regardless of their reasonableness.[34] The basic objection has been that such statutes amount to a taking of private property for public use without just compensation in violation of the due process clauses of both the federal and state constitutions.

The one case which squarely faced the issue and decided that amortization statutes were unconstitutional was *Hoffman v. Kinealy*.[35] There the court, in holding invalid a zoning ordinance requiring the discontinuance within six years of open storage of barrels in residential areas, refused to embrace the concepts espoused by the advocates of amortization. The court found that there was a distinction between regulating the future use of property and terminating preexisting lawful nonconforming uses. Referring to the dissenting opinion in *Harbison,* the court argued that it would be a strange and novel doctrine indeed which would approve a municipality's taking of private property for public use without compensation, if the property was not *too* valuable and the taking was not *too* soon.[36]

The issue whether an amortization statute, requiring the elimination of a junkyard within one year, constituted an invasion of a vested property right was considered in the leading Ohio case of *City of Akron v. Chapman*.[37] At first glance it would appear that the action

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33 *Id.* at 460, 274 P.2d at 44.

34 De Mull v. City of Lowell, 368 Mich. 242, 118 N.W.2d 232 (1962); Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965).

35 389 S.W.2d 745 (Mo. 1965).

36 *Id.* at 753.

37 160 Ohio St. 382, 116 N.E.2d 697 (1953).

of the Ohio Supreme Court, in upholding the right of the owner to continue his nonconforming use, blanketly invalidated all proposed statutes providing for the termination of such uses. This, however, might not be an accurate observation. *Chapman* has not escaped comment and criticism.[38] The Akron City Council was granted discretion to discontinue a nonconforming use when, in its opinion, the use had been permitted to continue for a reasonable time.[39] The council then sought by ordinance to immediately eliminate one particular junkyard. The court held that this would amount to an unconstitutional deprivation of property.[40] Strong support for the court's decision might be found in the fact that the ordinance was discriminatory in its application in that it was enforced only against the defendant and thus constituted a denial of equal protection.[41] It is very possible that a less arbitrary ordinance might survive a subsequent test in Ohio.

Proponents of amortization statutes claim that there is no taking of property, but rather a regulation of use. Courts can enjoin nuisances. Ordinances forbidding the enlargement and rebuilding of nonconforming uses have been upheld, even though the actions involved vested property rights.[42] It is well settled, however, that notwithstanding this concept of "vested rights", the use of land is subordinate to a valid exercise by a municipality of its power to zone and control land use within its boundaries.[43] This includes the power to make reasonable changes in regulations, provided they are consistent with the public good.[44]

38 *See, e.g.*, 67 HARV. L. REV. 1283 (1954); 11 VILL. L. REV. 189 (1965).

39 City of Akron v. Chapman, 160 Ohio St. at 386, 116 N.E.2d at 698 (1953).

40 *Id.* at 389, 116 N.E.2d at 700.

41 The courts have always stressed that the application of districting laws must be equal as to all persons similarly situated, and cannot be aimed at the detriment of a particular individual. *See, e.g.*, Dobbins v. Los Angeles, 195 U.S. 223, 236, 240 (1904).

42 *See, e.g.*, Green v. Board of Comm'rs, 131 N.J.L. 336, 36 A.2d 610 (Sup. Ct. 1944). The court held that a proposed building which would constitute a substantial enlargement of a nonconforming use, was not intended by the statute. (R.S. 40:55-48); DeVito v. Pearsall, 115 N.J.L. 323, 180 A. 202 (Sup. Ct. 1935) (where plaintiff was precluded from replacing his small greenhouse with a larger one); Conway v. Atlantic City, 107 N.J.L. 404, 154 A. 6 (Sup. Ct. 1931) (erection of new building as expansion of garage business prohibited).

43 *See, e.g.*, Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950); Collins v. Board of Adj. of Margate City, 3 N.J. 200, 67 A.2d 332 (1949) (upholding an ordinance prohibiting use of an accessory building for residence purposes by all except domestic servants of tenant or owner); People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952).

44 *See, e.g.*, Greenway Homes v. Borough of River Edge, 137 N.J.L. 453, 60 A.2d 811 (Sup. Ct. 1948), where a zoning ordinance increasing minimum frontage from 60 to 75 feet was sustained over the objection of a builder who had previously used 60 feet plots in building homes.

The vested interests rule is perhaps somewhat artificial itself as a constitutional safeguard. Government authorities are not limited in their legitimate exercise of police power, even though they may interfere with someone's vested property rights.[45]

The reasoning in *Grant*[46] best states the constitutional view:

> 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 depends on overall reasonableness, on the importance of the public gain in relation to the private loss.[47]

The argument might also be made that statutes permitting a nonconforming use to remain in an area where the same use is excluded *in futuro* should be voided because of the inherent discrimination involved in the exceptions. For example, in *Weadock v. Judge of Recorders' Court*,[48] which involved an ordinance regulating the locations of junkyards in Detroit, a provision authorizing continuation of operations begun prior to its enactment caused the entire statute to be declared void.

Also persuasive, although admittedly not conclusive, is the fact that the greater weight of authority sustains the right to terminate nonconforming uses under properly delegated police power.[49]

New Jersey Law

New Jersey's position on the subject of amortization is that there is no legislative grant to municipalities to enact such ordinances.[50] In

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45 For example, a person owning a building which was about to collapse could not claim exemption from a law commanding its removal, on the ground of vested interest.

46 212 Md. 301, 129 A.2d 363 (1957).

47 *Id.* at 314, 129 A.2d at 369.

48 156 Mich. 376, 120 N.W. 991 (1909).

49 *Compare* Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal. 2d 121, 272 P.2d 4 (1954) (twenty year amortization of a cement plant held valid); Spurgeon v. Board of Comm'rs, 181 Kan. 1008, 317 P.2d 798 (1957) (two year period for discontinuance of automobile wrecking yards held valid); Eutaw Enterprises, Inc. v. City of Baltimore, 241 Md. 686, 217 A.2d 348 (1966) (eighteen month amortization of check cashing operation upheld) *with* City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762, 304 P.2d 803 (Dist. Ct. App. 1956) (twenty year amortization period for a nonconforming building was invalid as applied to defendant's property); De Mull v. City of Lowell, 368 Mich. 242, 118 N.W.2d 232 (1962) (three year amortization of junkyards was invalid for want of legislative warrant).

50 New Jersey is not unique in this approach; *see, e.g.*, De Mull v. City of Lowell, 368 Mich. 242, 118 N.W.2d 232 (1962) where a city zoning ordinance which sought

the leading case of *United Advertising Corp. v. Borough of Raritan*,[51] a borough zoning ordinance requiring the removal of nonconforming signs within two years from its effective date was held invalid as conflicting with the state enabling statute, which provides:

> Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the building so occupied and any such structure may be restored or repaired in the event of partial destruction thereof.[52]

The court construed the statute as granting the owner of a nonconforming use a right to continue it indefinitely.[53] It has been suggested that this provision was included in the state zoning act because of urgent practical necessities and constitutional requirements of due process.[54] These necessities appear to have been the severe hardships which might be placed upon the owner of developed property if a uniform use scheme or zoning plan were to be suddenly impressed upon a diversified area, working a peremptory cessation of existing uses not in conformity with the plan.[55] This principle was well stated by the New York Court of Appeals in *People v. Miller*:

> The destruction of substantial businesses or structures developed or built prior to the adoption of a zoning ordinance is not deemed to be balanced or justified by the advantage to the public, in terms of more complete and effective zoning, accruing from the cessation of such uses.[56]

Thus it would appear that the New Jersey courts have adopted the above reasoning, but have failed to draw the distinction between "substantial" and "insubstantial."[57]

New Jersey courts have raised, but not answered, the question of the constitutional protection of due process as a legal obstacle to removing a prior nonconforming use.[58] This point was first considered

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abolition of automobile junkyards after three years was declared invalid for lack of legislative warrant.

51 11 N.J. 144, 93 A.2d 362 (1952).

52 N.J. STAT. ANN. § 40:55-48 (1967).

53 11 N.J. at 153, 93 A.2d at 367.

54 Ranney v. Instituto Pontificio Delle Maestre Filippini, 20 N.J. 189, 195, 119 A.2d 142, 145 (1955).

55 *Id.*

56 304 N.Y. 105, 108, 106 N.E.2d 34, 35 (1952).

57 It is noteworthy, however, that a nonconforming use may be enlarged where the enlargement is insubstantial. *See* Grundlehner v. Dangler, 29 N.J. 256, 148 A.2d 806 (1959). Why may not the same test be applied to diminish a nonconforming use?

58 *See* Ranney v. Instituto Pontificio Delle Maestre Filippini, 20 N.J. 189, 119 A.2d 142 (1955).

in *Frank J. Durkin Lumber Co. v. Fitzsimmons*,[59] where the owner of a lumber yard was charged with violation of a municipal ordinance prohibiting the use of certain premises as a storage area. The area had been so used before passage of the ordinance. The court said that the use was nonconforming but the owner was given the right to continue it under the 1928 zoning law[60] because it existed prior to the ordinance.[61] While the court did mention the possibility of use regulation or restriction being a taking without compensation, it did not undertake to decide the question. It instead stated that "[t]he statute clearly preserves the right, as against a zoning ordinance, to continue a use lawful at its inception."[62]

Again in *Ranney v. Instituto Pontificio Delle Maestre Filippini*,[63] the court noted that due process might be a legal obstacle to removing nonconforming uses. The court, however, went no further in pursuing this point than to refer to the California case of *Jones v. City of Los Angeles*,[64] involving a zoning ordinance which made it unlawful to maintain a sanitarium for the treatment of insane persons. The New Jersey court failed to note, however, that *Jones* distinguished itself from *State ex rel. Dema Realty Co. v. Jacoby*[65] on the ground that only a small investment was involved and the owner was given a reasonable time in which to liquidate the business.

Thus a review of New Jersey cases discloses that the elimination of prior nonconforming uses has not been declared unconstitutional as a denial of due process. Nor have the courts decided that it is inevitably an abuse of the police power to divest the owner of a nonconforming use of its enjoyment. The rationale has been that the legislature, by statutory mandate, has provided for the perpetual continuance of nonconforming uses. The courts, while indicating that the spirit of the law is to restrict nonconforming uses, have given full accord to the statutory mandate.[66]

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59 106 N.J.L. 183, 147 A. 555 (Ct. Err. & App. 1929).

60 Currently N.J. STAT. ANN. § 40:55-48 (1967).

61 106 N.J.L. at 190, 147 A. at 558.

62 *Id.*

63 20 N.J. 189, 119 A.2d 142 (1955).

64 211 Cal. 304, 295 P. 14 (1930). The court held that the ordinance could not deprive the owners of four sanitariums, located in a territory recently annexed by Los Angeles, of their right to continue such business. It is firmly established in California today, however, that legislation compelling discontinuance of existing uses is not barred where a reasonable amortization period is allowed. *See, e.g.*, National Advertising Co. v. County of Monterey, 211 Cal. App. 2d 375, 27 Cal. Rptr. 136 (Dist. Ct. App. 1962).

65 168 La. 752, 123 So. 314 (1929).

66 *See* Monmouth Lumber Co. v. Ocean Twp., 9 N.J. 64, 77, 87 A.2d 9, 15 (1952).

A PROPOSAL

The statute which has prevailed in New Jersey since the 1928 zoning act should be reexamined in the light of more modern attitudes toward the continuation of nonconforming uses. Since such uses were generally discordant to their surroundings, it was hoped that they would in time wither and die and be replaced by conforming uses.[67] However, such has not proved to be the case, and the legitimate purposes of zoning have been frustrated, and will continue to be frustrated, unless the legislature and the judiciary reconsider New Jersey's zoning policy in this area. It is submitted that steps toward compelling early abandonment of such uses can be legally effectuated, as they have been in other jurisdictions, without amounting to a taking of property without due process and equal protection of the law. Where the public benefit outweighs the private injury, and a reasonable time is allowed the owner to amortize his investment, a municipality should be permitted to exercise its police power and provide for the general welfare by eliminating undesirable nonconforming uses. This result could be achieved by means of an enabling statute such as the following:

> Any municipality may provide for the gradual elimination of uses, buildings and structures which are incompatible with the character of the districts in which they are performed or located. The elimination of such uses, buildings and structures shall be effectuated after due notice to the owner of record and after a period of time fixed by the municipality with due regard to the size of the investment involved.
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> Such notice shall be filed where the deed to the land involved is entitled to be recorded under N.J. STAT. ANN. § 46:16-1 (Supp. 1969), and the time fixed for termination of the use, building or structure shall run from the date of such filing.

An enabling statute of this type would preclude immediate cessation of a nonconforming use, which action would concededly smack of unconstitutionality because it brings about a deprivation of property rights out of proportion to the public benefit obtained. By allowing each municipality to provide for gradual elimination of those nonconforming uses which are incompatible with the surrounding neighborhood, the legislature would be adopting the standard of "reasonableness" which is steadily becoming established as the true criterion in determining the constitutionality of amortization statutes.[68]

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[67] *See* METZENBAUM, LAW OF ZONING 1210 *et seq.* (2d ed. 1955).

[68] Lachapelle v. Goffstown, 107 N.H. 485, 225 A.2d 624 (1967).

An example of an ordinance that might be adopted by a municipality pursuant to the proposed enabling statute, except as to the notice requirement, is one which has been adopted by the Chicago City Council:[69]

1. A nonconforming use of land shall be terminated within five (5) years;
2. A nonconforming use in a conforming structure or building shall be terminated within eight (8) to fifteen (15) years;
3. Nonconforming buildings and structures shall be eliminated as follows:
   a. Buildings or structures of a value of less than $5,000:
      (1) Under $2,000—within five (5) years after passage of the ordinance;
      (2) Over $2,000 but under $5,000—within ten (10) years after passage of the ordinance.
   b. All others, within twenty-five (25) to fifty (50) years depending upon the nature of the construction.

The 1970 census has indicated a substantial population shift from cities to suburbs, especially from New York City to the outlying areas. A manifestation of this change is the tremendous population growth in New Jersey. Areas once remote and sparsely settled are becoming growing communities. Accompanying this growth is a need for well planned and orderly development. Anachronistic uses or structures may be required to adapt to new standards or relocate. The junkyard or auto graveyard, once isolated but now being surrounded by family residences, should recede before our expanding population.

Other jurisdictions have shown that the problem of the nonconforming use can be resolved. A state which is urbanizing as rapidly as New Jersey needs to adopt the same course in order to achieve its goal of well ordered communities.

Vincent Connors, Jr.

69 CHICAGO, ILL., ZONING ORDINANCE art. 6 (1955), cited in 2 DUQ. L. REV. 1, 14-15 (1963).