1963

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ELIMINATION OF NON-CONFORMING USES, BUILDINGS, AND STRUCTURES BY AMORTIZATION-CONCEPT VERSUS LAW

Joseph A. Katarincic*

INTRODUCTION

A municipality contemplating the adoption of a comprehensive plan for the control of land use is inevitably faced with the problem of pre-existing incompatible land uses. Stores and other commercial enterprises will often be found in the use districts deemed best suited for residences; a sky-scraper may tower above proposed height limits. The question that municipal officials must realistically face is what should be done with the nonconformities. Should the nonconformity be permitted to continue, or is it more desirable to require transformation and eventual conformity? To permit the nonconformity to continue may weaken the effectiveness of the plan; to require conformity by termination of the use may well place an intolerable burden on property owners.

One of the frequently espoused theories for the elimination of non-conforming uses in the amortization theory of planning. Stated in its simplest terms, amortization contemplates the compulsory termination of a non-conformity at the expiration of a specified period of time, which period is equaled to the useful economic life of the non-conformity.

Since land use planning and particularly zoning necessarily have a specialized vocabulary, the following terms and their definitions will help the reader to better understand that which is to follow.

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NON-CONFORMING USES: A building, structure or use of land that is in existence and lawful on the date when a zoning ordinance or amendment becomes effective prohibiting such use, but which, nevertheless, continues unaffected by such an ordinance or amendment thereto.\(^1\)

CONFORMING USE IN A NON-CONFORMING STRUCTURE: A use or activity complying with the zoning ordinance or an amendment thereto, but which is conducted in a building or utilizes a structure that, because of some design characteristics, fails to conform to an ordinance passed after the building or structure has been constructed.

NON-CONFORMING USE IN A CONFORMING BUILDING OR STRUCTURE: A use or activity which is legal when commenced but made non-conforming by a subsequently enacted zoning ordinance, while the building in which the use or activity takes place, or the structure utilized, conforms to the ordinance. The most obvious example of such a use would be a small scale commercial activity or use (e.g. a beauty parlor) operating in a private home located in a residential district.

NON-CONFORMING STRUCTURE OF BUILDING: A lawfully existing structure which becomes non-conforming because of an ordinance enacted subsequent to its erection. The non-conformance may be attributed to size, nature of construction, location of the structure or building on the land, or its proximity to another building or structure.\(^2\)

Non-conforming uses, structures or buildings are considered to be out of keeping with the desirable land patterns for the community. Until the present generation, the accepted legal rule was that a use, building or structure in existence prior to the date on which a zoning ordinance became effective could not be terminated or altered without compensation. As a corollary to this proposition, it was held by the courts that a zoning ordinance which did not contain a provision

\(^1\) Yokley, Zoning Law and Practice §148 (2d ed. 1953); Whitpain Township v. Bodine, 372 Pa. 509, 94 A.2d 737 (1953); Chayt v. Board of Zoning Appeals of Baltimore City, 177 Md. 426, 9 A.2d 747 (1939).

\(^2\) Basset, Zoning 105 (5th ed. 1957); United Cerebral Palsy Association v. Zoning Board of Adjustment, 382 Pa. 67, 114 A. 2d 331 (1955). It has been suggested that these four categories be included within the broader term "non-conformities" thereby avoiding the possible confusion that might result by referring to them simply as non-conforming uses. See American Society of Planning Officials, Text of a Model Zoning Ordinance 30 (2d ed. 1960).
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preserving non-conforming uses would be unconstitutional.\(^3\) In order to avoid such constitutional attacks, communities invariably recognized the right of the landowner to maintain and continue a non-conforming use.\(^4\)

Early zoning ordinances, therefore, allowed for the continuation of all uses, buildings, and structures in existence as of the effective date of the ordinance in order to facilitate general acceptance of the need for comprehensive zoning.\(^5\) There also existed a persistent belief on the part of community officials and planners that non-conformities would eventually be eliminated by rigid enforcement of zoning ordinances. It was only matter of time, however, before it was realized that gradual elimination was little more than a fond hope. Twenty-five years after the passage of the first zoning ordinance in the United States, it was said:

> There is little indication that non-conforming uses ever do disappear. The favorable, sometimes monopolistic, position accorded them, together with municipal requirements that all buildings meet certain standards of fitness, militates against their elimination. And while there is little statistical data available, it is generally believed that the original non-conforming uses have not decreased during the past ten or fifteen years. On the contrary, the opinion prevalent among those familiar with the situation is that the number of non-conforming uses has been increasing rapidly.\(^6\)

The persistence of non-conformities has been recognized by the courts. In *Grant v. Mayor and City Council of Baltimore*, a decision by the Supreme Court of Maryland, which will be discussed later in greater detail, the court cogently pointed out that:

> Non-conforming uses have not disappeared as hoped and anticipated because the general regulation of future uses and changes, with some existing uses uncontrolled, have put the latter in an intrenched position often with a value that is great and grows because of the artificial monopoly given it by the law. Indeed, there is general

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agreement that the fundamental problem facing zoning is the inability to eliminate the non-conforming uses.\(^7\)

As the need for the control of urban land became increasingly important and more readily accepted, municipal officials, planners, and educators showed strong concern over the undesirable impact on land use and community planning caused by non-conformities. With varying degrees of urgency, it was stated that non-conforming uses, buildings and structures, should be eliminated at the earliest possible date. As one observer remarked:

One difficulty, and by far the most serious, is the continuation of the non-conforming use without an effective provision for its elimination. Until some method is devised to permanently eliminate the non-conforming use from our cities and towns, effective city planning cannot be achieved.\(^8\)

Some of the most vigorous and vociferous opponents of non-conformities are property owners and planners. Non-conformities may lead to reduced property values, a physical deterioration of neighborhoods, and a general reduction in the desirability of an entire area as a residential section. Concern is particularly valid where the non-conformities create air pollution, noise, or hazardous traffic or other adverse conditions obnoxious to the sensibilities of the residential property owner. Planners and city officials view non-conformities as undermining the community-wide programs for development and renewal. More specifically, municipal officials view non-conformities as a source of increased financial burden since such uses demands municipal services not necessitated by adjoining land uses, and tend to affect the orderly development of the community as a whole while simultaneously reducing the taxable value of other property.\(^9\)

Four general methods of eliminating non-conformities have been utilized in the United States:

1. **Condemnation**: By use of the power of eminent domain, a municipality could condemn land and eliminate the

\(^7\) Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 305, 129 A. 2d 363, 365 (1957).

\(^8\) Hertz, *Non-conforming uses: Problems and Methods of Elimination*, 33 Dicta 93 (1956); for a view of the position taken by a professional planner and a political scientist towards the need for eliminating non-conformities through amortization, see Bartholomew, *Land Use in American Cities* at 140-141 (Harvard University Press, 1955); Webster, *Urban Land Planning and Municipal Public Policy* 409 (Harper and Brothers 1958).

non-conformity. In 1947, Michigan enacted legislation permitting local units of government to take land for this purpose.\textsuperscript{10}

Because of the cost, the condemnation route has been used infrequently. Also, courts have expressed doubt that such use of the eminent domain power would constitute a taking for a "public purpose."\textsuperscript{11}

2. ABANDONMENT: A discontinuation of the use for a period of time specified in the zoning ordinance constitutes a permanent forfeiture and relinquishment of the non-conformity. The abandonment concept is followed by a large majority of the states and has the approval of the courts.\textsuperscript{12}

3. PROHIBITING OR LIMITING EXTENSIONS AND REPAIRS: More difficult problems arise when attempts are made to determine the conditions and circumstances under which a non-conformity may be repaired. The usual situation finds the non-conformity destroyed or substantially damaged by a catastrophe, e.g., a fire or hurricane. Where 50% or more of a non-conforming building or structure is damaged, repair is generally prohibited. To repair would allow the non-conformity to continue with renewed vigor.

4. AMORTIZATION: Under this method, the owner of a non-conforming use, structure or building must, within a stated period of time, be eliminated either by its termination, removal, or appropriate modification.

Elimination of non-conformities by amortization is the topic of this work. An effort will be made to examine and categorize state-enabling legislation granting municipalities the power to enact zoning ordinances. In addition an examination and analysis of the contents of zoning in the twenty-five most populous municipalities in the United States will be attempted in order to determine the extent to which the amortization theory has been adopted. No study of the

\textsuperscript{10} MICHI. STAT. ANN. § 5.2933(1) (1958).

\textsuperscript{11} See White's Appeal, 287 Pa. 259, 134 A. 409 (1926); County of Allegheny v. Maschuda, 360 U.S. 185 (1959). Several writers have expressed optimism as to the effectiveness of this approach, and suggest that the financing problem could be met by assessing each property owner an amount equivalent to the enhanced value resulting from and elimination of the non-conformity. Fratcher, Constitutional Law - Zoning Ordinances Prohibiting Repair of Existing Structures 35 MICH. L. REV. 642 (1937); Solberg, Rural Zoning in the United States, U.S. DEPARTMENT Of AGRICULTURE (1956).

topic would be complete or worthwhile without examining in detail the judicial decisions that have dealt with the constitutionality of the theory. Finally, amortization will be evaluated and several conclusions tendered.

ENABLING STATUTES

Usually, a municipality can not enact an ordinance or perform any municipal service unless authorized to do so by a grant of power from the state legislature. Any act by a municipality done in the absence of a grant is ultra-vires.¹³

Municipal adoption of the amortization theory must be eventually traced to a state-enabling statute. To fully comprehend what has and what has not been done by municipalities in this area, and to predict with some accuracy any future trends, the enabling statutes of each of the fifty states and Puerto Rico were examined to determine to what extent they would impede or allow adoption of the amortization theory. The enabling statutes fall into four general categories:

1. Statutes granting to the local municipality the general power to enact zoning ordinances, without reference to the power of a municipality to terminate non-conforming uses, structures, or buildings;
2. Statutes granting the local municipality the power to direct the involuntary termination of non-conforming uses only;
3. Statutes expressly prohibiting the municipality from enacting ordinances requiring the involuntary termination of non-conforming uses, structures, or buildings;
4. Recognition of non-conforming uses, structures, or buildings, and permitting them to continue indefinitely.

Each of these merit a more detailed examination.

1. DELEGATION OF GENERAL POWER TO ENACT ZONING ORDINANCES: Although the enabling statutes of thirty-six states contain a general grant of power to all or several of the local units of government to enact zoning ordinances, they make no reference whatsoever to the status of non-conforming uses, structures, or buildings.¹⁴ A large


number of the enabling statutes in this category were modeled after the Standard State Zoning Enabling Act drafted in 1923 by the Advisory Committee on Building Codes and Zoning appointed by Secretary of Commerce Hoover. With zoning advocates largely on the defensive at that time, it would be difficult to imagine the drafting of a model enabling act explicitly approving or permitting the adoption of the amortization theory.

The failure to expressly authorize local adoption of the amortization theory has not been considered a denial of such a power. It is frequently stated that a general grant of zoning power carries with it an implied power to provide for amortization. Courts in Louisiana, Maryland, Florida, New York, and California approved the adoption of the amortization theory by municipalities operating under general enabling statutes and found them both constitutional and intra-vires.

§§ 176.02, 176.03 (1961); Hawaii, REV. LAWS OF HAWAII ch. 149, §186 (1955); Idaho, GEN. LAWS OF IDAHO ANN. §§31-3801 (1957); Indiana, IND. STAT. ANN. §§ 53-701 to—794 (Burns 1951); Iowa, IOWA CODE ANN. ch. 414 (1962); Louisiana, LA. REV. STAT. tit. 33, § 4721 (1950); Maine, REV. STAT. OF MAINE ch. 93 § 1 (1954); Maryland, ANN. CODE OF MD. art. 66B, § 1 (1957); Michigan, MICH. STAT. ANN. § 5.2934 (Cities and Villages), § 5.2973(1) (townships) (1954); Minnesota, MINN. STAT. ANN. § 462.01 (1961); Missouri, MO. REV. STAT. ch. 64, § 64.010, ch. 89, § 89.010 (1959); Montana, REV. CODE OF MONT. ANN. tit. 11, §11-2701 (1957); Mississippi, MISS. CODE § 3590 (1956); Nevada, REV. STAT. tit. 22, § 278.250 (1957); Nebraska, REV. STAT. OF NEB. § 19-901 (1962); New Mexico, NEW MEXICO STAT. § 14-28-9 (1953); New York, N. Y. VILLAGE LAW § 175 (McKinney Book 63, 1951); N. Y. TOWN LAW § 261 (McKinney Book 61, 1951); N. Y. GENERAL CITY LAW § 24 (McKinney Book 20, 1951); North Carolina, GEN. STAT. OF N. C. art. 14, § 160-172 (1951); North Dakota, N. D. CENTURY CODE, tit. 40, § 40-47-01 (1960); Ohio, OHIO REV. CODE § 303.02 (Counties); § 713.15 (Municipal Corporations) (Baldwin); Oregon, ORE. REV. STAT. § 227.220 (Cities), § 215.220 (Counties) (1961); Puerto Rico, LAWS OF P. R. ANN. tit. 23, § 9; South Carolina, CODE OF S. C. ch. 10, § 47-1001 (1962); South Dakota, S. D. CODE § 45.2801; Tennessee, TENN. CODE ANN. ch. 7, § 13-701 (Municipalities), ch. 4, § 13-401 (Counties) (1959); Texas, REV. STAT. OF TEXAS art. 1011a, (Vernon 1963); Utah, UTAH CODE ANN. § 10-9-1 (1962); Vermont, VT. STAT. ANN. ch. 67, § 3002 (1959); Washington, REV. CODE OF WASH. § 35.63.080 (1961); West Virginia, WEST VA. CODE ch. 8, art. 5, § 511 (1961); Wyoming, WYO. STAT. ch. 6, § 18-284 (Counties); WYO. STAT. ch. 5, § 15-620 (Cities and Towns) (1957).

18. Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950).
2. TERMINATION AUTHORIZED; The enabling statutes of five states, Colorado, Georgia, Kansas, Utah, and Pennsylvania permit all or a specified class of political subdivisions to enact zoning ordinances providing for the involuntary termination of non-conforming uses.

The Colorado enabling act\(^{21}\) reads as follows:

The board of County Commissioners in any zoning resolution may provide for the termination of non-conforming uses, either by specifying the period in which the non-conforming uses shall be required to cease, or by providing a formula whereby the compulsory termination of a non-conforming use may be so fixed as to allow for the recovery or amortization of the investment in the non-conformance.

The provisions of the Georgia enabling act\(^{22}\) are identical to those of Colorado except that the power is granted to all local governing bodies.

The Kansas enabling act,\(^{23}\) also limited to counties, was amended in 1957\(^{24}\) to permit adoption of the amortization theory, and reads as follows:

The powers of this Act shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is lawfully devoted, except that reasonable regulations may be adopted for the gradual elimination of non-conforming uses.

The Pennsylvania\(^{25}\) and Utah\(^{26}\) enabling acts, both of which are applicable only to counties, contain provisions essentially identical to that enacted by Colorado.

Where only a county is expressly authorized to adopt the amortization theory, it is of some importance to determine if other local units of government acting under a general grant of power to enact zoning ordinances, could adopt the theory.

It is somewhat incongruous that none of these states have had appellate court review of the constitutionality of the amortization theory even though some level of local government was expressly empowered to adopt it. However, with the exception of Pennsylvania, none of

\(^{22}\) GA. CODE ANN. tit. 69, § 69-835 (1961).
\(^{23}\) GEN. STAT. OF KAN. § 19-2906 (1949).
\(^{24}\) GEN. STAT. OF KAN. § 19-2930 (1949).
\(^{25}\) PA. STAT. ANN. tit. 16, § 2033 (1956).
\(^{26}\) UTAH CODE ANN. § 17-27-18 (1953).
these states have large urban populations, with resultant land use pressures and rapidly shifting populations, where such an ordinance might become an indispensable tool of urban planning.27

3. PROHIBITING INVOLUNTARY TERMINATION: Six states have enabling acts that recognize non-conforming uses, structures and buildings, and explicitly deny the power of a municipality to provide for their termination.

The Virginia enabling act28 is typical:

Such ordinance or ordinances shall not prohibit the continuance of the use of any land, building or structure for the purpose for which such land, building or structure are used at the time such ordinance or ordinances take effect . . .

After granting a general power to enact zoning ordinances, the New Hampshire enacting statute provides:29

A regulation made under this subdivision shall not apply to existing structures nor to the existing use of any building . . .

The Oklahoma enabling act30 contains the most stringent prohibition against adoption of the amortization theory:

Saving vested rights

In any instance where it is shown that the application of the terms of this act or any proposed action hereunder will be in material conflict with any accrued vested rights so that it would, if applied to the particular property involved, result in substantial loss, damage or impairment, such right shall be preserved, recognized and given effect and may be protected by any remedy herein provided for.

27. In City of Clairton v. Pittsburgh Outdoor Advertising Co., 390 Pa. 1, 133 A.2d 542 (1957), The Court of Common Pleas of Allegheny County held an ordinance providing for a five-year amortization of certain signboards within the municipality unconstitutional. The Supreme Court reversed on procedural grounds.
30. OKL. STAT. ANN. tit 11 § 1433; the Oklahoma legislature seems to have been influenced by a string of decisions which struck down retroactive zoning ordinances aimed at non-conforming uses, structures and buildings on the theory that they constituted a vested right entitled to constitutional protection. Fratcher, Constitutional Law — Zoning Ordinances Prohibiting the Repair of Existing Structures, 35 MICH. L. REV. 642 (1937).
The Rhode Island enabling act\textsuperscript{31} clearly and emphatically protects non-conformities by providing that:

Pre-existing uses saved — No Ordinance enacted under authority of this chapter shall prevent or be construed to prevent the continuance of the use of any building, or improvement for any purpose to which such building or improvement is lawfully devoted at the time of the enactment of such an Ordinance.

The Illinois enabling act\textsuperscript{32} provides broad protection for a non-conformity:

In all ordinances passed under the authority of this article, due allowance shall be made for existing conditions, the conservation of property values, the direction of buildings development to the best advantage of the entire municipality and the uses to which the property is devoted at the time of the enactment of such an ordinance. The powers conferred by this article shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted.

A revised enabling act was adopted in Massachusetts in 1958\textsuperscript{33} containing a surprisingly broad provision:

\ldots a zoning ordinance or by-law or any amendment thereof shall not apply to existing buildings or structures, nor to the use of any building or structure, or of land to the extent to which it is used at the time of the adoption of the ordinance or by-law or amendment \ldots

In two other states, Tennessee and Texas, the enabling statutes both contain provisions which deny municipalities the authority to determine particular kinds of non-conformities, though they contain a general grant of power to municipalities to enact zoning ordinances.\textsuperscript{34} Tennessee insures that:\textsuperscript{35}

No airport zoning regulations adopted under this chapter shall require the removal, lowering or other change or alteration of any structure or tree not conforming to the

\begin{itemize}
  \item \textsuperscript{31} \textit{Gen. Laws of R. I.} § 45-24-10 (1956).
  \item \textsuperscript{32} \textit{Ill. Rev. Stat.} ch. 34 § 3151 (1961).
  \item \textsuperscript{35} \textit{Tenn. Code Ann.} § 42-412 (1959).
\end{itemize}
regulations when adopted or amended, or otherwise interfere with the continuance of any conforming use . . .

The Texas statute provides: 36

... this act shall not enable cities and incorporated villages aforesaid to require the removal or destruction of property, existing at the time such city or incorporated village shall take advantage of this act, actually and necessarily used in public service business.

The impact of these statutory restrictions upon the adoption of the amortization theory in Texas and Tennessee is not clear. It could be argued, however, that the enactment of such explicit prohibitions in cases of airport zoning and public service businesses is to be construed as an absence of prohibition against, and an approval of the amortization theory in all other zoning cases.

4. RECOGNITION OF NON-CONFORMING USES, STRUCTURES AND BUILDINGS: A fourth category of enabling statutes recognize and permit the continuance of a non-conforming use, structure or building, but do not expressly prohibit the local municipality from providing for their termination. Wisconsin 37 and Kentucky 38 have enacted such statutes; New Jersey's is typical of this category: 39

Non-conforming buildings and uses; Continuance of

Any non-conforming 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.

Although the effect of an enabling act in determining the validity of an ordinance adopting the amortization theory will be covered elsewhere, it is appropriate to say that it does not appear that the courts have been inclined to view such ordinances as ultra-vires. Generally, there is a tacit or implied recognition of the power of a municipality to enact an amortization ordinance as a necessary corollary to a general grant of power to control land use, height and bulk. The dispute instead largely centers around constitutionality.

36. REV. STAT. OF TEXAS art. 1011a (Vernon 1963).
37. WIS. STAT. ANN. § 62.23 (1961).
38. KY. REV. STAT. § 100.069 (Baldwin 1963).
From the enabling statutes reviewed, it appears that there is no general trend in the state legislatures to expressly authorize adoption of the amortization theory by municipalities. However, this is not to suggest that there is no agitation for such legislation, or that municipalities have failed to enact ordinances containing amortization schemes. In this area, as in many other areas of municipal law, local governments proceed to exercise powers where the scope of the delegation is not completely clear, and perhaps even doubtful.

In order to secure some insight into the extent to which the amortization theory has been accepted, and the type of amortization provisions that have been enacted, a review was made of the zoning ordinances of each of the twenty-five most populous municipalities in the United States.40

The review indicated that ten cities including Baltimore, Boston, Buffalo, Chicago, Cleveland, Denver, Kansas City, Los Angeles, San Francisco, and Seattle have adopted amortization provisions within the last fifteen years. Pittsburgh, New York, and Washington, D.C. have considered but rejected them. New Orleans, a pioneer in this area, abandoned its amortization scheme in 1948.41 The Cleveland ordinance was declared unconstitutional in Curtis v. City of Cleveland.42

There are substantial variations in the contents of the ordinances enacted or considered by the municipalities surveyed. Some include only particular uses and structures, e.g., junk yards and billboards, while others extend to non-conforming uses, structures, and buildings. Certain of the ordinances provide a general, fixed period of amortization, while others fix the period in great detail varying it according to the use being made of the land, as well as the nature


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and value of any non-conforming buildings or structures that may be involved.

The ordinance of Kansas City, Missouri, makes a clear distinction among the amortization of a non-conforming use, a conforming structure or building used in a non-conforming manner, and a non-conforming structure or building. As might be expected, a different period for the amortization of each of the non-conformities is provided. It reads as follows:

(1) A non-conforming use of land shall not be continued beyond the term ending one (1) year from the effective date of this chapter and the use of land which becomes non-conforming by reason of a subsequent change of zoning shall also be discontinued within one (1) year of the effective date of such change, unless in either case, such land be wholly or partially occupied with a permanent, enclosed building, the design or use of which is non-conforming.

(2) The lawful use of a building or structure, at the time of the effective date of this chapter, which is designed for a conforming use but is being used in a non-conforming manner, may be continued for a period of ten years from the effective date of this chapter. Within that time it shall be removed or converted to a conforming use. Any such building or structure, the use of which becomes non-conforming by reason of a subsequent change in zoning, shall be removed or converted to a conforming use within ten (10) years from the effective date of such change.

(3) The lawful use of a building or structure, at the time of the effective date of this chapter, which is designed for a non-conforming use, shall be permitted to continue for the usable life of the building or structure which becomes a non-conforming use by reason of a subsequent change in zoning shall be continued for the usable life of the building or structure except as provided hereafter.

(4) All signs and billboards non-conforming with the use provisions of this chapter shall be removed within a period of five (5) years from the effective date of this chapter, except that non-conforming signs specifically describing the business or nature of a non-conforming building, structure or use of the same premises may be maintained during the usable life of such building, structure or use.43

43. KANSAS CITY, MISSOURI, ZONING ORDINANCE ch. 65 § 65.230.
Under subdivision (3) of the Kansas City Ordinance, there is no amortization of non-conforming buildings or structures since they can continue for the period of their usable life. Under the provisions of a conventional ordinance, a non-conforming building would be subject to the same restriction. Also, it should be noted that under subdivision (1) a non-conforming use of land may be terminated in one year, while under subdivision (2) the use if performed in conjunction with any building or structure can continue for ten years. Since the latter may involve a structure having little or no value, it would appear that problems may arise in defending the difference between the two amortization periods.\textsuperscript{44}

The ordinance does provide for removal of a non-conforming building or structure in subdivision (2) which becomes such as a result of an amendment to the zoning ordinance, but fails to establish the requirement of removal in subdivision (3) where conceivably the structure or building could still be standing though its period of useful life has passed.

The Chicago Ordinance contains the most detailed treatment of the amortization theory that has been enacted by any municipality to date. It provides that:

1. A non-conforming use of land shall be terminated within five (5) years;
2. A non-conforming use in a conforming structure or building shall be terminated within eight (8) to fifteen (15) years;
3. Non-conforming buildings and structures shall be eliminated as follows:
   a. Buildings or structures of a value of less than $5,000.00
      (1) Under $2,000.00—within five (5) years after passage of the ordinance;
      (2) Over $2,000.00—but under $5,000.00, ten (10) years after adoption;

\textsuperscript{44} In City of Seattle v. Martin, 554, Wash. 2d, 663, 342, P.2d 602 (1959) the Supreme Court upheld an ordinance providing for the involuntary termination of a non-conforming use of land, not involving any structure, within one year. In a letter to this writer, dated March 4, 1960, counsel for the appellant - landowner said the following which is applicable to the Kansas City Ordinance:

"If Mr. Martin had had a little old shack on the lot, he probably could have continued on in business."
b. All others, within twenty-five (25) to fifty (50) years depending upon the nature of the construction.\textsuperscript{45}

The Chicago Ordinance, like that of Kansas City, is self executing and provides little area for individual treatment of the various non-conformities. The detailed provisions of the Chicago Ordinance should prove useful in the event its constitutionality is challenged. Courts in several cases, which will be analyzed later, have criticized the amortization theory because of the general application of its provisions.\textsuperscript{46}

The Chicago Ordinance stands in contrast to the general provisions of the zoning ordinance enacted by Seattle, Washington, which reads as follows:

Termination of certain Non-Conforming uses

Any Non-conforming use not involving a structure or one involving a structure having assessed value of less than one hundred dollars ($100) on the effective date of this Ordinance may be continued for no longer than one year after said date, and any non-conforming use involving a structure having an assessed value of more than one hundred dollars ($100) but less than three hundred dollars ($300) on the effective date of this Ordinance may be continued no longer than two years after said date; provided, however, the above provisions shall not apply to any non-conforming advertising sign.\textsuperscript{47}

Los Angeles adopted the amortization theory in 1946 in a comprehensive zoning ordinance in spite of the sweeping language in \textit{Jones v. City of Los Angeles}, where in 1930 the California Supreme Court said:

Threatened invasion of a residence district by business may be an impelling reason for affording protection by way of a zoning ordinance, \textit{but such an ordinance may not operate to remove business found there}.\textsuperscript{48} (Emphasis supplied)

\textsuperscript{45} CHICAGO, ILL., ZONING ORDINANCE Art. 6. The committee that drafted and submitted Article 6 to the Chicago City Council said the following:

"It is obviously necessary in the interests of urban conservation and rehabilitation to provide a mechanism for the gradual elimination of non-conforming uses."

\textit{CITY COUNCIL COMMITTEE ON BUILDINGS AND ZONING, A REPORT ON THE PROPOSED COMPREHENSIVE AMENDMENT TO THE CHICAGO ZONING ORDINANCE} 28 (1955).

\textsuperscript{46} City of La Mesa v. Tweed and Gambrell Planning Mill 146 Cal. App. 2d 762, 304 P.2d 803 (1956); Harbison v. City of Buffalo, 4 N.Y. 2d 553, 152 N.E.2d 42 (1958) (dissenting opinion).

\textsuperscript{47} SEATTLE, WASH., ZONING ORDINANCE §5.33.

\textsuperscript{48} 211 Cal. 304, 308, 295 P. 14, 18 (1930).
The Los Angeles amortization provision was the most elaborate and detailed one in existence at the time of its passage, and eventually was upheld by the courts in the landmark case of City of Los Angeles v. Gage. The Ordinance provides that a non-conforming use of a conforming building or structure may be continued except that in residential zones any non-conforming commercial or industrial use of a residential building or residential accessory building shall be discontinued within five years. The limitation of amortization to non-conforming uses found only within residential districts constitutes a sounder approach than one requiring elimination from all districts. It is in such zones that the non-conformity proves most obnoxious, and it can reduce the usefulness of residential land which may have high social utility and value.

The Los Angeles Ordinance also provides that a non-conforming use of land shall be discontinued within five years after June, 1946, or within five years from the date the use became non-conforming, if:

1. No building is employed in conjunction with such use.
2. The only buildings that are employed are necessary to or incidental to such use.
3. Such use is maintained in connection with a non-conforming building.

Where the non-conforming use of land is accessory or incidental to the non-conforming use of a non-conforming building, it shall be discontinued on the same date the non-conforming use is discontinued.

The enactment of Denver, Colorado contains a feature that many feel is essential to effective control of non-conforming uses, buildings and other structures. Under this provision, all non-conformities must be registered with the Department of Zoning Administration, thereby giving a central administration officer a complete picture of the extent of non-conformity throughout the municipality. The Ordinance provides that non-conforming uses taking place within a building or structure, containing less than one hundred square feet of gross floor area, or a junk yard, shall be terminated within three years. Non-conforming uses in residential districts are given fifteen years in which to terminate. No provision is made for the termination or elimination of non-conforming buildings or structures.

50. LOS ANGELES, CAL., MUNICIPAL CODE § 12.23.
52. CITY AND COUNTY OF DENVER, COLORADO, REVISED MUNICIPAL CODE OF THE CITY AND COUNTY § 617.
A recently enacted ordinance containing an amortization provision was adopted by San Francisco, California on September 13, 1958. The ordinance contains detailed and quite specific provisions governing the amortization periods and administration of the program of elimination.53

The San Francisco Ordinance states that:

1. Non-conforming uses, buildings and signs shall be terminated within five years after the effective date of the ordinance where,

   a. The non-conforming commercial or industrial use does not involve a building, or

   b. The non-conforming building in a residential area does not have an assessed valuation in excess of $500.

Section 54 of the Ordinance contains a long and complicated preamble suggestive of the language used by the courts in giving judicial sanction to the theory:

The purpose of this section is to provide for the gradual elimination of conversion after a reasonable allowance of time for the amortization of investments therein, of certain classes of non-conforming buildings, in order to encourage and promote the orderly and beneficial development of land with non-conforming buildings and uses. This section is intended to apply to obsolescent buildings whose use is widely at variance with the regulations of this ordinance, and is a safeguard against unnecessary hardship in application by a provision for a minimum period of continuance of twenty (20) years, by procedure for extension and exception, and by the requirement for repeated notice as the buildings approach an age indicative of obsolescence. It is further declared that the requirement of eventual removal, or conversion to conforming use of such buildings, subject to exceptions set forth, is in the public interest and is intended to promote the general welfare.

The minimum period for removal or conversion of the non-conforming building is twenty years. Thereafter, depending upon the nature of construction and type of materials, the buildings must be removed or converted within periods ranging from thirty to fifty years. Where special circumstances exist, applying to any one building but not to all in general, which would cause hardship to the

53. CITY AND COUNTY OF SAN FRANCISCO, CAL.; ORDINANCE No. 492-58 §§ 50-56. The entire Ordinance has not as yet been reproduced for public use, but can be found in the San Francisco News, August 30, 1958, p. A-B.
owner if removal or conversion was required, annual extensions may be granted under the variance procedures.\textsuperscript{54}

Administrative officials are required to identify all non-conformities and to notify the owners of any impending termination.

Additionally, the Planning Commission may under certain conditions permit the following non-conformities to continue indefinitely as conditional uses:

1. Private residential dwellings;
2. Commercial or industrial buildings;
3. Professional offices or stores in certain residential districts.

The San Francisco Ordinance allows for a flexibility not present in similar enactments, and permits the termination of non-conformities to be integrated into a general overall scheme of community development by making use of the Planning Commission and the Professional Zoning Administrator. By allowing exceptions to the absolute application of the theory, the ordinance allows for the retention in individual cases of those buildings or uses which in fact are beneficial and acceptable to the local economy and the land use pattern of the zone in which they are located.

Though the constitutionality and general desirability of the amortization theory will be discussed later, it can be said that an ordinance, like that of San Francisco, providing for an amortization period which is not a fixed or unchanging period, but is sufficiently broad to allow adjustments and changes under the circumstances of any particular case will more probably be upheld.\textsuperscript{55}

Boston operates under an ordinance closely patterned after the one Kansas City, Missouri enacted, and provides for the elimination of all non-conforming buildings by April 1, 1961, or thirty-seven years after such a building becomes non-conforming.\textsuperscript{56}

New York, Pittsburgh, and Washington, D. C. have considered and rejected the amortization theory within the last several years.\textsuperscript{57}

These proposed ordinances all reflected the most advanced thinking

\textsuperscript{54} CITY AND COUNTY OF SAN FRANCISCO, CAL., ORDINANCE NO. 492-58 § 202.

\textsuperscript{55} Note, 2 U.C.L.A. LAW REV. 295 (1955).


\textsuperscript{57} AMERICAN INSTITUTE OF ARCHITECTS, NEW YORK CHAPTER, \textit{Rezoning New York City} 33 (1951).
on the amortization theory. The proposed Washington, D. C. ordinance provided for four separate classes of non-conformities:

1. Class I applied to non-conforming uses of land which were to terminate within five years if no structure was involved, or if the value of any structure connected with the use was less than $1,000.

2. Class II extended to all other uses, including those which provide the greatest risk of deterioration to neighboring property, and which must terminate within fifteen years.

3. Class III encompassed a group of uses which presented the next most serious threat to surrounding uses, and which must terminate within twenty-five years.

4. Class IV covered all other non-conforming uses, including apartment houses in commercial districts, all of which could continue indefinitely.

A novel feature of the Washington, D. C. proposal was that the period of allowable amortization was, to a large extent, to be determined by the deleterious effect on surrounding uses that the particular non-conformity caused.

The power of Newark, New Jersey, to adopt the amortization theory is doubtful in light of a provision in the enabling act which provides:

Any non-conforming use or structure existing at the time of the passage of an ordinance may be continued . . .

The Zoning Commission of Baltimore, Maryland on February 1, 1960 transmitted an amendment to the zoning ordinance to the Mayor dealing with non-conforming uses and buildings. Its purpose was to:


59. This approach to the priority of elimination was apparently first suggested by Attorney Richard F. Babcock at the annual meeting of the American Society of Planning Officials in 1954, where he indicated that the amortization period should be based on the municipality's objective in eliminating the non-conformity. Planning 158 (1954).

60. N.J. Stat. Ann. § 40:55-48 (1937). In a letter to this writer dated March 4, 1960, Newark Corporate Counsel Vincent P. Torpey indicated that this provision in the enabling act would not only prohibit adoption of the amortization theory, but prohibited the enactment of a provision providing that "No non-conforming use which shall have discontinued for a period of twelve (12) months shall be resumed . . ." Newark, New Jersey, Ordinance § 36:15. This position is substantiated by Report of Committee on Zoning and Planning, made to the National Institute of Municipal Law Officers, 1958, and written by Fred G. Stickel, Counsel for Roseland, New Jersey.
1. Provide an effective tool for the regulation and control of non-conformities in order to arrest the spread of blight and the further deterioration of neighborhoods within the city; and to

2. Reduce non-conformities as speedily as possible.

The proposal distinguishes among non-conforming uses, structures, and buildings with emphasis on the realization of securing a compatible land use pattern. The over-emphasis on elimination for the sake of elimination is avoided, and extensive discretionary powers are vested in a Board of Municipal and Zoning Appeals to relax or vary the application of the ordinance in certain described situations.61

Certain general observations concerning the ordinances reviewed are possible. It is immediately obvious that those enacted during the current decade are more elaborate and flexible than the ordinances first enacted by New Orleans, Louisiana in 1927 and repealed in 1948. Correspondingly there is a recognition of the need for a professional public servant to administer and exercise the discretion that flexibility inevitably demands. In addition, flexibility should help to avoid hardships in individual cases, and should permit the community to retain those non-conformities that give promise of the greatest amount of social benefit.62

But this sophistication may have undesirable ramifications in another direction. Many small political subdivisions find it difficult, if not impossible, to obtain and retain competent zoning officers and officials who can administer such an ordinance. An unwise exercise of discretion by local officials susceptible to various pressures, political and economic, and not possessing the independence that accompanies professionalism and competence, could do much to impede public acceptance and legislative adoption of an amortization scheme.

THE AMORTIZATION THEORY IN THE COURTS

From its earliest days the law of zoning has largely developed around a basic rule of constitutional law which prohibits legislation retroactively divesting property rights without paying compensation. Applying this general principle to zoning law, some courts early held that a use, building or structure, lawful at the time that a zoning

61. ZONING COMMISSION OF BALTIMORE CITY, MARYLAND, RECOMMENDED REGULATIONS ON NON CONFORMANCE (January 28, 1960).

ordinance or amendment thereto is enacted, may continue indefinitely as a legally protected non-conformity. Cases so holding have generally proceeded on the theory that once one undertakes a use or erects a structure or building, he obtains a vested right in its continuation protected in most instances, excepting perhaps where a nuisance exists, by the law.\(^6\)

In *State ex rel. Dema Realty Co. v. Jacoby*,\(^6\) an ordinance enacted by New Orleans provided that all commercial activities were to be excluded from a residential zone one year after its enactment. The defendant landowner had operated a drugstore in the area for many years and relied on the due process and equal protection clauses of the Constitution in resisting efforts to discontinue the non-conforming use.\(^6\) The Supreme Court of Louisiana approved termination of the use and found that the ordinance was not an unreasonable exercise of the police power. A companion case, *State ex rel. Dema Realty Co. v. McDonald*,\(^6\) involved the same ordinance and approved the termination of a grocery store, a non-conforming use, within one year. Both the *Jacoby* and *McDonald* cases must be read carefully inasmuch as the language in the opinions indicate that the uses did, in fact, constitute nuisances which, of course, could always be summarily terminated without compensation.\(^6\) These cases have not been cited with frequency by individuals favoring the amortization theory. In referring to the *Dema* case, for example, one writer has said:

> The Louisiana decisions in this field . . . sound more like Cosack interpretations of Muscovite ukases than utterances of a court operating under the benign provisions of the Magna Carta.\(^6\)

Little was heard of amortization during the depression years since matters of greater urgency absorbed the nation's attention and energies. In 1942 an article appeared in the *University of Chicago Law Review* discussing in detail the development and then existing state of the amortization theory.\(^6\) The author's conclusion was prophetic of the tone of later judicial decisions reviewing the constitutionality of amortization when he said:

> The advantage of amortization as a method of eliminating

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\(^6\) Note, 7 STAN. L. REV., 415 (1955).
\(^6\) 168 La. 752, 123 So. 314 (1929).
\(^6\) U.S. CONST. amend. XIV § 1.
\(^6\) 168 La. 172, 121 So. 613 (1929) cert. denied, 280 U.S. 556 (1929).
existing non-conforming uses is that it would allow the owner of the non-conforming use, by affording him an opportunity to make new plans, at least partially to offset any loss which he might suffer . . . If the period is skillfully computed, the loss to the owner will be small when compared with the benefit to the public.\textsuperscript{70}

In \textit{City of Akron v. Chapman},\textsuperscript{71} the defendant opened a junk yard in 1916. Under a comprehensive ordinance enacted in 1922 by the City of Akron, it became non-conforming. The ordinance contained an unusual provision whereby city council could by separate ordinance direct the discontinuance of such use after it had been in existence for a reasonable time. The defendant landowner attacked an ordinance passed in 1950 providing for termination of his use within one year. The court said that a zoning ordinance may not divest a vested property right, and held that an ordinance which prohibits the continuation of an existing use of valuable property is unconstitutional.

The court did not discuss or attempt to refute by analysis various arguments supporting amortization. This decision was criticized in \textit{Grant v. Mayor and City Council of Baltimore}.\textsuperscript{71A} An attempt has been made to explain \textit{Chapman} and minimize its effect on the basis that the original comprehensive ordinance was indefinite, and that the one year period of amortization in the 1950 ordinance was too short.\textsuperscript{72}

In a corollary to the \textit{Chapman} case, the Ohio Court of Appeals of Cuyahoga County in \textit{Curtis v. City of Cleveland},\textsuperscript{73} reviewed an amendment to a zoning ordinance rezoning an area from commercial to residential. The plaintiff landowners had erected a large commercial structure and had made substantial capital investments in its modification. The court found that the amendment was unconstitutional because by making the structure non-conforming, the

\textsuperscript{70} Op. cit. supra, note 6, pp.486-487.
\textsuperscript{71} 160 Ohio St. 382, 116 N.E. 2d 697 (1953).
\textsuperscript{71A} 212 Md. 301, 129 A.2d 363 (1957).
\textsuperscript{72} Note, 67 HARV. L. REV. 1283 (1954); It has also been said that the Ohio Court did not reach the question of whether or not the time limit for termination was too short, or to state it differently, not long enough, but rather that it was apparently content to let the matter rest on what the court considered to be obvious confiscation. 1 YORKE, ZONING LAW AND PRACTICE, § 159 (2d ed. 1953).
\textsuperscript{73} 164 Ohio St. 296, 130 N.E.2d 342 (1955); After a series of appeals, reversals, and remands, the Ohio Courts held that the amendatory ordinances were confiscatory, unreasonable, and discriminatory, without any relationship to the furtherance of the health and welfare of the community, and a violation of due process.
plaintiff's land was reduced in value and this constituted an unconstitutitional taking.

The attitude of the Ohio Courts towards amortization was clearly shown when the Curtis Case, reached the appellate court, where it was said:

The fact that owners have substantially improved their lands for a use, lawful at the time they have so improved them (whether lawful because of or by reason of the absence of applicable zoning legislation) is always an important factor in determining the validity of subsequent zoning legislation providing against such use . . . This court has recognized it as so important a factor as to prevent such legislation from being valid if it does not provide for the continuance of a non-conforming use . . . although not so important a factor as to always prevent legislation limiting the extension of such use . . . 74

The reasoning of the court in the Curtis case was unusual for, if anything, the value of the plaintiff's land and structure, by virtue of the monopolistic position it enjoyed, was in fact increased over that of vacant land in the immediate vicinity.75

In Concord Township v. Cornog,76 the municipality brought a bill in equity to require the General Outdoor Advertising Company to remove free-standing advertising signs from a commercial district. The local zoning ordinance contained a six month amortization period for non-conforming signs. In a short opinion based on proceedings where no testimony was taken or finding of fact made, the Court of Common Pleas of Delaware County, Pennsylvania, held the ordinance unconstitutional and went on to say:

Never in Pennsylvania have owners of land been deprived of pre-existing non-conforming uses. Indeed a pre-existing non-conforming use in Pennsylvania has always, and we think properly so, been treated as a vested property right: Appeal of Haller Baking Co. 295 Pa. 257 . . . I am an individual considerably more consecrated to the constitutional safeguards of this government than I am a champion of the aesthetic beauties of this land, and as a lawyer and a judge I am sworn to preserve and protect the Constitution of the

74. 164 Ohio St. 296, 130 N.E.2d 342 (1955).
75. This decision is criticized as being unsound. AMERICAN SOCIETY OF PLANNING OFFICIALS, 8 ZONING DIGEST at 37-39 (February, 1956).
Commonwealth of Pennsylvania and of the United States of America.\textsuperscript{77}

The municipality in \textit{Concord} contended that the termination of a non-conforming structure could be compelled if a reasonable time was allowed to permit the owner to recoup his capital investment. The court refused to accept this argument, and said:

\begin{quote}
Just how one is going to recoup his investment under the circumstances here is not made clear. Certainly the advertising company can within a reasonable period of time recoup the cost of erecting their signs but the real defendants here are the owners of land, the ones named defendants originally by the township. How are they going to recoup the value of the land which yield them a substantial annual income. The answer is they can’t.\textsuperscript{78}
\end{quote}

The appellate courts of two states have refused to pass on the constitutionality of amortization provisions. They disposed of the cases in which such provisions were attacked on other grounds. The Court of Common Pleas of Allegheny County, Pennsylvania sitting in equity, held unconstitutional an amortization scheme requiring the removal of all free-standing advertising signs within the City of Clairton five years after the effective date of the ordinance. The Supreme Court of Pennsylvania, on appeal, in \textit{Clairton v. Pittsburgh Outdoor Advertising Company},\textsuperscript{79} held that the constitutionality of a zoning ordinance could not be attacked in equity, but that such an attack should follow the statutory procedure for appeal through the local zoning board of adjustment. In \textit{United Advertising Corp. v. Raritan},\textsuperscript{80} an ordinance providing a two year amortization period for the elimina-


\textsuperscript{78}. 9 D.C.2d 79, 86-87; 48 MUN. L. REV. 202, 208-209. In Drago v. Norristown Borough Board of Adjustment, 53 D. & C. 380 (Pa. Com. Pl., 1945) the defendant operated a junk yard which became a non-conforming use. The applicable zoning ordinance provided that within three years after the passage, a non-conforming use, upon petition signed by sixty per cent of all property owners within two hundred feet of such use was to be discontinued upon approval of the Zoning Board of Adjustment. The Board's action in refusing to direct discontinuance upon petition was affirmed by the court which said that there was no evidence of a abuse of discretion in the refusal. In dicta, the court said, "While it is true that appellate courts have become more liberal in upholding the constitutionality of zoning ordinances (see White's Appeal, 287 Pa. 259 (1926), and cases therein cited), yet no case seems to have gone so far as to sustain an ordinance, in effect legislating out of existence an existing legal business. . . . The fact that the present ordinance allows a grace of three years does not affect this general principle of Law." (Emphasis added) (53 D.&C. at 385)."

\textsuperscript{79}. 390 Pa. 1, 133 A.2d 542 (1958).

\textsuperscript{80}. 11 N.J. 144, 93 A.2d 362 (1952).
tion of general ground advertising signs was held to be outside the scope of power granted to the municipality by the enabling act, and hence ultra-vires.

In 1949 Corpus Christi, Texas, amended its zoning ordinance to thereafter require certain specifically enumerated non-conforming uses to be discontinued by 1950. The City, acting in pursuance of the amendment, attempted to enjoin the defendant from operating a non-conforming junk yard in a light industrial area. The Supreme Court of Texas in *City of Corpus Christi v. Allen*, 81 held the amendment unconstitutional reasoning that the use did not present any threat of harm to the public health, safety or morals, and that the cost of relocating the junk yard constituted an unconstitutional taking of property under the state constitution. 82 This case is often cited as authority for the proposition that Texas has repudiated the amortization theory. 83 However, one should not overlook the final sentence of the opinion, where it was said:

> Our conclusion is not to be construed as a holding that the ordinance in question may not, under other circumstances be invoked to terminate a non-conforming use, not a nuisance nor injurious to the public health, morals, safety or welfare. 84

In *Caruthers v. Board of Adjustment of the City of Bunker Hill Village*, 85 the Court of Civil Appeals of Texas relied on *Corpus Christi* and upheld a zoning ordinance establishing minimum building site area requirements. In dicta, the court left open the constitutionality of amortization, saying:

> We do not wish to be understood as implying that the prior existence of a non-conforming use is not a factor of great weight. The fact that most zoning ordinances permit the continuance of such uses constitutes widespread legislative recognition, we think, of the importance to be given such a

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81. 152 Tex 137, 254 S.W.2d 759 (1953); The fact that the junk yard was located in a light industrial area may have influenced the Court, and a commentator on this decision has said that its “emphasis is found on the degree of difference between the use whose termination is sought and the characteristic use permitted in the neighborhood.” Williams, *Zoning and Planning Notes*, 68 AMER. CITY 155, 163 (May 1953). A writer commenting on the recent trend of decisions throughout the United States has predicted that Texas would approve the amortization theory subject to the test of reasonableness. Note, 7 BAYLOR L. REV. 73 (1955).

82. TEX. CONS. art. I, § 17.

83. 42 A.L.R.2d 1146, 1150.

84. 254 S.W.2d 759, 761 (1953).

85. 290 S.W.2d 340 (1956).
use in balancing private against public equities. Undoubtedly in many situations a prior existing non-conforming use may very well constitute the deciding element. But this is still somewhat short of saying that a prior existing use is in every case alone and without more to be given controlling effect. (Emphasis supplied)\textsuperscript{86}

It has been said that Iowa can also be considered a member of the camp opposing amortization,\textsuperscript{87} because of the decision of the state Supreme Court in \textit{Stover McCray System v. City of Des Moines}.\textsuperscript{88} The plaintiff in the \textit{Des Moines} case was an outdoor advertising company that proceeded, by a bill in equity, to enjoin the enforcement of a local zoning ordinance. An amendment to the ordinance provided that all free-standing signs were to be removed within a two year amortization period. The Supreme Court of Iowa enjoined enforcement of the ordinance holding that the plaintiff had a vested property right in maintaining the signs which could not be arbitrarily interfered with, and that a two year period of amortization constituted a taking of property without just compensation. But one cannot discount lightly a sentence tacked on to the end of the opinion in which the court said:

\begin{quote}
We do not wish to infer herein that under certain circumstances a municipality could not provide for the termination of non-conforming uses, especially if the period of amortization of the investment was just and reasonable, and the present use was a source of danger to the public health, morals, safety or general welfare of those who have come to be occupants in the surrounding territory.\textsuperscript{89}
\end{quote}

It should be remembered that neither the \textit{Chapman} decision in Ohio nor the \textit{Allen} case in Texas involved an attack on the constitutionality of an amortization scheme enacted as part of a general comprehensive zoning ordinance. Rather, both involved amendments which directed the discontinuance of certain non-conformities within a relatively short period of time. Courts are understandably suspicious of an \textit{ad hoc} approach to zoning which, in many cases, grows out of an attempt to accord special treatment to a favored few, or reflects the state of political and economic power as of a particular instance.

\begin{itemize}
\item \textsuperscript{86} 290 S.W.2d 340, 346 (1956).
\item \textsuperscript{87} 247 Ia. 1313, 78 N.W.2d 843 (1956).
\item \textsuperscript{88} Mandelker, \textit{Prolonging the Non-conforming use: Judicial Restriction of the Power to Zone in Iowa}, 8 DRAKE L. REV. 23 (1958).
\item \textsuperscript{89} 78 N.W.2d 843, 848 (1956).
\end{itemize}
There has been a decided trend of decisions favoring the amortization theory, and the appellate courts of New York, Maryland, Washington, Kansas, California, and a federal court sitting in Florida have upheld its use. In 1958, the Committee on Zoning and Planning in a report to the National Institute of Municipal Law Officers said:

We predict, as we have heretofore in previous reports, that the gradual elimination of non-conforming uses by some amortization plan or program will continue to grow and be accepted by more and more of our states.90

In Standard Oil Co. v. City of Tallahassee,91 the defendant had erected a modern and completely equipped garage and gasoline service station in 1938. By virtue of a subsequently adopted comprehensive zoning ordinance both the use and the building became non-conforming. In 1939 an amendment was enacted to the zoning ordinance requiring that all uses and buildings similar to the plaintiff's be terminated by January 1, 1949. The United States Court of Appeals for the Fifth Circuit upheld the ordinance finding that it constituted a reasonable exercise of the police powers of the municipality. The court relied heavily on the presumed constitutionality of the zoning ordinance and emphasized that the use was taking place, and the building located, near the State Capital of Florida. The court showed little concern over what future use could be made of the service station whose buildings and other equipment, being specialized in nature, had little adaptability.

The United States Supreme Court has refused to review decisions where the amortization theory was attacked on constitutional grounds. It has been predicated, however,92 that review is inevitable, and that the decision will be as significant as Euclid v. Ambler Realty Co., which upheld the constitutionality of zoning ordinances.93 Some writers have ventured to predict that the United States Supreme Court will uphold the constitutionality of amortization:

In view of the fact that a majority of the justices of the Supreme Court are little concerned with private property rights, it follows that if and when this type of provision is presented for their consideration the ordinance will be sustained.94

90. REPORT OF THE COMMITTEE ON ZONING AND PLANNING TO THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS 18 (1958).
91. 183 F.2d 410 (5th Cir. 1950), cert. denied, 340 U.S. 892 (1950).
93. 272 U.S. 365 (1926).
One of the landmark cases upholding the constitutionality of amortization is City of Los Angeles v. Gage. In 1930 defendant Gage constructed a residential structure on one of two contiguous lots legally using the second floor and half of the first as a private living facility. The remainder of the first floor faced the street and was used as an office for a plumbing business. In a garage located to the rear, and on the adjoining lot, Gage erected storage bins and racks in which he kept a supply of pipe. Both the structure and the use when commenced were permitted by the zoning ordinance. Under an ordinance enacted in 1941, the open storage of materials in the district where the Gage operation took place was prohibited, but it did recognize the continuation of non-conforming uses. In 1946 Los Angeles enacted a comprehensive zoning ordinance changing the area where Gage conducted his activity to a multiple residential zone, and provided that all non-conforming uses were to be terminated within five years of the effective date of the ordinance.

The ordinance was upheld as a valid exercise of police power. The court reasoned that where the landowner is given a specified period of time during which he may plan to move to a new location, and where the gain to the public is large when compared to the loss sustained by the owner, there is no taking that would require compensation.

Some light was thrown on the scope of the holding in the Gage case when City of La Mesa v. Tweed & Gambrell Planing Mill was decided two years later. In La Mesa the defendant's predecessor in title in 1936 erected a planing mill in an area zoned industrial. This same

96. Los Angeles, Cal., Municipal Code § 12.23 (B) (1) (a), which formed the basis for the Gage litigation, and which is still in existence, reads as follows: "The non-conforming use of a conforming building or structure may be continued, except that in the "R" zones any non-conforming commercial or industrial use of a residential building or residential accessory building shall be discontinued within five (5) years from June 1, 1946, or five (5) years from the date the use becomes non-conforming, whichever date is later."
97. The Gage case has received extensive approval by commentators. Note, 8 Okl. L. Rev. 239 (1955); Note, 6 West Res. L. Rev. 182 (1955); Note, 53 Mich. L. Rev. 762 (1955); Note, 7 Stan. L. Rev. 409 (1955); and Note, 30 Ind. L. Jour. 521 (1955). It is interesting to note that after the conclusion of this case and the refusal of Mr. Gage to terminate his commercial use, a criminal action was filed against him after which he readily complied and removed his plumbing business to other land within Los Angeles. This information was contained in a speech delivered by the City Solicitor of Los Angeles, California, before a meeting of the Southern California Planning Congress held at Anaheim, California on November 14, 1957.
area was subsequently rezoned residential thus making the mill a non-conforming use of a non-conforming building. The amending ordinance required, in effect, that the mill be eliminated within twenty years after its initial erection, but in no event could it continue operating more than five years after notice to remove was given. When notice was given, the mill had twenty-one years of economic life remaining. The City relied on the *Gage* case, while the defendant argued that it only applied to a non-conforming use of a conforming structure. The court held that the ordinance, as applied to the facts in the case before it was unreasonable and discriminatory, because the period of amortization had no relationship to the value of the non-conforming structure. The *Gage* case was distinguished on the grounds that the public gain there, unlike the present case, exceeded the private loss.

Additional light was thrown on the breath of *Gage* in *McCaslin v. City of Monterey.*99 There the landowner conducted a mining operation on his land. Two basic ordinances were involved: one provided for the continuation of non-conforming buildings for a period not in excess of twenty years from the time of their original construction; a second ordinance provided for a termination of a non-conforming use of land within two years after the ordinance was enacted. In 1956, the second ordinance was amended so as to require the termination of non-conforming uses of land within sixty days after the effective date of the enactment.

The amendment was declared unconstitutional by the court on the basis that it was directed specifically at the landowner, and constituted a taking of property without "due and just compensation." As a makeweight, the court in substituting its judgment for that of the legislative branch, went on to say that the mining operation was beneficial to the community since it cleared land for future subdivision. The court said, in conclusion:

Plaintiff had a vested property right in the use of his property as a quarry of decomposed granite of which he could not be constitutionally deprived without due process of law. The legislation in question does not attempt to regulate plaintiff's operations but prohibits the continuance of the prior non-conforming use altogether. Such legislation can be sustained under the police power only if it is reasonably related to the object sought to be accomplished and is not arbitrary and discriminatory in its application to plaintiff.100

There are two additional cases approving the amortization theory which when considered in detail give some indication of what the courts will look for in reviewing amortization provisions. *Grant v. Mayor and City Council of Baltimore*,\(^{101}\) involved an ordinance providing for the removal of outdoor advertising signs from a residential district within five years of the date on which they become non-conforming. The plaintiff advertising company sought to restrain enforcement of the ordinance which effected seventy-eight signs with a gross annual revenue totaling approximately $45,000.00. Witnesses testified that the signs were unsightly, cause a depreciation of property values, and brought discomfort to the neighborhood. The court, in an exhaustive opinion, upheld the ordinance as a reasonable exercise of the police powers of the municipality. The court went on to review in great detail the assumption made by early zoners that non-conformities would gradually disappear. The court concluded that here was a need for the early elimination of the signs and that reliance on the law of nuisance and eminent domain was impractical. The language of the court, however, suggests that the signs did in fact constitute a nuisance:

> In a neighborhood of homes, such commercial intrusions are offenses to the sight and obnoxious to ordinary, reasonable persons who may own or occupy those homes. Because of the serious aversion to such signs and billboards, they substantially and materially annoy and disturb the occupants and interfere with the comfortable enjoyment of their homes.\(^{102}\)

The court did recognize a fact peculiar to advertising signs, which are often placed on steep grades or narrow strips of land, when it said:

> If the ordinance imposed such restrictions that the land could not be used for any reasonable purpose, it would, of course, be invalid as to it.\(^{103}\)

New York approved the amortization theory by a process of judicial evolution. In *People v. Miller*,\(^ {104}\) the defendant, as a hobby, kept pigeons in the back yard of his home in a residential area. He was convicted for violation of a zoning ordinance subsequently enacted which prohibited the keeping of pigeons in the district. The conviction was affirmed, with the court holding—as did the California

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courts in the case discussed earlier—that a zoning ordinance may constitutionally require the termination of a non-conforming use if the loss to the owner is relatively slight and insubstantial as compared to the gain experienced by the public. Further, the court pointed out, an inconsequential use such as the harboring of pigeons did not constitute a "vested right" which was considered to be an essential prerequisite for protecting a non-conforming use. 105

Following the Müller decision, the Court of Appeals of New York in 1958 placed that State in the column approving amortization by its decision in Harbison v. City of Buffalo. 106 In 1924 Harbison purchased a lot abutting on an unpaved street in Buffalo, erected a wooden structure measuring thirty feet by forty feet on the land, and opened a junk yard. In 1926 the City enacted a comprehensive zoning ordinance making the area in which the lot was located residential. An amendment passed in 1953 provided that the use of land as a junk yard was to terminate within three years. 107 The City notified Harbison in 1957 that he was to terminate the use, and renewal of his license to operate the junk yard was refused. The lower court in mandamus proceedings directed renewal of the license, and the City appealed relying on the amortization provision of the ordinance.

Four members of the Court of Appeals voted for reversal while three of the Justices dissented. The majority in reversing and remanding held that a municipality may terminate a non-conforming use if the owner is permitted to retain the non-conformity for a period of time sufficiently long to allow the recouping of his investment. Two members of the majority relied on the Müller decision. The opinion emphasized that the constitutionality of the ordinance would depend upon the period allowed for amortization. In remanding the case, the court directed the trial court to consider the following factors in determining whether the amortization period was reasonable:

105. After the Müller case, a commentator said that in New York the "size of the investment is primary criterion" in determining if the non-conformity can be terminated. Williams, 68 AMER. CITY 155, 163 (May, 1953).

106. 4 N.Y.2d 553, 152 N.E.2d 42 (1958).

107. This amendment, contained in Section 18 of Chapter LXX of the Ordinances of the City of Buffalo, reads as follows: "§ 18. Non-conforming uses and buildings. Continuing existing uses: Except as provided in this section, any non-conforming use of any building, structure, land or premises may be continued. Provided, however, that on premises situate in any "R" district each use which is not a conforming use in the "R5" district and which falls into one of the categories hereinafter enumerated shall cease or shall be changed to a conforming use within 3 years from the effective date of this amended chapter. The requirements of this subdivision for the termination of non-conforming uses shall apply in each of the following cases:

... (d) Any junk yard, auto wrecking or dismantling establishment."
1. Nature of the surrounding neighborhood;
2. Value and condition of improvements on the premises;
3. Cost of and availability of an area to which the use could be moved.\textsuperscript{108}

The majority made a clear distinction between a non-conforming use and a non-conforming structure or building, indicating that the amortization theory was in their opinion an essential tool to planning in an ever changing community:

To enunciate a contrary rule would mean that the use of land for such purposes as a tennis court, an open air skating rink, a junk yard or a parking lot—readily transferable to another site—at the date of the enactment of the zoning ordinance vests the owner thereof with the right to utilize the land in that manner in perpetuity, regardless of changes in the neighborhood over the course of time.\textsuperscript{109}

Though two separate opinions constitute the majority, it can be said that New York courts have approved the amortization theory, and this decision has been favorably reviewed by writers and commentators.\textsuperscript{110}

Three judges vigorously dissented and painstakingly evaluated the underlying theory as well as the means of implementing amortization. Initially, they felt that the majority failed to keep separate the theories of police power and eminent domain. Under the amortization theory, the dissenters said, we are in effect carrying out a redevelopment program which should be predicated on the exercise of the power of eminent domain. In addition, it was said that no prin-

\textsuperscript{108} Upon remand, the lower court held a hearing at which evidence was taken and the following facts established: There were two wooden buildings and a shed on the premises, and a permanent concrete pad with a drain and catch basin. Real estate experts testified that the buildings and other structures were worth $10,747.00, while the land itself was worth $5,347.00. The only other suitable site within the general vicinity to which the junk yard could be moved would cost $32,000.00, and the overall cost of the move to Harbison would be in excess of $20,000.00. As to the nature of the neighborhood, the court found that a large mercantile area and storage area for concrete blocks were located within 100 to 300 yards of the junk yard. Based on these facts, the court held the ordinance as applied unconstitutional. Note, 44 Cor. L. Quar. 450 (1959). In a letter, City of Buffalo Corporate Counsel Anthony Manguso indicated that no appeal would be taken from this determination.

\textsuperscript{109} 4 N.Y.2d 553, 562, 152 N.E.2d 42, 47 (1958).

\textsuperscript{110} Note, 44 CORNELL L. Q. 450 (1959); Note, 30 MISS. L. JOUR. 210 (1959); Anderson, Amortization of Non-Conforming Uses - A Preliminary appraisal of Harbison v. City of Buffalo, 10 SYR. L. REV. 44 (1959); Note 23 ALB. L. REV. 181 (1959); Note, 4 S.D. L. REV. 180 (1959).
ciple was available for the application of the ordinance, and that the
same amortization period applied to all structures and uses regard-
less of the nature of their construction or the amount of the invest-
ment. With a freedom of expression often available only to dissenters,
they went on to raise a question that deserves consideration by those
interested in the development of new communities, as well as the pres-
ervation of existing economic resources in saying:

Moreover, this theory, if it were seriously advanced, would
imply that the owner should not keep up his property by
making necessary replacements to restore against the rav-
ages of time. Such replacements would be money thrown
away. The amortization theory would thus encourage own-
ers of non-conforming uses to allow them to decay and be-
come slums.111

In Spurgeon v. Board of Commissioners of Shawnee
County,112 the plaintiff owned and operated a junk yard which constituted a non-
conforming use. By virtue of subsequent amendments to the zoning
ordinance, it was to be terminated within two years. The Supreme
Court of Kansas held that requiring the discontinuance of a non-
conforming use within two years, based on the facts, was not an un-
reasonable exercise of the police powers. The court, sub silento, re-
versed a decision rendered in 1935 which purported to give perpetual
protection to all non-conformities.113

The most recent decision involving amortization in the appellate
courts is City of Seattle v. Martin.114 The defendant Martin, had oc-
cupied the land for nine years, on a month to month tenancy, as a
repair site for construction vehicles before it was zoned residential.
The defendant was given one year in which to terminate his use. The
Supreme Court of Washington affirmed the defendant’s conviction
for violation of the ordinance reaffirming the principle that the con-
stitutionality of amortization ordinances would rest on whether the
significance of the hardship to the landowner is more compelling, or
whether it is reasonably overbalanced by the benefit which the pub-
lic would realize by termination. The court found that defendant
realized no substantial hardship from enforcement of the ordinance
because no structures were involved, the tenancy was on a month to
month basis, and the junk yard could have been readily relocated. The

114. 54 Wash. 2d 663, 342 p.2d 602 (1959).
court said: "Appellant is not being required to tear down a building or liquidate a large business."

The Seattle ordinance involved in the Martin case limited application of the amortization theory to uses not taking place in a building. Such limitation suggests that the ordinance was motivated by aesthetic considerations. It would be difficult to imagine that a use would become any less or more compatible if it takes place in or outside a building. Noise may be reduced, but smoke and other obnoxious by-products will be present together with a need for parking and other public facilities. In challenging this difference in treatment, counsel for Mr. Martin in his brief in the Supreme Court of Washington said:

A watchmaker in a $400.00 building could continue. A used car lot or a parking lot with no office would have to stop. If they had a $100.00 office building perhaps they could continue. Such distinctions are not reasonable.

With the exception of the Grant and the Standard Oil Co. cases the litigation involved non-conforming uses with relatively little or no investment in structures or buildings.

**EVALUATION OF THE THEORY AND PROPOSED ALTERNATIVES**

The regulation and control of land use in America has become a matter of increasing concern to every individual even remotely aware of "urban sprawl". The problems facing professional planners, public officials, and civic groups who are attempting to correct the deleterious results of unguided, and perhaps at times reckless, urban growth are complex and many. Those individuals even remotely associated with the problems gripping our cities realize that the counterattack will involve many tools and techniques: comprehensive planning, urban renewal and redevelopment, zoning and land use control, training of a hard core of professional planners and ad-

115. 54 Wash. 2d 663, 666, 342 p.2d 602, 604 (1959).

"In the Martin Case it (Washington Supreme Court) allows a taking of rights—if not property in the strict sense, at least a use of property—where no compensation is made. Whatever be the policy result desired, would it not be better that our court clearly articulate its policy reasoning and at least compensate a property owner for a taking of his rights."
ministrators, and, most significantly, an aware, sympathetic, and recep-tive citizenry.

The elimination of non-conformities is one aspect of this total effort, and the importance of elimination varies with both the nature of the community and the particular non-conformity. The need to eliminate non-conformities has at times been viewed with urgency. An early advocate of the amortization theory said:

Professional planners and city officials now recognize . . . . that the fundamental problem facing zoning is the inability to eliminate the non-conforming use.117

Whether elimination deserves such priority is doubtful, and there is certainly reason for believing that too much reliance is being placed on elimination merely for the sake of elimination.

There are three reasons commonly advanced to support adoption of ordinances embodying amortization provisions:

1. A non-conformity, during the period when it enjoys such status, is in a monopolistic position which should generate extraordinary returns to compensate any losses possibly sustained by virtue of elimination;118

2. During the amortization period, the original investment in the non-conformity may be recouped, and the owner can make plans for relocating the non-conformity;119

3. Where a non-conforming use of land not involving a building or structure must be terminated, the detriment suffered by the owner will in most cases be small and the gain to the public substantial.120

A. Effectiveness of Amortization as a Tool of Planning:

1. Period of Amortization: Professional planners and public officials frequently assume that a non-conformity must be eliminated at the earliest possible date. Where a non-conforming use of land is involved, the period provided for amortization is relatively short and ranges from one to three years. However, elimination of non-conforming structures is ordinarily provided for over a period ranging from ten to fifty years and in certain instances to the "usable

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118. 102 U. PA. L. REV. 91, 94 (1953).
119. Mandelker, op. cit. note 83, at 23.
120. Note, 2 U.C.L.A. L. REV. 295, 297 (1955); People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1953), gave judicial approval to this approach. It is developed in greater detail by Crolly, How to Get Rid of Non-conforming Uses, 68 AMER. CITY 106 (November, 1952).
life of the building”. There is a genuine basis for questioning the effectiveness of the theory where such long periods for elimination are contemplated. One planner has observed that amortization is ineffective where the elimination period exceeds ten years. A long amortization period suggests that the harmful impact of the non-conformity is more fictional than real. In questioning amortization schemes requiring the passage of several decades before a non-conformity can be eliminated, another writer said:

Unfortunately, the normal period for amortization is so long that the real determination is left to succeeding generations unless the owner voluntarily abandons his business. When amortization is fixed for a period of 10 to 20 years, we are not resolving the problem; we are avoiding it.

Long amortization periods may bring on a solidification of the future growth of the community and results in a static, self-satisfied planning situation. To some extent it is arbitrary soothsaying for anyone to contend that at a point twenty years or thirty years hence, any particular structure or building should be eliminated.

2. Economics of Amortization: There is reason for being concerned about the economic waste that may result from compliance with the amortization provisions of a zoning ordinance. The answer, equally speculative, is a general belief that effective planning should, over the long term, benefit the entire community. There is present the hidden fear that a building subject to amortization will become vacant long in advance of the established termination date. A tenant may be reluctant to lease such a structure, even for a short period of time, if an adequate supply of conforming buildings exist in another part of the community. A vacated structure quickly becomes a hazard to the community and often tends to aggravate an already deteriorating area. In addition, the owner of a non-conforming building, scheduled for elimination because of an amortization provision, would be naturally reluctant to undertake necessary expenditures to improve and maintain the structure.

However, there is no reason to think that a municipality could not protect itself by code enforcement or reliance on the law of nuisance. This may actually be a means of accelerating the termination date.

123. The three dissenting judges in Harbison v. City of Buffalo, 4 N.Y. 2d 553, 571, 152 N.E.2d 42, 54 (1958) expressed concern for such a possibility.
inasmuch as the law of nuisance is an effective means for abolishing a non-conformity without compensation.\textsuperscript{124}

3. \textit{Administration}: It is an elementary principle of municipal government that the effectiveness of a zoning ordinance can be easily neutralized unless capable personnel are recruited to administer it through a well organized department within the local government. Amortization provisions, especially those proposed in recent years, are complex and require continuous oversight by the administrator.

Many large cities have professionally trained employees in departments assigned the responsibility for enforcing zoning ordinances. They are insulated from a host of formal and informal pressures that tend to impede and at times subtly coerce officials in the smaller units of government. Amortization ordinances will require a high degree of expertise on the part of the zoning staff. Non-conformities must be identified, observed, and definite termination dates established and enforced. It is this latter responsibility that will probably prove to be the pitfall for amortization in certain municipalities. There is a certain repugnance to requiring a use which is not a nuisance to be terminated or a building which does not pose an obvious or clear threat to the public health and safety to be removed.

Writers have pessimistically viewed effective enforcement of amortization provisions. One has warned:

The greatest danger is that amortization provisions will become 'dead letters'. The difficulties of enforcement, particularly in smaller cities, make it unlikely that many non-conforming uses will be enjoined at the end of the amortization period.\textsuperscript{125}

Such fears are not in themselves a ground for rejecting the earliest possible termination of non-conformities. Yet, it is always a matter of concern that those charged with the responsibility of enforcing any law are reluctant to discharge their responsibility. One possible inference is that such officials feel the law to be unjustly harsh, or they lack belief in its usefulness and necessity.

B. \textit{Legality and Reality}

1. \textit{Amortization—Definition}: Only ten years ago the zoning panel of the National Institute of Municipal Law Officers expressed strong

\textsuperscript{124} Note, 23 \textsc{Albany L. Rev.} 181 (1959).

\textsuperscript{125} \textsc{Horack & Val Nolan, Land Use Controls} at 162-163 (West Publishing Co. 1955).
doubt as to the constitutionality of amortization. One of the more
distinguished members of the panel when asked for his opinion said:

Mr. Yokley: I am frank to state, Sir, on the basis of the de-
cisions I have read I do not believe your provisions in your
ordinance could be sustained, unless there was specific statu-
tory authorization for that specific type of thing, and even
then I think that the statute would be questionable.\[126\]

Now, however, the trend of decisions is clearly in favor of approving
the amortization theory as a tool necessary for orderly community
development. There is little, if any, sustained and organized oppo-
sition to it. There was never any really effective and determined
effort by the propertied interests to counter amortization.

The essence of the amortization theory, so far as the question of
constitutionality is concerned, is as follows:

one can maintain a non-conforming use, building, or structure until
such time as the non-conformity no longer has economic value. The
period is calculated by measuring the time required for depreciating
such an item as a cost of doing business, thereby permitting the
owner to recoup his investment. This is the accountant's treatment of
depreciation and is computed in terms of investment in the property,
and not in terms of useful life or the ability to generate economic gain.
Use of the word amortization in zoning ordinance is inaccurate, for
it has been defined as follows:

In its modern sense, amortization is the operation of paying
off bonds, stock, a mortgage, or other indebtedness, com-
monly of a state or corporation, by installments, or by a
sinking fund.\[127\]

From this definition it can be seen that it would be more accurate to
use the word "depreciation". It has been recommended that the word
"liquidate" be used as a substitute for amortization.\[128\]

The amortization theory is in essence synonymous with the term
"theoretical depreciation" which is defined as follows:

\[126\] National Institute of Municipal Law Officers, Municipalities and
The Law in Action 163 (1950). Seven years later the National Institute of
Municipal Law Officers dispelled all doubt and said: "The policy of the law is the
gradual elimination of non-conforming uses . . . and amortization is a reasonable
exercise of police powers." Rhyne, Municipal Law § 32-33 (1957). The amorti-
zation theory is now generally included in the compilations of model zoning
ordinance provisions that are utilized by local units of government in preparing
their enactments. Matthews, Drafting Municipal Ordinances § 5.46 (Callayhan
and Co. 1958).


\[128\] Note, 6 West Res. L. Rev. 182 (1955).
Theoretical Depreciation is the amount of depreciation calculated for a property by the mechanical application of some theoretical method. Accountants, without expert knowledge of either the property or the service characteristics of its units, often determine theoretical depreciation by using average life tables. In so doing their object is not one of valuation but one of amortizing a prepaid expense.\textsuperscript{129}

Theoretical depreciation does not necessarily include the useful life inherent in the asset, but is similar to that adopted by the Internal Revenue Service.\textsuperscript{130} Amortization or theoretical depreciation when applied to any particular non-conformity, therefore, does not allow for the fact that, at the end of the amortization or depreciation period the non-conformity may still have a useful life or the capacity to generate economic gain.

A term more realistically reflecting the actual economic situation at the end of the amortization period is "Actual Depreciation" which has been defined as follows:

\textit{Actual Depreciation} is the true loss of value of property units during service as contrasted with depreciation calculated by some assumed rate at which the property units lose value with increase of age. Actual depreciation can be determined correctly only by competent engineering valuation experts, who personally examine the property and who form sound judgments of their depreciation by applying correctly the principles of depreciation losses of value after careful consideration of the facts bearing on depreciation in each particular case.\textsuperscript{131} (Emphasis supplied)

Amortization provisions in zoning ordinances usually do not contain the flexibility to allow for the individualized treatment of property that actual depreciation requires. The ordinances for the most part provide the same amortization period for all property of a certain general nature in broad inclusive categories. The theory assumes that at the end of the amortization period the property has no remaining economic life or value. Yet, it is quite conceivable that a building or structure, though totally depreciated so far as the accountants and

\textsuperscript{129} Wenfrey, \textit{Depreciation of Group Properties}, 41 IOWA ENGINEERING EXPERIMENTATION STATION BULLETIN #115 No. 1, at 11 (1942).

\textsuperscript{130} Int. Rev. Code of 1954, § 1167(b); Int. Rev. Code Reg. § 1.167(b).

\textsuperscript{131} Wenfrey, op. cit. supra Note 129, at 11. For a relatively brief discussion of the underlying theory of depreciation as used by the Internal Revenue Service, and its persistent shift reflecting national economic policy, see Terborgh, \textit{Realistic Depreciation Policy}, MACHINERY AND ALLIED PRODUCTS INSTITUTE at 48-58 (1954).
tax officials are concerned, may have economic value and still be capable of producing income. Although the practical affects of the theoretical approach to amortization has not been of concern to the courts or commentators, it is difficult to deny that an economic value or income potential may still be present in the non-conformity even though the amortization period provided for in the ordinance has expired.

The amortization period often bears no relationship to the nature of the non-conformity. It has been said that the common meaning of the word amortization has become so distorted as to be meaningless, and is little more than an "empty catch phrase".\textsuperscript{132}

2. \textit{Exclusion of Non-Conformities from Entire Municipality}: In approving the amortization theory, the courts have found comfort in the fact that the owner could relocate. The court in \textit{City of Los Angeles v. Gage}, for example, said:

The ordinance does not prevent the operation of defendants' business; it merely restricts its location. Discontinuance of the non-conforming use requires only that Gage move his plumbing business to property that is zoned for it.\textsuperscript{133}

None of the cases reviewed approving the amortization theory involved a total restriction against a relocation of the non-conformity anywhere within the municipality. Though some doubt has been expressed as to the constitutionality of a provision totally excluding a non-conformity from a municipality thereby preventing relocation, at least one observer predicts that such a provision would be approved by the courts.\textsuperscript{134} It is difficult, however, to generalize on this matter without taking the following factors into consideration:

a. Size and character of the municipality;

b. Ability to relocate and operate the non-conformity in another municipality in the area;

c. Nature and incompatibility of the particular non-conformity. From a consideration of these factors the court might determine that in a particular case, total exclusion, or prohibition against relocation, is a reasonable exercise of the police power and, therefore, constitutional.

3. \textit{No Other Available Use Remaining}: Situations can be imagined where no other use, structure or building could be economically commenced or erected except one that constitutes a non-conformity. In

\begin{itemize}
\item \textsuperscript{132} Note, 23 Albany L. Rev. 181 (1959).
\item \textsuperscript{133} 127 Cal. App.2d 442, 447, 274 p.2d 34, 44 (1954).
\item \textsuperscript{134} Messer, Non-Conforming Uses, Municipalities and the Law in Action 374 (1951).
\end{itemize}
Grant v. Mayor and City Council, the Maryland Court of Appeals after approving an ordinance compelling the elimination of billboards said:

If the ordinance imposed such restrictions that the land could not be used for any reasonable purpose, it would, of course, be invalid as to it.135

C. Proposed Alternatives; Performance Standards: One of the more obvious disadvantages to the amortization theory is that it eliminates a going enterprise that may in fact be providing a necessary service and employing individuals that may not be readily re-employed. There is the case of a small non-conforming grocery store serving a residential area. Though perhaps by day it may suggest a disharmonious land use, by night it provides help to the housewife who suddenly becomes aware that she has a short supply of bread or milk. Such an activity may be both desirable and necessary within an area. But such a sympathetic approach cannot ignore the fact that this same grocery store may contribute to parking problems, have lights that glare into adjoining homes, be unsightly, and provide a haven for nocturnal meetings of neighborhood juveniles.136 The same ambivalent position could be taken about a light industrial plant or a warehouse constituting a non-conformity.

One of the solutions recommended, as a means of escaping from the horns of the dilemma posed, is the adoption of performance standards.137 Under this approach, again returning to the corner grocery, the municipality would require off-street parking facilities, a redesigned front, and other useful adaptations. There is no genuine disagreement as to what type of modifications might be necessary in order to make a grocery store a compatible use in a residential area.

135. 129 A.2d 363, 373 (1957). Messer, in Non-Conforming Uses, Municipalities and the Law in Action 374 (1951) said the following:

"Of course, there might be instances in which the property the use of which is sought to be discontinued cannot be adopted to any use permitted under the provisions of the ordinance relating to the particular district, and in such cases undoubtedly the court would hold the discontinuance provision to be unreasonable as applied to particular property."


137. Horack, Performance Standards in Zoning, Planning 153 (1952); Anderson, Amortization of Non-Conforming Uses—A Preliminary Appraisal of Harbison v. City of Buffalo, 10 Syr. L. Rev. 44 (1959); There has been no appreciable movement towards adopting this alternative to amortization. None of the twenty-five cities surveyed adopted this approach. W. Spanger, in Model Zoning Ordinances (1960), suggests a model amortization scheme for Stanislaus County, California, whereby all non-conforming uses would be involuntarily terminated unless altered so as to be in conformity with strict performance standards.
From the corner grocery store, by a series of graduations, we move to the light industrial facility where the problems of establishing and administering performance standards become more difficult. There is a substantial area of disagreement over such standards.138

Performance standards imply enforcement and governmental oversight that may impose a substantial burden on local officials. To some extent this burden may be lightened by a co-operative citizenry alert to any violations. Great advances have been made in the technological phases of all human endeavor. It is difficult to believe that many of the obnoxious, and at times intolerable, side effects of certain activities cannot be completely negated by performance standards. Great emphasis has been placed on the adoption of performance standards even by those that helped formulate the amortization theory. It was early said that constitutionality of the amortization theory should be considered in light of the feasibility of adopting performance standards.139

D. Establishment and Administration of Flexible Amortization: Most ordinances containing an amortization provision contain a fixed period within which the non-conformity is to terminate. Early ordinances provided nearly uniform periods of amortization while the more sophisticated enactments and proposals of the present decade give consideration to the value, nature of construction, and incompatibility of the non-conformity. Yet none of these ordinances or proposals allow for sufficient flexibility to individualize the amortization period for every particular non-conformity. Few of them allow any discretion to local administrators.

If a flexible procedure is established, it will be necessary for the administration first to identify and establish the value of the non-conformity, and secondly, to prescribe the period within which the non-conformity must terminate. Identification is essentially ministerial and should be completed with little difficulty. The valuation phase of the first step will present greater difficulty. It has been recommended that the valuation be established on the basis of the assessment rolls used for purposes of taxation.140 This approach is questionable inasmuch as local tax assessment rarely reflects the actual value of the property. In a number of municipalities there is a deliberate design on the part of a local taxing body to systematically

138. Williams, Implications of the Franklin Institute Study for Planning and Zoning, 18 JR. AM. INST. OF PLANNERS 181 (1952).
140. BUREAU OF COMMUNITY DEVELOPMENT, PENNSYLVANIA DEPARTMENT OF COMMERCE, PRELIMINARY DRAFT OF PROPOSED PLANNING CODE § 523. (This publication is undated, and is available in the Library of the Graduate School of Public and International Affairs, University of Pittsburgh).
keep real estate assessments at a percentage well below the actual value of the property.\textsuperscript{141} A more accurate approach would be to require a determination of the value of each non-conformity and then to post it in a public office.

Though valuation itself may prove difficult enough, the problems inherent in determining the amortization period once value is established would be even more challenging. The first and uniquely difficult problem would be to determine the amount of discretion that should be vested in the local administrators fixing the period.

It has been recommended that the local official be permitted to exercise his discretion between established maximum and minimum periods.\textsuperscript{142} This would restrict the discretion of the official and allow for tolerable limits within which social and economic forces could move. Another proposal would grant the same local official discretion to fix the amortization period in each particular case based on the facts peculiar to the particular non-conformity in question. This immediately raises the never to be neglected fear of arbitrariness. There may well be some basis for such fear, and the eventual solution may be the establishment of a quasi-judicial body in the municipality to fix amortization periods for non-conformities. In the absence of a grant of discretion, however, it is difficult to imagine how the amortization period can in fact be tailored to coincide with the inherent economic life of the particular non-conformity.

CONCLUSION

There is a clear, though as yet not decisive, movement to approve reasonable legislation requiring the elimination of all non-conformities. The courts are slowly, but persistently, upholding amortization provisions in comprehensive zoning ordinances.

How useful the amortization approach will be to thorough, sound community planning and development is far from certain. The amortization theory can be successfully applied to the elimination of non-structural non-conforming uses. The number of such uses existing in many municipalities is large, and their overall impact on the health, safety, and welfare of the population cannot be ignored.

The success and usefulness of the amortization theory will first be seriously challenged when it comes into conflict with non-conformities involving substantial capital investments. That point has not yet arrived. How significant amortization will be in making large scale

\textsuperscript{141} MCDONALD, AMERICAN CITY GOVERNMENT AND ADMINISTRATION at 438, 444 (Crowell Co. 1951).

\textsuperscript{142} Note, 30 IND. L. J. 521 (1955).
contributions to the future development of our communities should be carefully evaluated. This is not to imply that amortization be ignored or abandoned, but rather to suggest that it be placed in a perspective that will not cause planners to rely on it to the detriment of other, possibly more effective, tools.

From an examination of the judicial decisions dealing with amortization provisions, and various authorities that have advocated and resisted its adoption, it becomes evident that planners have not precisely articulated what they anticipate the theory can and should accomplish.

One detects at times a spirit of elimination for the sake of elimination. Perhaps such enthusiasm can be attributed to the long and at times imponderable obstacles that planners and public officials met in the past when they attempted to eliminate non-conformities.

Planners have not yet sufficiently developed and expounded a sound and systematic philosophy to support the adoption of the amortization theory as a necessary tool for community planning and development. There is a danger that amortization provisions will be constructed and administered so as to treat all non-conformities in a stereotyped routine manner, and that little effort will be expended towards discovering and understanding the total environment in which a particular non-conformity exists. In this regard, emphasis should shift to determining the compatibility of particular non-conformities, and the subsequent elimination of those that are considered to be incompatible and deleterious to the community. This will, of course, require a value judgment in an area where there is little agreement on absolutes and basic premises.143

Until such time as the scope and purpose of the amortization theory are succinctly formulated, it will be difficult for the lawyer to draft amortization provisions meant to do more than merely receive judicial approval. No frame of reference or point of departure has been forthcoming upon which the property owners, lawyers, and planners together with municipal officials can base their action.144

There is a natural tendency after completing any research in an area of the law that is rapidly changing and undergoing significant developments, to synthesize a host of facts and relatively insignificant discoveries into something tangible that anticipates what the law will be in the near future. The temptation to prepare a detailed amortization scheme is great, but the need for restraint is compelling and


clear.\textsuperscript{145} From an analysis of the judicial decisions and writings dealing with amortization one can find a few general guide lines that could form the point of departure for drafting an amortization provision in a zoning ordinance. From among these, the following should be considered:

1. The courts are more receptive to an amortization provision where it is enacted as a part of a general comprehensive zoning ordinance and is not a one-time attempt to eliminate certain undesirable non-conformities;

2. The following distinctions should be kept in mind:
   a. A non-conforming use of a conforming structure or building;
   b. A conforming use of a non-conforming structure or building;
   c. A non-conforming use of land not involving a structure or building; and
   d. A non-conforming use of a non-conforming structure or building.

3. The plan should provide different amortization periods for each of the categories in 2. above, taking into consideration the size of any non-conforming building or structure, especially the cost of construction, as well as the nature of the construction;

4. The amortization scheme should be flexible and permit certain types of non-conformities, not otherwise incompatible with an overall community plan, to continue indefinitely, after a finding by a quasi-judicial body that specific pre-established conditions exist;
   a. The existence of an extraordinary economic hardship; or
   b. The community need for, or desirability of, continuing the non-conformity in any particular situation regardless of economic hardship;

5. There should be provision, finally, for the establishment of a new unit, or utilization of an otherwise adequate and existing unit, within the local government, staffed with professional personnel to administer and provide oversight for any amortization scheme.

\textsuperscript{145} The reasons for this reluctance to be more concrete was succinctly stated by the American Society of Planning Officials, in \textit{Text of a Model Zoning Ordinance} (2d ed., 1960) where at p. 35 the following was said:

"The writers did not choose to include provisions in the model text setting up base period schedules. There is, to begin with, a serious question as to whether any given community will want to resort to what a substantial element of the area will view as a 'radical' measure. There is, further, no general agreement yet as to what constitutes 'proper' amortization bases. The appellate court cases are not yet sufficiently numerous to work a rationale. Examination of zoning ordinances including this feature disclose a wide variation of judgment as to what is reasonable."