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BACKGROUND

Constitutionality of Comprehensive Zoning

Municipal zoning, which has been defined as "the districting of municipalities on the basis of one or both of (a) nature and extent of use, and (b) architectural and structural requirements,"[1] is a relatively new concept in the United States. Although many cities had, prior to the enactment of comprehensive zoning ordinances, regulated the height of buildings, the use of limited areas for certain trades considered to be offensive, and the spacing of buildings,[2] when municipalities attempted to exclude *all* trades or businesses from residential districts, there were many who questioned the constitutionality of such legislative action.[3]

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Any fears as to the validity of comprehensive zoning were put to rest by the land-mark case of *Village of Euclid v. Ambler Realty Company*,[4] decided by the United States Supreme Court in 1926. In this case, the Village of Euclid, Ohio, had zoned for residential use only an area wherein the Ambler Realty Company owned land. The realty company argued that such zoning was unreasonable and arbitrary in that the industrial development of Cleveland had reached the village limits and, thus, the natural and most economical use of the land would be for commercial purposes. In holding that the village had the power to divert the "natural expansion" of such land in order to protect the residential users thereof and that the zoning ordinance could not be said to be so clearly unreasonable and arbitrary as to have no substantial relation to the public health, safety, morals, or general welfare, the Court firmly established the constitutionality of the principle of comprehensive zoning.[5] The Court ob-

1. 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 7.00 (1958).

2. See 8 MCQUILLIN, MUNICIPAL CORPORATIONS § 25.01 (3d ed. rev. 1957); 1 METZENBAUM, LAW OF ZONING 1-11 (2d ed. 1955).

3. See Pontiac Imp. Co. v. Board of Comm'rs, 104 Ohio St. 447, 135 N.E. 635 (1922); Lucas v. State, 21 Ohio L. Rep. 363 (Ct. App. 1923).

4. 272 U.S. 365 (1926).

5. Prior to the *Ambler Realty Co.* case, the Ohio Supreme Court, in Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925), held that comprehensive zoning was a valid exercise of the police power reasonably related to the preservation of public health and welfare, and that it did not constitute a taking of property without compensation. On the same day, the court held that an ordinance which purported to limit the use of only a small portion of land within

served that while constitutional guarantees are invariable, the scope of their application is sufficiently elastic to meet new and changing conditions. The Supreme Court also stated that if the validity of the legislative classification under the zoning ordinance is clearly debatable, the judgment of the legislature, as reflected by their enactment, must prevail.[6]

While the constitutionality of the general principle of comprehensive zoning is beyond question, the legality of certain types of enactments is still open to question,[7] as is the application of the zoning ordinance to a specific piece of property.[8]

Ohio Municipalities' Authority to Zone

Article XVIII, section 3 of the Ohio Constitution provides that:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general law.

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the municipal limits was not a proper exercise of the police power either with respect to zoning generally, or with respect to the police power as it related to the ability to remove a nuisance. The court found that apartments were not a nuisance per se in an area zoned for single family residences and, thus, the exercise could not be sustained on that ground either. City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842 (1925).

The correct interpretation of these two cases was given in State *ex rel.* Srigley v. Woodworth, 33 Ohio App. 406, 169 N.E. 713 (1929), wherein the court stated that considering the cases together, it seemed that "the Supreme Court sustained a comprehensive city-wide ordinance which prohibits the construction of an apartment building within a residential district, and refuses to sustain an ordinance containing a like exclusion where only a part of the city is zoned unless it can be shown that the block ordinance prevents the erection of a building that would be a nuisance or a place for carrying on a business that would be a nuisance." *Id.* at 409, 169 N.E. at 714.

6. "If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfactory to a majority of the citizens, their recourse is to the ballot — not to the courts." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 393 (1926).

7. For example, the following types of zoning have been held to be invalid: spot zoning (City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842 (1925); Cassel v. Lexington Township Bd. of Zoning Appeals, 163 Ohio St. 340, 127 N.E.2d 11 (1955)); zoning based upon a consideration of supply and demand of the type of business for which the owner wanted to use his particular lot (Henle v. City of Euclid, 97 Ohio App. 258, *appeal dismissed,* 162 Ohio St. 280, 122 N.E.2d 792 (1954)); arbitrary zoning, such as zoning an area for residential purposes where the district was in the middle of the heavy industrial area and part was used as a dump (Loesch Allotment Co. v. Village of Newburg Heights, 100 N.E.2d 543 (Ohio C.P. 1950)), where billboards could not be erected within village limits, when it was zoned for industrial use (Central Outdoor Advertising Co. v. Village of Evendale, 124 N.E.2d 189 (Ohio C.P. 1954)), or where district is zoned for single family use when located on main thoroughfare and in commercial area (State *ex rel.* Stine v. Village of Brook Park, 107 Ohio App. 325, 153 N.E.2d 677 (1958); State *ex rel.* DiCarlo v. Gallo, 80 Ohio L. Abs. 355 (Ct. App. 1957)); aesthetic zoning (Wondrak v. Kelley, 129 Ohio St. 268, 195 N.E. 65 (1935); State *ex rel.* Srigley v. Woodworth, 33 Ohio App. 406, 169 N.E. 713 (1929)).

8. State *ex rel.* Killeen Realty Co. v. City of East Cleveland, 169 Ohio St. 375, 160 N.E.2d 1 (1959); Curtiss v. City of Cleveland, 166 Ohio St. 509, 144 N.E.2d 177 (1957); White

Inasmuch as a zoning ordinance is a police regulation, this provision is self-executing with respect to zoning and, hence, municipal corporations are able to enact zoning laws without the aid of state enabling statutes.[9] While the state legislature has not enacted zoning regulations as such, it has passed statutes which purportedly give municipalities the power to zone[10] and which purport to set forth the procedure which must be followed by municipalities when enacting such measures.[11] The code also provides that:

> Sections 713.06 to 713.12, inclusive, of the Revised Code do not repeal, reduce, or modify any power granted by law or charter to any municipal corporation or the legislative authority thereof, or impair or restrict the power of any municipal corporation under Article XVIII of the Ohio Constitution. . . .[12]

The Ohio Supreme Court has held that this section "yields unrestricted power to municipalities in respect to zoning, if such powers are granted by the municipal charter."[13] Thus, since the constitution gives municipalities the power to adopt police regulations "not in conflict with general law," and the "general law" authorizes the municipalities to exercise unrestricted power with respect to zoning if their charter so provides, there can be no conflict between the two.[14] Under this view it would appear that the state statutes relating to zoning are completely superfluous with respect to charter municipalities.[15] Only if the General Assembly should enact substantive zoning regulations of general application and only if the municipal zoning ordinance should conflict with such state statutes, would the state enactment have the effect of limiting the charter-municipality's power to zone.[16]

Since zoning legislation is an exercise of the power to adopt police regulations, it is subject to the limitation inherent in all ordinances founded upon such basis, *i.e.,* its exercise must be reasonably related to

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v. City of Cincinnati, 101 Ohio App. 160, 138 N.E.2d 412 (1956); State *ex rel.* Rosenthal v. Bedford, 74 Ohio L. Abs. 425 (Ct. App. 1956); State *ex rel.* Euverard v. Miller, 98 Ohio App. 283, 129 N.E.2d 209 (1954); State *ex rel.* Gaddis v. City of Oakwood, 49 N.E.2d 956 (Ohio Ct. App. 1942).

9. Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925).

10. OHIO REV. CODE § 713.06.

11. OHIO REV. CODE § 713.12.

12. OHIO REV. CODE § 713.14 (Supp. 1960).

13. Bauman v. State *ex rel.* Underwood, 122 Ohio St. 270, 171 N.E. 336 (1930).

14. *Ibid.*

15. State *ex rel.* Fairmount Center Co. v. Arnold, 138 Ohio St. 252, 34 N.E.2d 777 (1941), noted this distinction. In Morris v. Roseman, 118 N.E.2d 429 (Ohio Ct. App. 1954), the court held that the non-charter municipality could likewise disregard the state statutes purporting to lay down rules with respect to the procedure for passing a zoning ordinance. However, this case was reversed. 162 Ohio St. 447, 123 N.E.2d 419 (1954).

16. It is urged that the same rule applies to non-charter municipalities also. For a further discussion of this point see notes 64-68 *infra* and accompanying text.

the public health, safety, morals, or general welfare.[17] In addition, since zoning is a limitation on an individual's right to use his property as he sees fit, zoning laws must be such that the good to the public outweighs the detriment to the individual's rights.[18] In accordance with the principle set forth in *Village of Euclid v. Ambler Realty Company,* the courts are prone to abide by the judgment of the legislative body in this respect if the question is at all debatable.[19]

Uses Not Complying with Zoning Ordinance

Because of the harsh nature of zoning ordinances as applied to certain pieces of property, provision is usually made to allow within a district uses other than those specifically set forth. These variations from the zoning law differ in nature, and the distinction is of vital importance in determining the power of a municipality to remove nonconforming uses. Therefore, the classification of noncomplying uses will be set forth briefly.

Exceptions

Many times the municipal zoning ordinance specifically allows a property owner to use his property in a manner other than that provided for in a given district if certain stated conditions exist. This type of use is called an exception. In the strict sense of the word, this is not a noncomplying use because such use is provided for in the ordinance. The validity of such exceptions is generally recognized.[20]

Variances

The legislation adopting a plan of zoning usually provides that a board or an official shall hear requests by property owners to use their land in a manner which does not conform to the use provided for in that district. If permission is granted, it is called a variance. Although the granting of such variances is not particularly favored by many courts,[21]

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17. Village of University Heights v. Cleveland Jewish Orphans' Home, 20 F.2d 743 (6th Cir. 1927), *cert. denied,* 275 U.S. 569 (1927).

18. Curtiss v. City of Cleveland, 170 Ohio St. 127, 163 N.E.2d 682 (1959) (syllabus 4).

19. For example, see State *ex rel.* Associated Land & Inv. Corp. v. City of Lyndhurst, 168 Ohio St. 289, 154 N.E.2d 435 (1958), wherein the court said that a legislative determination that traffic conditions in the municipality warranted the inclusion of a requirement that buildings generating traffic provide off-street parking would not be disturbed.

This idea was also expressed in *Pritz v. Messer,* wherein Judge Allen said: "The courts in such cases have no right to determine whether the measures questioned are wise or the best that might have been adopted. The courts cannot hold such laws invalid upon the mere ground of inexpediency. In other words, the question of the reasonableness of this ordinance is one, in the first instance, for the determination of the council which enacted it." 112 Ohio St. 628, 639, 149 N.E. 30, 35 (1925). See also Francisco v. City of Columbus, 31 N.E.2d 236 (Ohio Ct. App. 1937), *appeal dismissed,* 134 Ohio St. 526 (1938).

20. See 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 7.08 (1958).

21. *But see* State *ex rel.* Killeen Realty Co. v. City of East Cleveland, 169 Ohio St. 375, 160 N.E.2d 1 (1959).

the general principle of allowing variances under a zoning ordinance is unquestionably valid.[22]

A variance is to be distinguished from an exception in that the body delegated to pass upon applications for the former has discretionary power to grant or to deny such use as a departure from the precise regulations for a given zone. It is in the nature of an equitable proceeding. Exceptions, on the other hand, are uses other than those prescribed for a particular use district, but they come into operation when certain statutory conditions exist, and, thus, are actually conforming uses within the broad wording of the ordinance.

Nonconforming Uses

A use of property in existence on the effective date of a municipal zoning ordinance, which use does not comply with the statute, is called a nonconforming use. It is generally considered that an ordinance which attempts to eliminate such nonconforming use is unconstitutional on the basis that it is a taking of property without due process of law.[23] A municipality's zoning law, in order to avoid this potential pitfall of unconstitutionality, will ordinarily make provision for the continuation of such nonconforming uses. The degree to which such nonconforming uses may be regulated will be considered in detail in subsequent sections.[24]

It should be noted that the nonconforming use differs from an exception and a variance in that the nonconforming use comes into being solely by virtue of its existence at the time the zoning ordinance became effective, whereas the exception and the variance are noncomplying uses which may arise after the ordinance has been in effect. Furthermore, since under most ordinances the right to continue a nonconforming use arises by virtue of its prior existence, it is in no way dependent upon a grant by some municipal body.

Accessory Uses

An accessory use is one which, although not sanctioned by the letter of the zoning ordinance, is nevertheless allowed to be carried on because it is incident to a conforming use. For example, it has been held that having a dance studio in a home is a proper accessory use in an area zoned for residential purposes only.[25]

22. Furthermore, if a business is permitted to operate as a variance, the municipality can reasonably restrict the days of operation of the business. State *ex rel.* 12501 Superior Corp. v. East Cleveland, 81 Ohio L. Abs. 177 (Ohio Ct. App. 1959).

23. State *ex rel.* Fairmount Center Co. v. Arnold, 138 Ohio St. 259, 34 N.E.2d 777 (1941).

24. See notes 26-75 *infra* and accompanying text.

25. Stewart v. Humphries, 132 N.E.2d 758 (Ohio Ct. App. 1955). The court held that the accessory use was permissible since it came within a city zoning ordinance which allowed accessory uses only if the business did not occupy more than twenty-five per cent of the lot area.

The basic distinction between an accessory use and the other three noncomplying uses mentioned above is that the accessory use is one permitted in conjunction with a conforming use of property, whereas the other three involve the use of property primarily for a noncomplying purpose.

REGULATION OF NONCONFORMING USES

Nonconforming uses, like common-law marriages, are not favorites of the law. Upon reflection, the reason for their disfavored position becomes clear: if the segregation of buildings and uses, which is the function of zoning, is valid because of the beneficial results which this brings to the community, to the extent that such segregation is not carried out, the value of zoning is diminished and the public is thereby harmed. As previously noted, nonconforming uses are allowed to exist merely because of the harshness of, and the supposed constitutional prohibition against, the immediate termination of a use which was legal when the zoning ordinance was enacted. However,

> . . . the rights contemplated by zoning measures to continue nonconforming uses are not perpetual easements. They are not like the rights of patentees to exclude the world from the use of inventions even though the patentees themselves make no use thereof.[26]

Rather, the rights of a nonconforming user are limited, and the clear intent and purpose is to eliminate such nonconforming uses as rapidly as possible.[27] With this in mind, the courts have generally recognized the right of a municipality strictly to regulate these nonconforming uses.

The Requirement of Actual Use

Since the protection afforded is based upon the concept that an existing legal use should not be denied a property owner by the enactment of a zoning ordinance, there must usually be an *actual* nonconforming use in existence on the effective date of the ordinance in order to come within the protection of this rule. The mere contemplation of using the property in a nonconforming manner will not be sufficient,[28] nor will a nonconforming use prior to the enactment of the ordinance, but not in existence on the effective date of the ordinance, qualify.[29] Furthermore, the

26. 8 MCQUILLIN, MUNICIPAL CORPORATIONS § 25.183 (3d ed. rev. 1957).

27. Curtiss v. City of Cleveland, 166 Ohio St. 509, 144 N.E.2d 177 (1957).

28. Ohio State Students Trailer Park Cooperative v. County of Franklin, 123 N.E.2d 542 (Ohio Ct. App. 1953).

29. See State *ex rel.* Turner v. Baumhauer, 234 Ala. 286, 174 So. 514 (1937); City of Everett v. Capitol Motor Transp. Co., 330 Mass. 417, 144 N.E.2d 547 (1953); Whitpain Township v. Bodine, 372 Pa. 509, 94 A.2d 737 (1953). Also, a use established after the effective date of the ordinance will not give rise to a protected nonconforming use. Application of Hepner, 152 N.Y.S.2d 984 (1956).

property owner clearly has the burden of proving that the alleged nonconforming use existed.[30]

Possession of a Permit and "Actual Use"

In most municipalities today, a property owner must obtain a building permit from the municipal authorities before he may proceed to erect a structure on his property. Whether or not an Ohio municipal corporation may, if it so desires, prohibit the construction of a nonconforming building subsequent to the effective date of the zoning ordinance when a permit has been issued prior to such date, is not clear.

In *State ex rel. Fairmount Center Company v. Arnold,*[31] there was dictum in the supreme court's opinion indicating that a municipality could not make its zoning ordinance apply to buildings for which permits had been issued prior to the effective date of the ordinance, even though the permit holder had incurred no expense in reliance upon the permit. However, in *Williams v. Village of Deer Park,*[32] a court of appeals held that a zoning ordinance could be applied to prohibit the construction of a building for which a permit had been issued prior to the ordinance's effective date, provided that the property owner had not incurred large expenses nor proceeded to any considerable degree in the erection of the building in reliance upon the permit. In another case,[33] a second court of appeals held that a permit issued after the adoption of a zoning ordinance but before the effective date of the ordinance could be revoked.

Subsequently, the supreme court, in *Smith v. Juillerat,*[34] held that the fact that money had been expended for preliminary work in connection with the construction of a nonconforming use did not in itself create a nonconforming use when the property was not substantially in use in a nonconforming manner on the effective date of the ordinance. In a later appellate case, however, it was held that where the owner of property had spent over twenty thousand dollars for preliminary plans, excavation, and partial construction, he could not be denied the right to proceed with the construction of a nonconforming trailer park for which he had obtained a permit.[35]

30. Reilly v. Conti, 93 Ohio App. 188, 112 N.E.2d 558 (1952), *aff'd,* 158 Ohio St. 232, 108 N.E.2d 281 (1952).

31. 138 Ohio St. 259, 34 N.E.2d 777 (1941).

32. 78 Ohio App. 231, 69 N.E.2d 536 (1946). The court placed great reliance upon State *ex rel.* Bolce v. Hauser, 111 Ohio St. 402, 145 N.E. 851 (1924), wherein the court, passing upon the right of a municipality to exempt from the operation of its ordinance those who had applied for a building permit, proceeded upon the theory that municipalities could have included the permit holders within the statute. See also Hauser v. State *ex rel.* Erdman, 113 Ohio St. 662, 150 N.E. 42 (1925); Meuser v. Smith, 75 Ohio L. Abs. 161 (C.P. 1955).

33. Cahn v. Guion, 27 Ohio App. 141, 160 N.E. 868 (1927).

34. 161 Ohio St. 424, 119 N.E.2d 611 (1954).

35. Kessler v. Smith, 104 Ohio App. 213, 142 N.E.2d 231 (1957), *motion to certify denied,*

The waters were further muddied by the recent *Curtiss v. City of Cleveland* series of cases.[36] Here, capital had been expended and improvements had been made upon property zoned for commercial use. The property was subsequently zoned for limited residential use. In urging that the amendments to the ordinance were unconstitutional, the plaintiff contended that he was entitled to rely upon the original ordinance, without amendments which would materially increase the restrictions on the use of the land. While the effect of a previously issued permit was not the direct question in issue, the possibility of acquiring a right to a nonconforming use through substantial investments made with respect to a contemplated use of property was involved. When the issue came before the Ohio Supreme Court in 1957, the court, in essence, held that if substantial use had not been made of the property, a nonconforming use was not established.[37] When the case was again before the supreme court in 1959, the majority held that the application of the amended ordinance constituted an unconstitutional taking of property. In a very unsatisfactory opinion, the court did not state that a substantial investment created a right to use property in a nonconforming manner;[38] however, this theory could be inferred from the court's holding that the amended ordinance was unconstitutional.

In view of the above cases, the law is clearly unsettled in Ohio with respect to the relationship between building permits and nonconforming uses. Other states have held that the issuance of a building permit prior to the effective date of a zoning ordinance does not prevent the operation of a zoning ordinance with respect to that property. It would seem that the same rule should prevail in Ohio, in view of the nature of the nonconforming use and the policy of strictly regulating them.[39] At least, a municipality should not be precluded from preventing the protection of a nonconforming use when there has been no substantial investment and partial construction or use of the property in a nonconforming manner. It must be remembered that if a permit were deemed to confer no right to a nonconforming use, the permit holder could still apply for a variance and, if the facts clearly substantiated the justice of his claim, such a variance could then be granted.

Oct. 30, 1957. This case could be interpreted as turning upon the validity of the ordinance as applied, rather than generally.

36. 130 N.E.2d 342 (Ohio Ct. App. 1955), *reversed and remanded,* 166 Ohio St. 509, 144 N.E.2d 177 (1957), *on remand,* 146 N.E.2d 323 (Ohio Ct. App. 1957), *modified and affirmed,* 170 Ohio St. 127, 163 N.E.2d 682 (1959).

37. 166 Ohio St. 509, 144 N.E.2d 177 (1957) (syllabus 3).

38. 170 Ohio St. 127, 163 N.E.2d 682 (1959).

39. See note 27 *supra* and accompanying text.

A Nonconforming Use May Not Be Extended

As has been indicated, the right to continue a nonconforming use is recognized in order to allow a person to use his property in the same manner as it was used prior to the adoption of the zoning ordinance. With this in mind, it is generally recognized that a municipality can restrict, or completely prohibit, the extension of a nonconforming use. This position is buttressed by the policy that nonconforming uses are to be eliminated as rapidly as possible. Thus, if a nonconforming business establishment in a residential district is precluded from expanding such use to new properties, the owner may well be forced to give up the use and move his business to a district zoned for such use.

In line with this thinking, the Ohio Supreme Court, in *State ex rel. City Ice & Fuel Company v. Stegner,*[40] specifically held that a zoning ordinance prohibiting the extension of a nonconforming use, unless approved by the zoning board of appeals, was valid. Similarly, in *Davis v. Miller,*[41] it was held that where a person owned two lots separated by a street, and a nonconforming use had been established on the one lot, the owner could not extend the use to the other piece of property, even though such extension had been contemplated at the time that the zoning ordinance was adopted.

Termination of a Nonconforming Use

A second method of regulating nonconforming uses is to provide that once such use has been terminated or ended, it may not be restored. There are four recognized methods by which a termination of a nonconforming use may be effected: abandonment, non-use or discontinuance, voluntary destruction, and involuntary destruction. While the courts do not always keep these distinctions clear, there is some basis for the categorization.

Abandonment

A leading case in the United States said that the requirements for abandonment are two-fold: an intention to abandon and an overt act, or failure to act, "which carries the implication that the owner neither claims nor retains any interest in the subject matter of the abandonment."[42] If there *is* a distinction between non-use and abandonment, this definition would seem to be improper. An abandonment, properly speaking, takes place when the property is used in a manner which manifestly denies the claim of a nonconforming use. Thus, where a nonconforming piece of

40. 120 Ohio St. 418, 166 N.E. 226 (1929). See also McLandish v. Maumee, 7 Ohio L. Abs. 453 (Ct. App. 1929).

41. 163 Ohio St. 91, 126 N.E.2d 49 (1955).

42. Landay v. Zoning Appeal Board, 173 Md. 460, 470, 196 Atl. 293, 297 (1938).

property has been used for some time in a conforming manner, the nonconforming use has been terminated through an abandonment.[43]

Discontinuance or Non-User

Distinguished from termination by abandonment, which requires an affirmative act, is termination by discontinuance or non-user, which arises through the absence of an overt act. In order for the latter rule to come into operation, there must be a cessation of the nonconforming use for a stated period of time. Ordinances which provide for the termination of a nonconforming use by non-user have been upheld in Ohio.[44]

It should be noted that the *temporary* non-use of the property in a nonconforming manner will not result in a termination. Further, it is in connection with this type of termination that "intent" may become relevant. That is, if the ordinance does not state a period of non-use which will terminate the right to a nonconforming use, then the intent to discontinue such use is material. However, ordinances which state that a given period of non-use in a nonconforming manner will work a termination have been upheld.

Voluntary Destruction

Another manner in which a termination may occur is in the case of the removal or destruction of a prior nonconforming use. In *State ex rel. Cataland v. Birk*,[45] it was held that where a person tore down a nonconforming garage, a new one could not be constructed on the same foundation. This would seem to be a just decision in view of the extraordinary nature of the right to continue a nonconforming use. If such complete reconstruction of the nonconforming use were allowed, such nonconforming use could go on indefinitely.

Involuntary Destruction

Although there are apparently no cases in Ohio directly decided upon this point, it would seem that the municipality could also provide that a nonconforming use which has been destroyed by fire, flood, or other natural forces would be a termination of the nonconforming use and, hence, no right would exist for its reconstruction.[46] The rationale for

43. Termination by abandonment ordinances have been upheld in Ohio. See Curtiss v. City of Cleveland, 166 Ohio St. 509, 144 N.E.2d 177 (1957); Francisco v. City of Columbus, 31 N.E.2d 236 (Ohio Ct. App. 1937), *appeal dismissed*, 134 Ohio St. 526 (1938).

44. In fact, such ordinances are now authorized by state statute. OHIO REV. CODE § 713.15 (Supp. 1960).

45. 125 N.E.2d 748 (Ohio Ct. App. 1953).

46. Such an ordinance was upheld in D'Agostine v. Jaguar Realty Co., 22 N.J. Super. 74, 91 A.2d 500 (1952).

this view is that the right to continue a nonconforming use is based upon the concept that one should not be deprived of a substantial investment which existed prior to the enactment of the zoning ordinance. However, when a building has been destroyed, the reason for allowing the continuation of a prior nonconforming use is not applicable to the reconstruction of the nonconforming use. The investment required to rebuild will be substantially the same, regardless of whether the structure is built in a conforming or a nonconforming manner. Hence, there exists no reason to allow the continuation of this exceptional use.

If, however, the nonconformity is in the use made of the property, rather than in the type of structure involved,[47] the reason for requiring compliance with the zoning laws is less persuasive. Under such circumstances, it is no longer a matter of whether the owner can rebuild a structure similar to that which had previously existed or whether he must build a structure in conformity with the zoning requirements; rather, the issue now becomes whether the owner will be permitted to use the property at all for the same purpose as before the destruction, or whether he will be required to acquire a new piece of property in order to carry on the desired activity. While the reasoning requiring compliance is less persuasive in this situation, it still has validity. When a person acquires a lot in a certain area with the idea of locating a factory thereon and, before construction, the area is zoned for residential use only, the owner may constitutionally be required to purchase a new piece of property to carry out such project. The nonconforming user whose factory has been destroyed by fire is, in essence, in the same position as the individual who, prior to the enactment of the zoning law, purchased land with the idea of building a factory thereon. Since the refusal to allow the construction of the contemplated building in violation of the zoning ordinance is constitutional, it would seem that one desiring to *rebuild* a factory could be similarly restrained.[48]

Degree of Destruction

If the building is less than completely destroyed, either voluntarily or involuntarily, there may be a closer question as to the right of a municipality to consider this to be a termination of the nonconforming use. However, ordinances from other jurisdictions dispensing with a nonconforming use have been upheld when the building has been destroyed in large part,[49] seventy-five per cent destroyed,[50] and when the building has

47. See note 1 *supra* and accompanying text.

48. The analogy is less persuasive when applied to the rebuilding of a commercial business which depends upon personal contact in the neighborhood in which it is situated.

49. *E.g.*, Appeal of Berberian, 351 Pa. 475, 41 A.2d 670 (1945).

50. Navin v. Early, 56 N.Y.S.2d 346 (1945).

been destroyed in excess of fifty per cent of value and sixty per cent of physical proportion.[51] Also, the first *Curtiss v. City of Cleveland* case[52] said that an ordinance which provided that:

> . . . Repairs to building . . . after damage thereto shall not exceed 50 per cent of the valuation of such building unless it is changed to a conforming use, constitutes a valid exercise of the police power of the municipality.[53]

By clear implication, an ordinance which prohibited the restoration of a nonconforming building after less than total destruction would be valid.

Substitution of Nonconforming Uses

Another method of regulating a nonconforming use is by refusing to allow a property owner to substitute one nonconforming use for another. In *State ex rel. Clifton-Highland Company v. City of Lakewood,*[54] the Ohio Supreme Court held that the city could refuse to permit the property owner to substitute a new nonconforming use for an existing nonconforming use. In the *Stegner* case,[55] the court upheld such a regulation even though that ordinance prohibited the substitution of a use of greater conformity than the prior nonconforming use.[56]

In view of the above decisions, it would seem to be logically clear that if a property owner substitutes one nonconforming use for another, he has terminated his right to claim *any* nonconforming use.[57] Such a position is also supported by the general policy relating to nonconforming uses — only uses existing on the effective date of the ordinance are protected, and even these uses are to be terminated as rapidly as possible. In effect, then, the substitution of nonconforming uses is actually a termination of the prior nonconforming use through abandonment.[58]

Protection of Nonconforming Uses

Although disfavored by the law, nonconforming users are not completely without protection. Thus, it is clear that the property and build-

51. Baird v. Bradley, 109 Cal. App. 2d 365, 240 P.2d 1016 (1952).

52. 166 Ohio St. 509, 144 N.E.2d 177 (1957).

53. *Id.* at syllabus 1.

54. 124 Ohio St. 399, 178 N.E. 837 (1931).

55. 120 Ohio St. 418, 166 N.E. 226 (1929).

56. The ordinance under consideration in the *Stegner* case did permit the property owner of a nonconforming use to appeal to the zoning board of appeals for an extension or a substitution of his nonconforming use, but not both.

57. Other jurisdictions have so held. See Dorman v. Baltimore, 187 Md. 678, 51 A.2d 658 (1947); see also Town of Darien v. Webb, 115 Conn. 581, 162 Atl. 690 (1932) (when nonconforming use replaced by other uses, some conforming and others nonconforming, it was held to be an abandonment of the nonconforming use); and Branch v. Powers, 210 Ark. 836, 197 S.W.2d 928 (1946) (court would not permit a nonconforming use to be substituted for a conforming use).

58. See note 42 *supra* and accompanying text.

ings may be maintained and repaired. The usual qualification found in enabling ordinances is that work may be done on a building so long as it does not amount to a "structural alteration."[59] Also, it is clear that the mere conveyance of property to another person should not constitute an abandonment of a nonconforming use,[60] nor should the leasing of property constitute an abandonment.[61] With respect to alterations, what constitutes a "structural alteration" within the meaning of the ordinance is a question of fact.[62]

Section 713.15 and Nonconforming Uses

In 1957, the Ohio General Assembly amended the portion of the code relating to zoning to provide as follows:

> The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enacting a zoning ordinance or amendment thereto, may be continued, although such use does not conform with the provisions of such ordinance or amendment, but if any such nonconforming use is voluntarily discontinued for two years or more, any future use of such land shall be in conformity with sections 713.01 to 713.15, inclusive, of the Revised Code. The legislative authority of a municipal corporation shall provide in any zoning ordinance for the completion, restoration, reconstruction, extension or substitution of nonconforming uses upon such reasonable terms as are set forth in the zoning ordinance.[63]

The precise purpose of this section of the Code is not clear, nor is the validity of this amendment free from doubt.

As has been noted,[64] under the Home Rule Amendment to the Ohio Constitution[65] a municipality has the power to enact such police regulations "as are not in conflict with general law." In order for a conflict to exist within the meaning of this provision, there must be a police regulation which prescribes a rule of conduct for all the citizens of the state, regardless of the political subdivision wherein they reside.[66] Thus, a law of general application which attempts to limit the right of a municipality to perform functions rightly belonging to it is not, under the better view, a "general law" within the purview of article XVIII, section 3

59. See State *ex rel.* Euclid-Doan Bldg. Co. v. Cunningham, 97 Ohio St. 130, 119 N.E. 361 (1918); 8 MCQUILLIN, MUNICIPAL CORPORATIONS § 25.201 (3d ed. rev. 1957).

60. O'Connor v. City of Moscow, 69 Idaho 37, 202 P.2d 401 (1949); Elsinor Property Owners Ass'n, Inc. v. Morwand Homes, Inc., 286 App. Div. 1105, 146 N.Y.S.2d 78 (1955).

61. Dube v. Allman, 333 Ill. App. 538, 77 N.E.2d 855 (1948).

62. See 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 7.07 (1958). Frequently, the ordinance will include percentage limitations with respect to what constitutes a "structural change."

63. OHIO REV. CODE § 713.15 (Supp. 1960).

64. See note 9 *supra* and accompanying text.

65. OHIO CONST. art. XVIII, § 3.

66. Fitzgerald v. City of Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).

of the Ohio Constitution. This thesis, strongly urged by Ellis,[67] is buttressed by the fact that the debates of the constitutional convention[68] reveal that the purpose of the "conflict" provision was to insure the uniform application of state police regulations throughout the state, regardless of the political subdivisions, and not to limit the power of a municipal corporation to enact police measures.[69]

If the above interpretation of the Home Rule Amendment is accepted, then section 713.15 would be invalid, and municipalities would be free to establish their own rules with regard to nonconforming uses and the termination thereof. However, even if this section is valid, its effect would appear to be very limited in scope. Essentially, section 713.15 has three provisions: (1) nonconforming uses must be recognized and protected; (2) if a nonconforming use is "voluntarily discontinued" for two or more years, it may not be restored; and (3) municipalities must provide for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses "upon reasonable terms." Examining each provision, it seems that only the second one is of significance under the present status of zoning law.

With respect to the first provision, under the overwhelming majority view, a prior nonconforming use must be allowed to continue, or else the ordinance runs afoul of the federal constitution.[70] The third provision is also nothing but a restatement of the existing law. That is, inasmuch as the right to zone is based upon the police power of the municipality, *all* ordinances, including those relating to nonconforming uses, must meet the test of "reasonableness" in order to be a valid exercise of that power.[71] Hence, only the second provision is controversial.

It should be noted that the Code says that a termination of a nonconforming use will occur if such use is "voluntarily discontinued" for two years or more. Remembering that a termination by discontinuance is one which relates to a non-user,[72] the only effect of this part of the Code is to provide a two-year standard to be applied in place of any other standard that a municipality might have with respect to termination through non-

67. ELLIS, MUNICIPAL CORPORATIONS IN OHIO § 1.30 (10th ed. Farrell 1955).

68. Constitutional Convention of 1912.

69. See City of Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929); City of Fremont v. Keating, 96 Ohio St. 468, 118 N.E. 114 (1917).

70. See note 23 *supra* and accompanying text.

71. See note 17 *supra* and accompanying text.

72. See note 44 *supra* and accompanying text. It has been held, and properly so, that a termination cannot occur by a city taking a portion of the nonconforming premises. 440 East 102d St. Corp. v. Murlock, 285 N.Y. 298, 34 N.E.2d 329 (1941); Empire City Racing Ass'n v. City of Yonkers, 230 N.Y. Supp. 457, 132 Misc. 816 (1928); Beck v. Zoning Board of Adjustment, 69 Pa. D. & C. 438 (1949). The same result has been reached where part of the nonconforming land was taken by the state through condemnation proceedings. Connor v. Township of Chanhassen, 249 Minn. 205, 81 N.W.2d 789 (1957).

user. Although it is not clear whether the legislature intended to use the word "discontinued" in its technical sense, it is urged that such an interpretation is the proper one. Conceding for the moment that it is desirable to protect persons from losing the right to a nonconforming use through the temporary non-use of property, it would seem that no such need exists where the owner abandons this use.[73] By the same token, one who tears down a nonconforming structure needs no such protection.[74] While a more difficult question is presented where the structure is destroyed by some involuntary act, the better view would uphold the right of a municipality to forbid absolutely the reconstruction of the nonconforming use, rather than be bound by the statutory two year limitation.[75] This interpretation, which would limit the second provision to cases of termination by non-user, is supported by the fact that to hold otherwise would be to give a forced meaning to the word "discontinue," and by the fact that the restoration or the reconstruction of nonconforming uses (which relate to the abandonment or the destruction of nonconforming uses, respectively) is covered by the third provision of 713.15, thereby excluding it from the second provision. The net result is that even if section 713.15 is valid, its scope is extremely limited.[76]

TERMINATION OF NONCONFORMING USES

Retroactive Application of Ordinances

The overwhelming majority view in the United States today is that a zoning ordinance which makes no provision for the continuation of a prior nonconforming use is unconstitutional.[77] This has also been the view of the Ohio courts.[78] However, there are some cases which indicate that it would not be unconstitutional to prohibit all nonconforming uses as long as the benefit to the public is not clearly outweighed by the harm to the property owner.

73. See note 42 *supra* and accompanying text.

74. See note 45 *supra* and accompanying text.

75. See note 46 *supra* and accompanying text.

76. The only case which has interpreted this section has been Curtiss v. City of Cleveland, 146 N.E.2d 323 (Ohio Ct. App. 1957). The court found that the amending ordinance, which provided that nonconforming uses could not be substituted or changed except by permission and at the discretion of the Board of Zoning Appeals, was invalid as being in conflict with section 713.15. This interpretation would seem to be clearly erroneous. The supreme court did not consider this point because it was not included in the journal entry of the court of appeals. 170 Ohio St. 127, 163 N.E.2d 682 (1959).

77. See Acker v. Baldwin, 18 Cal. 2d 341, 115 P.2d 455 (1941); Douglas v. Village of Melrose Park, 389 Ill. 98, 58 N.E.2d 864 (1945); Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 N.W. 86 (1928); Curtiss-Wright Corp. v. Garden City, 85 Misc. 508, 57 N.Y.S.2d 377 (1945); City of Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953).

78. State *ex rel.* Fairmount Center Co. v. Arnold, 138 Ohio St. 259, 34 N.E.2d 777 (1941); City of Toledo v. Miller, 106 Ohio App. 290, 154 N.E.2d 169 (1957).

Thus, in New York, the Court of Appeals upheld a zoning ordinance which prohibited nonconforming uses. The court stated that the enforcement of a zoning regulation against prior nonconforming uses will be valid "where the resulting loss to the owner is relatively slight and insubstantial."[79] Florida[80] and Louisiana[81] have also upheld retroactive zoning laws.

The retroactive application of zoning laws, while shocking at first blush, is not entirely void of merit. All zoning laws are a restriction upon the right of an individual to use his property as he sees fit. However, the mere restriction of this right has not been deemed sufficient to strike down the zoning ordinances to date. Rather, they have been upheld on the basis that under the police power the restriction is reasonable. While "reasonableness" is a nebulous term, some definiteness can be given to it by weighing the private interest restricted and the public benefit contemplated by the regulation. Thus, if the nonconforming use is that of keeping goats in one's yard, it would appear that the public benefit to be derived from removing such use would justify the refusal to recognize the nonconforming use, and still meet the test of "reasonableness." In other cases, where a large financial investment is at stake, even if the right to continue a use were not automatically granted under the nonconforming use doctrine, such use could be continued by means of an exception or a variance. The net result of the retroactive application of zoning laws then would be to eliminate the myriad of small, but bothersome, nonconforming uses presently protected. At the same time, the individual property owner would still have an opportunity to request special consideration in those cases where the zoning law would work a truly disproportionate hardship.

The flaw in this argument is that (1) the right to protection would in most cases be dependent upon the dollar value of the use in question, and (2) the large nonconforming uses, which are the ones that are most detrimental to the public, would in all probability be the uses that would be allowed to continue.

Amortization of Nonconforming Uses

A less drastic, but nonetheless effective manner of terminating nonconforming uses is to provide that such uses must be eliminated within a certain period of time, or at the end of the estimated useful life of the

79. People v. Miller, 304 N.Y. 105, 108, 106 N.E.2d 34, 36 (1952). See also People v. Kesbec, Inc., 281 N.Y. 785, 24 N.E.2d 476 (1939).

80. Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950); State *ex rel.* Skilman v. City of Miami, 101 Fla. 585, 134 So. 541 (1931).

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

structure. This method of resolving the conflict between the municipality and the property owner is growing in popularity.[82] The decisions in a number of states, especially the liberal states of New York and California, indicate that this type of ordinance will be upheld against the contention that it amounts to an unconstitutional taking of property without due process of law.[83] A California appellate court sustained an ordinance requiring the termination of a nonconforming use within five years after the enactment of the zoning law;[84] the California Supreme Court, in dictum, said that such an ordinance did not amount to a taking of property and that as long as the amortization period was reasonable, "a legislative body may well conclude that the beneficial effect on the community . . . by a reasonable amortization plan more than offsets individual losses";[85] and the New York Court of Appeals, in remanding a case for further facts, said that "we cannot say that a legislative body may not in any case, after a consideration of the factors involved, conclude that the termination of a use after a period of time sufficient to allow a property owner an opportunity to amortize his investment and make other plans is a valid method of solving the problem."[86]

Ohio has not yet passed upon a plan of this type. In *Akron v. Chapman*,[87] the Ohio Supreme Court did hold unconstitutional an Akron ordinance which authorized the city council to require the termination of a nonconforming use when, in the opinion of the council, such nonconforming use had existed for a "reasonable" period of time. However, this case should not be deemed to settle the question of whether an ordinance which requires the termination of a nonconforming use within a stated reasonable time, or within the useful life of the property, would be constitutional.

In the *Chapman* case, the owner had used the property in the same manner since 1916 and had acquired a nonconforming use upon the passage of the zoning ordinance in 1922. Then, in January of 1950, the council said that Chapman's property, and only his, had been used in a nonconforming manner for a reasonable period of time and they directed

82. See, *e.g.*, ILL. REV. STAT. ch. 24, § 73-1 (1945); KANSAS GEN. STAT. § 19-2919; VIRGINIA CODE ANNO. § 15-843 (1950).

83. See City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954) (ordinance requiring termination of nonconforming use within five years sustained); Livingston Rock & Gravel Co. v. City of Los Angeles, 43 Cal. 2d 121, 272 P.2d 4 (1954) (dictum); Harbison v. City of Buffalo, 4 N.Y.2d 553, 76 N.Y.S.2d 598 (1958). See also Grant v. Mayor & City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957) (ordinance requiring removal of billboards, which were nonconforming uses in residential zones, within five years of enactment); Spurgeon v. Board of Comm'rs, 181 Kan. 1008, 317 P.2d 798 (1957).

84. City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

85. Livingston Rock & Gravel Co. v. City of Los Angeles, 43 Cal. 2d 121, 272 P.2d 4 (1954) (dictum).

86. Harbison v. City of Buffalo, 4 N.Y.2d 553, 562, 176 N.Y.S.2d 598, 607 (1958).

87. 160 Ohio St. 382, 116 N.E.2d 697 (1953).

that such use terminate by January 1, 1951. Under these circumstances, it is little wonder that the court held Chapman had been deprived of his property rights in an unconstitutional manner.

Perhaps a hint of the court's attitude toward an ordinance requiring the elimination of a nonconforming use may be gleaned from its statement that such a law might be sustained if it were based upon the "gradual elimination of nonconforming uses within a zoned area."[88] The court qualified this statement by adding that such action could be taken only where it would not deprive the owner of a "vested property right." The court went on to define such right as

> . . . not merely the ownership and possession of lands or chattels but the unrestricted right to their use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right.[89]

It is submitted that this definition of "property" is too broad. While the above-quoted passage may properly describe the incidents of ownership, it is not an accurate statement of the property rights which are protected against invasion from any source. If the court's definition correctly described the property rights which are absolutely inviolate, then *all* zoning laws would be unconstitutional. On the other hand, if this definition is to be used only with respect to prior nonconforming uses, then the property rights connected with nonconforming uses must, of necessity, be of a higher order than any other property rights. That would seem to be as incomprehensible as it would be unjustifiable.

In view of the fact situation in the *Chapman* case, the limitations inherent in the court's definition of property rights, and the hint that the "gradual" elimination of nonconforming uses might be valid, it seems fair to conclude that Ohio has not yet passed upon the validity of an ordinance which would require the amortization of a nonconforming use over a reasonable period of time.

Use of Eminent Domain

Another possible method of terminating nonconforming uses is through the exercise of the power of eminent domain. Although a few states have authorized such action,[90] the constitutionality of this method of removing nonconforming uses is not entirely clear, at least in Ohio. While eminent domain does provide compensation for the dispossessed property owner, there would appear to be some question as to whether

88. *Id.* at 386, 116 N.E.2d at 699.

89. *Id.* at 388, 116 N.E.2d at 700.

90. *E.g.*, MICHIGAN STAT. ANNO. § 5.2933(1); MINNESOTA STAT. ANNO. § 462.12.

this would be an expenditure for a public purpose, as required.[91] Ohio has not yet passed upon the use of such power as a method of terminating nonconforming uses; however, the use of eminent domain for purposes of urban redevelopment has been upheld.[92] These holdings might be deemed to be sufficiently analagous to lend support to the proposition that eminent domain is available to Ohio municipalities as a method of removing nonconforming uses.

Because of the red-tape and the expense involved in this type of proceeding, municipalities may not feel that this is a very valuable tool in effecting the purposes of zoning.[93]

Nuisances

Finally, a municipality clearly has the right under its police power to compel the termination of a nonconforming use when it constitutes a nuisance.[94] Although there is no indication that this method has been widely used in Ohio, its potential value should not be overlooked. Whether an ordinance which creates a presumption of a nuisance when a nonconforming use has been partially or totally destroyed or when a nonconforming use has been in existence a certain number of years would stand up under constitutional scrutiny is rather doubtful. It is clear that an activity cannot simply be declared by ordinance to be a nuisance and its removal thereby compelled.[95] Rather, the activity must be a nuisance per se before it can be treated in so arbitrary a manner.[96] However, as the courts become more convinced of the public value derived from zoning and the deleterious effects which can flow from continued nonconforming uses, it is not inconceivable that they would in some future year uphold an ordinance which makes a nonconforming use a statutory nuisance after it has been in existence a certain number of years.

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91. The requirement of a public purpose is requisite for any expenditure of taxpayers' money.

92. State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953).

93. However, some municipal corporation authorities favor this method of removing nonconforming uses. See 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 7.07 (1958).

94. Baird v. Bradley, 109 Cal. App. 2d 365, 240 P.2d 1016 (1952); Perkins v. City of Coral Gables, 57 So. 2d 663 (Fla. 1952). It should be noted that an illegal use cannot give rise to a protected nonconforming use. Gross v. Allan, 57 N.J. Super. 262, 117 A.2d 275 (1955). See also Village of Warrensville Heights v. Cleveland Raceways, Inc., 161 Ohio St. 592, 120 N.E.2d 305 (1954), *dismissing appeal from* 73 Ohio L. Abs. 318 (Ct. App.).

95. Bane v. Township of Pontiac, 343 Mich. 481, 72 N.W.2d 134 (1955); Keenly v. McCarty, 137 Misc. 524, 244 N.Y.S. 63 (1930). Ohio has held that a municipality cannot completely prohibit a legal business merely by calling it a nuisance. See Simon v. City of Cleveland Heights, 46 Ohio App. 234, 188 N.E. 308 (1933); Wolarz v. Village of Cuyahoga Heights, 53 Ohio App. 161, 4 N.E.2d 400 (1936). *A fortiori,* a legal, existing nonconforming use could not be terminated merely by classifying it as a nuisance.

96. *But see* Hadachek v. City of Los Angeles, 239 U.S. 394 (1915).

CONCLUSION

> Zoning is an offspring of urgent urban necessity. Without doubt, sound comprehensive zoning not only contributes but is essential to public health, safety and welfare. Moreover, it is economically desirable and necessary, since it results in the most appropriate and economic use of land within the municipal area.[97]

Accepting this as the starting point, it cannot be doubted that nonconforming uses vitiate the value of zoning ordinances. Although it was once thought that the restrictions placed upon the nonconforming use of land and buildings would lead to their early demise, experience has shown that quite often the opposite is true. Nonconforming uses which are profitable to the property owner will not be voluntarily terminated. Rather, owners will cling to their monopolistic position as long as possible. With this realization in mind, many states have taken steps to hasten the day of bringing all uses within a district to a conforming status. While some of the measures used to accomplish this result are harsh, it is submitted that the ordinances requiring the amortization of a nonconforming use over a reasonable period of time are both constitutionally and equitably sound. This does not constitute a taking of property, because the owner is given a reasonable period to amortize his investment and make other plans. Furthermore, it is a reasonable exercise of police power since such removal of the nonconforming use has a real relationship to the public health, safety and morals. At the same time it is just, in that the property owner is not deprived of the use of his property immediately upon the passage of a zoning ordinance, nor is he allowed perpetually to reap the benefits of a windfall arising from his existing location and the prohibition against similar types of businesses coming into his district.

The use of land has become so critical today that municipalities can no longer sit idly by awaiting the day when the nonconforming user will voluntarily give up his gold mine. Because of this urgency, and keeping in mind the factors set forth above, it is to be hoped that if an amortization ordinance comes before the Ohio Supreme Court, it will not strike down the ordinance on the basis of the *Chapman* case, but will take cognizance of the above considerations and uphold the ordinance as a valid exercise of the municipality's police power.

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97. 8 MCQUILLIN, MUNICIPAL CORPORATIONS § 25.02, at 13 (3d ed. rev. 1957).