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Robert G. Zweigart
University of Kentucky

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ELIMINATING THE NONCONFORMING USE IN KENTUCKY

This note on the Kentucky law of nonconforming uses includes four areas of discussion: (1) when a use is "vested" so as to be entitled to immunity from the zoning restrictions; (2) the constitutional means of immediate termination of these inconsistent uses—abatement of nuisance, condemnation, and public purchase; (3) the traditional restrictions on change and extension of use, alteration and repair, reconstruction, and resumed use after abandonment—designed to "starve" out nonconforming uses; (4) a realistic and equitable theory for amortizing the life of nonconforming uses which will provide assured compensation in return for assured elimination.

Introduction

In 1928, Kentucky followed the Supreme Court of the United States in upholding zoning as a valid exercise of the police power.¹ The Supreme Court had two years earlier in *Village of Euclid v. Ambler Realty Co.*² approved a zoning ordinance which divided an Ohio town into classes of use districts and prohibited incompatible uses within those districts. The *Euclid* decision marked the beginning of an era of judicially-sanctioned use zoning. The object of this theory of zoning is to "foster improvement by confining certain classes of buildings and uses to certain localities without imposing undue hardship upon the property owners."³ Because uses are classified and segregated under a "Euclidean" zoning ordinance, those nonconforming uses which existed prior to passage of the ordinance pose a ready-made problem.

In few instances have municipalities begun their community existence with a zoning scheme; usually an old town is divided into geographical use districts by a new ordinance. Without prior planning and regulation it is only natural to find residential, commercial, and industrial uses in each other's back yard in disaccord with the new use restrictions.

There are several reasons why these nonconforming uses have been allowed to remain. Foremost is the right to the use of property free from unreasonable regulation under the police power.⁴ Zoning has traditionally been considered as having only a prospective opera-

¹ *Fowler v. Obier*, 224 Ky. 742, 7 S.W. 2d 219 (1928).

² 272 U.S. 365 (1926).

³ *Goodrich v. Selligman*, 298 Ky. 863, 183 S.W. 2d 625, 627 (1944).

⁴ U.S. Const. amend. XIV, § 1; Ky. Const. § 1; cf. *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P. 2d 401 (1949).

tion,⁵ and when made to apply retroactively it has been held to be unreasonable regulation.⁶ Another reason for allowing these uses to remain is the economic hardship which might result. Due to lot size, topography and other physical factors, the owner cannot get a reasonable return from such "landlocked" property as a conforming use, and the cost of relocation would be too great a burden to place upon him alone. As a practical matter, some nonconforming uses justify their continued existence by providing service needs to their particular neighborhood; grocery stores, drug stores, and churches are convenient to, and perhaps not really incompatible with, their residential neighborhood.⁷

With regard to nonconforming uses initially, planners adopted a "hands-off" policy because of the doubtful constitutionality of immediate termination without compensation.⁸ They could not afford to arouse public antagonism over existing uses at the expense of the whole zoning plan. In addition, it was generally felt that existing nonconforming uses would eventually "rot out" due to the limitations placed on expansion and reconstruction of such uses.

But it has since become apparent that the early planners were only half right—the old uses did *rot*, but not *out*.⁹ The obvious reason for their survival is that the zoning ordinances, with their prohibition

⁵ The Kentucky court stated in *Fowler v. Obier*, *supra* note 1 at 749, 7 S.W. 2d at 222:

Zoning ordinances and laws do not look to the past so much as to the future. Where mistakes have been made in the past, zoning must recognize actual conditions and follow such plans as will be best under all the circumstances.

⁶ *Standard Oil Co. v. City of Bowling Green*, 244 Ky. 362, 50 S.W. 2d 960 (1932); *Jones v. City of Los Angeles*, 211 Cal. 304, 295 Pac. 14 (1930). The public policy against retroactive laws is reflected generally in Ky. Rev. Stat. § 446.080 (3) (1892) which provides that "No statute shall be construed to be retroactive, unless expressly so declared." Existing nonconforming uses are specifically protected under Ky. Rev. Stat. §§ 100.068-069 (1942, as amended 1948) (first class cities) and § 100.355 (1952) (second class cities); no provision is made for protection of nonconforming uses in third through sixth class cities. See comment, 4 Vill. L. Rev. 416 (1959).

⁷ See Goldston and Scheuer, "Zoning of Planned Residential Developments," 73 Harv. L. Rev. 241, 246 (1959).

⁸ Just four years prior to the *Euclid* decision, Justice Holmes had warned that: . . . if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

⁹ It is ironic that James Metzenbaum, who was the victorious counsel in the *Euclid* case, predicted in 1930 that "within a period of another twenty years, a large number of such 'non-conforming' uses will have disappeared. . . ." Metzenbaum, *Zoning* 288 (1930). Never saying die, Metzenbaum in 1955 reaffirmed his former position, declaring that "Within a period of another quarter century, a large number of such 'non-conforming uses' will have disappeared. . . ." 2 Metzenbaum, *Zoning* 1211 (2d ed. 1955).

of new nonconforming uses, operated to grant the old uses a monopolistic position in their neighborhood.¹⁰ Consequently, many old buildings permitted to exist, but the renovation of which is forbidden, detrimentally affect the neighboring property values and contribute to the spread of urban blight and congestion.¹¹ They create an unwholesome environment for homes¹² and overburden municipal services.¹³ Thus it has been said that "the fundamental problem facing zoning is the inability to eliminate the nonconforming use."¹⁴

Existing Use

Before the problem of eliminating the use arises, it first must be found that it is an *existing* use; otherwise it is entitled to no protection from the zoning classification. The right to a use which the courts will protect is generally labelled a vested right. In the final analysis, a use will be held vested by a court after weighing the public interest against the private investment and determining whether "the property interest affected by the particular ordinance is too substantial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision."¹⁵ It is settled that mere adaptability for a particular use, contemplation of use, a permit to establish the use, and even a contract to construct the use do not constitute such a substantial property interest as to be awarded the status of a vested right.¹⁶ There must be something beyond mere preparation.¹⁷

In *Darlington v. Board of Councilmen of City of Frankfort*,¹⁸ the

¹⁰ Norton, "Elimination of Incompatible Uses and Structures," 20 Law & Contemp. Prob. 305, 308 (1955).

¹¹ For a survey of land uses in a city of 30,000, in which the writer concludes that "the presence of nonconforming uses and buildings produces breakdown and blight in residential districts," see Note, 30 Ind. L.J. 521, 524 (1954).

¹² "At a public hearing called to consider the adoption of a zoning ordinance one citizen stated that during his lifetime his family had built six homes, each successive home being farther removed from the city's center than the last, that each home had been well built but had to be abandoned because the environment of the neighborhood became objectionable as the result of the intrusion of non-residential uses. Each of the old homes was sold at a small sum compared with its original cost, and all but one were still standing," Haar, Land-Use Planning 264 (1959).

¹³ The location of conflicting land uses in a zone complicates the task of administration in making assessments, locating schools, providing police protection, preventing and fighting fires, developing street plans, regulating traffic, and providing sanitary services. Note, 30 Ind. L.J. 521, 523, n. 17 (1954).

¹⁴ *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P. 2d 34, 40 (1954).

¹⁵ *People v. Miller*, 304 N.Y. 105, 106 N.E. 2d 34, 35 (1952).

¹⁶ 1 Antieau, Municipal Corporation Law § 7.07 (1958); Note, 1 Current Mun. Prob., No. 2, 109 (1959).

¹⁷ See 45 Ky. L.J. 205 (1956).

¹⁸ 282 Ky. 778, 140 S.W. 2d 392 (1940).

plaintiff had purchased property in a residential neighborhood with the intention of converting it into a florist shop. After she had removed a tree, made limited excavations and sold a few flowers, the city passed an interim zoning ordinance and prevented her from proceeding with the work. The Court of Appeals held that the plaintiff's right to the commercial use had become "vested" . . . when, prior to the enactment of [the interim ordinance], the owner . . . in good faith substantially entered upon the performance of the series of acts necessary to the accomplishment of the end intended.¹⁹ The substantial performance test is ultimately a question of degree depending upon the particular facts of each case and the court's attitude toward the economic effects of zoning. From the facts of the *Darlington* case, it is evident the Kentucky court will shield from zoning classifications a lesser degree of performance than will be protected in other jurisdictions.²⁰

Even if there has been substantial performance and actual use, it must have been continuously operated in nonconformity to be granted immunity when the ordinance is adopted. Thus in *Durning v. Summerfield*,²¹ it was held that occasional use of a vacant lot by carnivals over a ten year period did not establish a vested right. The court said that an existing use is "what is customarily or habitually done or the subject of a common practice."²²

If the right of use is not vested when the zoning ordinance is passed, any nonconformity may be summarily terminated. But if the owner has acquired a vested right, the municipality faces a problem of constitutional elimination. If such use constitutes a nuisance it may be promptly abated; otherwise immediate termination must pay its way by condemnation award or public purchase.

Nuisance

Although the law of nuisance has the advantage of immediate termination without compensation, it has a limited application in the eradication of nonconforming uses. Most such uses do not materially interfere with the enjoyment of neighboring property, although they may be offensive to aesthetic sensitivities and cause depreciation of property values, and city officials cannot declare a use to be a

¹⁹ *Id.* at 785, 140 S.W. 2d at 396.

²⁰ Compare *A and P Mobilehome Court, Inc. v. Town of Groton*, 21 Conn. Supp. 275, 154 A. 2d 243 (1959); *Griffin v. County of Marin*, 157 Cal. App. 2d 507, 321 P. 2d 148 (1958); *Caruthers v. Board of Adjustment of the City of Bunker Hill Village*, 290 S.W. 2d 340 (Tex. 1956).

²¹ 235 S.W. 2d 761 (Ky. 1951).

²² *Id.* at 763.

nuisance when it is not a nuisance in fact.²³ The point was well stated recently by the Maryland court:²⁴

The law of nuisances has limits that many times make its use fall short of the objective. Some courts will restrain only common law nuisances and even where the lawmakers have expanded the nuisance category, judicial enforcement seems often to have been restricted to uses that cause a material and tangible interference with the property or personal well-being of others, uses that are equivalent to or are likely to become common law traditional nuisances.²⁵

Eminent Domain

An experiment in zoning by eminent domain preceded zoning under the police power;²⁶ however, less than one percent of the area to which it applied was zoned,²⁷ the obvious reason for its failure being the enormous expense involved.²⁸ Although it would be necessary to condemn only the use, and not the fee, the municipality in every instance would be faced with paying the owner of the nonconforming use the difference between the fair market value of the property as a nonconforming use and as a conforming use. A city's budget could be wrecked by one case such as *Hadacheck v. Sebastian*²⁹ where this difference amounted to \$740,000. In addition to the expense problem, the validity of eminent domain zoning was early, and successfully, challenged on the ground that the nonconforming uses are not condemned for public use.³⁰ Achieving conformity to zoning regulations, however, would seem to secure a public advantage similar to that of urban redevelopment, for which condemnation has been approved.³¹

²³ *City of Mt. Sterling v. Donaldson Baking Co.*, 287 Ky. 781, 155 S.W. 2d 237 (1941).

²⁴ *Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 129 A. 2d 363 (1957).

²⁵ *Id.* 129 A. 2d at 366.

²⁶ Minn. Laws 1915, ch. 128 §§ 1-7. The first zoning ordinance, as we know it today, was enacted by New York City in 1916. Bassett, zoning 20 (1940).

²⁷ Comment, 1951 Wis. L. Rev. 685, 696.

²⁸ Unless zoning in cities can be done under the police power . . . it would be exceedingly difficult, if not impossible, to do it otherwise, as we can hardly perceive how it might be accomplished through the exercise of eminent domain. *Fowler v. Obier*, 224 Ky. 742, 752, 7 S.W. 2d 219, 223 (1928).

²⁹ 239 U.S. 394 (1915). A more striking illustration of the unbearable expense which eminent domain would entail involves residential restrictions in oil country; see, e.g., *Marblehead Land Co. v. City of Los Angeles*, 47 F. 2d 528 (9th Cir. 1931).

³⁰ *Pontiac Improvement Co. v. Bd. of Com'rs of Cleveland Metropolitan Park Dist.*, 104 Ohio St. 447, 135 N.E. 635 (1922).

³¹ *Berman v. Parker*, 348 U.S. 26 (1954); see Note, 102 U. Pa. L. Rev. 91, 93 (1953); Note, 58 Yale L.J. 599 (1949).

Public Purchase

The third way to eliminate nonconforming uses immediately is public purchase, which merges the law of eminent domain, zoning, and improvement assessments. The cost of terminating the use is assessed to its neighbors. This device has the advantage of spreading the economic burden among those who benefit, but it raises the same objections as eminent domain, and the gain to the community usually is not worth the purchase price. However, some writers feel that eminent domain or public purchase may be used advantageously in particular situations where "great public good will result from a purchase which can be made at a price within reason."³²

Although the early zoning enthusiasts dreamed of immediate elimination of nonconforming uses, they realized the impracticality of the means available and settled for a gradual elimination which they hoped would result from ordinance restrictions on future improvement of the old uses. The effect of these traditional restrictions, in theory at least, is to harass the nonconformists until continuance of the use becomes unprofitable.³³

Change of Use

Even though the legislative policy of most states is to allow existing uses to continue in nonconformance,³⁴ the general rule is that an existing use cannot be converted to a different nonconforming use.³⁵ Any new *structures, methods, objectives, or results* of an enterprise must accord with the original nature and purpose of the use.³⁶ A change of ownership or expiration of a lease alone does not violate the test,³⁷ but the purchaser or lessee cannot deviate from his grantor's use. In *Feldman v. Hesch*,³⁸ a lessor, who had used a nonconforming garage in which to park his trucks and make minor repairs, leased the garage to a used car dealer who used it for washing, painting, repairing, and generally reconditioning his autos. The Kentucky court condemned the lessee's operations as an invalid change of use,

³² Comment, 26 U. Chi. L. Rev. 442, 453 (1959); Comment, 1951 Wis. L. Rev. 685, 697.

³³ Anderson, "The Nonconforming Use—A Product of Euclidean Zoning," 10 Syracuse L. Rev. 214, 221 (1959).

³⁴ 1 Antieau, Municipal Corporation Law § 7.07 (1958); 1 Yokley, Zoning Law and Practice § 149 (2d ed. 1953).

³⁵ 8 McQuillin, Municipal Corporations § 25.202 (3d ed. 1957).

³⁶ A. L. Carrithers & Son v. City of Louisville, 250 Ky. 462, 469, 63 S.W. 2d 493 (1933); De Felice v. Zoning Board of Appeals of Town of East Haven, 180 Conn. 156, 32 A. 2d 635, 638 (1943).

³⁷ O'Connor v. City of Moscow, 69 Idaho 37, 202 P. 2d 401, 404 (1949).

³⁸ 254 S.W. 2d 914 (Ky. 1953).

applying the test of whether "the kinds of activities principally carried on under the second use were *only incidental* to some other major activity under the former use."³⁹ [Emphasis added.]

The *Carrithers*⁴⁰ and *Feldman* decisions would seem to bring Kentucky in line with the prevailing judicial rule that no change of use may be made. But in 1948, the legislative policy with respect to change of use was revised to permit "a nonconforming use of a building or structure to be changed to another nonconforming use of the same or more restricted classification."⁴¹ This provision is ambiguous as to the meaning of "classification." It is susceptible of two interpretations, in order of probable legislative intent: First, that it refers to the classification of the highest (most restrictive) district in which the use would be allowed *if conforming*, so that a grocery store in a district zoned residential may be changed to any other use allowed in the highest district permitting grocery stores. Second, that it means a use may be changed to any other use which is *no more objectionable* in degree of nonconformity, so that, where the ordinance permits a beauty parlor, a shoe repair shop and a supermarket in the same district, the beauty parlor may be changed to a shoe repair shop but not to a supermarket because of increased traffic, noise and dirt generated by such use.

Feldman, which was decided after the 1948 revision but which conspicuously fails to mention it, *apparently* stands for the second—and more restrictive—interpretation, as shown by the court's emphasis on the increased burden imposed upon the residential district by the new use.⁴² A more recent case, *City of Bowling Green v. Miller*,⁴³ where the court stressed the "shift from the passive use of the building for storage and sales purposes to a manufacturing enterprise,"⁴⁴ also sustains this interpretation without referring to the statute.

Extension of Use

Zoning ordinances usually provide that nonconforming uses shall not be extended except in conformity with the regulations.⁴⁵ But an increase in *volume* of business alone is not an invalid extension.⁴⁶

³⁹ *Id.* at 916.

⁴⁰ A. L. Carrithers & Son v. City of Louisville, *supra* note 36.

⁴¹ Ky. Rev. Stat. § 100.069 (1948) (for first class cities) and § 100.355 (2) (1948) (for second class cities); there are no nonconforming use provisions for third through sixth class cities.

⁴² *Feldman v. Hesch*, 254 S.W. 2d 914, 916 (Ky. 1953).

⁴³ 335 S.W. 2d 893 (Ky. 1960).

⁴⁴ *Id.* at 894.

⁴⁵ *E.g.*, Lexington, Ky., Zoning Ordinance-Resolution § 5.225 (1953).

⁴⁶ 8 McQuillin, Municipal Corporations § 25.207 (3d ed. 1957).

And where, due to increased volume of business or because of the nature of the use, (*e.g.*, extraction industries) or for other reasons, the use seeks to expand its *area*, there is a division of authority.⁴⁷ Courts adhering to the "natural expansion" rule permit a nonconforming use to be extended to the limits of its original lot,⁴⁸ while courts following the "precise magnitude" rule limit the use to the exact area occupied when the ordinance was enacted.⁴⁹

In the two extension cases considered by the Kentucky court, it was held that the Louisville board of appeals wrongfully denied permits for additions to nonconforming uses. The *Carrithers*⁵⁰ decision allowed an extension in order to comply with local health regulations under a provision permitting additions only as required by some law or ordinance.⁵¹ But in 1948, the "no addition" limitation was deleted from the statute,⁵² and in 1949, the Court of Appeals held that the enabling act does not prohibit additions to nonconforming uses.⁵³

Alteration and Repair

Most zoning ordinances limit structural alteration to those repairs required by the building inspector to make the building safe.⁵⁴ A strict construction of the term "structural alteration" is necessary if the purpose of such ordinance provisions is to be effected; otherwise "a nonconforming use might permanently be 'zoned-in' rather than 'zoned-out.'"⁵⁵ The Kentucky court supplied this strict construction in *Selligman v. Von Allmen Bros.*⁵⁶ There the owner of a milk plant was required by the health inspector to repair his roof and inside walls; while constructing a new roof it became apparent the old walls were so decayed they would not support it, and the owner began construction of brick walls in place of the old wooden ones. When the walls were ninety percent completed the building inspector stopped the work because the new walls amounted to a structural alteration.

⁴⁷ Note, 102 U. Pa. L. Rev. 91, 98 (1953).

⁴⁸ See 2 Metzenbaum, *Zoning* 1227 (2d ed. 1955); Craig, *Zoning Law*, U. Pitt. L. Rev. 223, 228 (1959).

⁴⁹ See 1 Antieau, *Municipal Corporation Law* § 7.07 at 446 (1958).

⁵⁰ *A. L. Carrithers & Son v. City of Louisville*, *supra* note 36.

⁵¹ At the time of the *Carrithers* decision the health and safety exception was not specifically provided for by statute—only by the ordinance in question—but it was subsequently made an express statutory provision by Ky. Acts 1942, ch. 176 § 8.

⁵² Ky. Rev. Stat. § 100.069 (1948).

⁵³ *Butler v. Louisville & Jefferson County Board of Zoning Adjustment and Appeals*, 311 Ky. 663, 224 S.W. 2d 658 (1949).

⁵⁴ *E.g.*, Lexington, Ky., *Zoning Ordinance-Resolution* § 5.224 (1953).

⁵⁵ Mandelker, "Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa," 8 *Drake L. Rev.* 23, 24, (1958).

⁵⁶ 297 Ky. 121, 179 S.W. 2d 207 (1944).

In upholding the board of appeals' refusal to allow completion, the court said: "The present use of a nonconforming building may be continued but it cannot be increased nor can it be extended indefinitely if zoning is to accomplish anything. . . ."⁵⁷ Therefore, "the owner can make no structural alteration in the building which will *indefinitely prolong its life*."⁵⁸ [Emphasis added.]

This rule is the backbone of the traditional means of eliminating nonconforming uses, and its adherence yields the only hope of a gradual conformance. But the 1948 statutory revision⁵⁹ annulled the staunch position taken by the Court of Appeals, and the next year Commissioner Stanley, speaking for the court, interpreted the legislative intent as prohibiting structural alteration or reconstruction *only* when it constitutes a forbidden change of use.⁶⁰

Destruction and Reconstruction

Where a nonconforming building has been damaged or destroyed by "fire, flood, explosion, earthquake, war, riot or other act of God" zoning ordinances commonly permit reconstruction if the damage does not exceed a specified percentage (averaging from 60% to 75%) of the assessed or fair market value at the time damaged.⁶¹

In some states, the percentage provision is incorporated in the enabling act, as it was in Kentucky until deleted by the 1948 statutory revision.⁶² In 1953, the Court of Appeals held the owner of a nonconforming service station, restaurant, and tavern, which had been totally destroyed by flood, was entitled to rebuild his old uses.⁶³ Thus Kentucky again departed from the traditional restrictions on nonconforming uses and now permits reconstruction, no matter how great the damage.

Abandonment

Not only must the nonconforming use be existing when the zoning ordinance is passed, but it must continue without interruption to retain its immunity to the use restrictions. Some ordinances require abandonment, while others require only discontinuance, which may

⁵⁷ *Id.* at 124, 179 S.W. 2d at 209.

⁵⁸ *Id.* at 126, 179 S.W. 2d at 210; see *Goodrich v. Selligman*, 298 Ky. 863, 183 S.W. 2d 625 (1944); *A. L. Carrithers & Son v. City of Louisville*, 250 Ky. 462, 63 S.W. 2d 493 (1933).

⁵⁹ Ky. Rev. Stat. §§ 100.069 (1948), 100.355 (1952).

⁶⁰ *Butler v. Louisville & Jefferson County Board of Zoning Adjustment and Appeals*, *supra* note 53 at 665, 224 S.W. 2d at 660.

⁶¹ *E.g.*, Lexington, Ky., Zoning Ordinance-Resolution § 5.223 (1953); see *Horack and Nolan, Land Use Controls* 157 (1955).

⁶² Ky. Acts 1942, ch. 176 § 8.

⁶³ *Louisville & Jefferson County Planning & Zoning Commission v. Stoker*, 259 S.W. 2d 443 (Ky. 1953).

be involuntary. But the two terms are often confused, both in the ordinances⁶⁴ and by the courts,⁶⁵ and it is usually held the owner may resume a use which he involuntarily stopped.⁶⁶ Nonuse due to acts of God, war, inability to rent, financial difficulty, business conditions, and seasonal business lacks the requisite intent to prohibit resumption.⁶⁷ Illustrative of this point is *Louisville & Jefferson County Planning & Zoning Commission v. Stoker*,⁶⁸ where the owner was permitted to resume his nonconforming use after seven years of inactivity resulting from a flood.

The 1948 legislative revision which permitted change, extension, alteration, and reconstruction of nonconforming uses left Kentucky with virtually no means of eliminating such uses. From the Court of Appeals came the comment that "though the effect of these amendments is to weaken the law and remove it from accord with the general concept of a gradual complete conformity, the legislature has ordered it."⁶⁹ The revision is inconsistent with the Euclidean theory of use classification in that it encourages nonconformity, but it is not totally indefensible. Perhaps the change was produced by a realization of the weakness inherent in the concept of use classification: that present zoning measures are directed solely at the *type* of use, regardless of their actual compatibility with the surrounding neighborhood. Prominent zoning authorities⁷⁰ have challenged the Euclidean theory and are advocating a new concept of "performance zoning" which emphasizes the harmful effects of the use rather than its mere species.⁷¹ But it is safe to assume that the Kentucky legislature

⁶⁴ *E.g.*, Lexington, Ky., Zoning Ordinance-Resolution § 5.222 (1953)—the provision is entitled "Discontinuance," but it must be voluntary.

⁶⁵ 1 Antieau, *Municipal Corporation Law* § 7.07 at 449 (1958); 8 McQuillin, *Municipal Corporations* § 25.193 (3d ed. 1957).

⁶⁶ *City of Bowling Green v. Miller*, 335 S.W. 2d 893, 894 (Ky. 1960).

⁶⁷ 2 Rathkopf, *Zoning and Planning* 63-70 (1957).

⁶⁸ 259 S.W. 2d 443 (Ky. 1953); compare *Durning v. Summerfield*, 235 S.W. 2d 761 (Ky. 1951).

⁶⁹ *Butler v. Louisville & Jefferson County Board of Zoning Adjustment and Appeals*, *supra* note 53 at 665, 224 S.W. 2d at 660.

⁷⁰ Haar, *Foreword (Zoning Symposium)*, 36 B.U.L. Rev. 331, 334 (1956); Horack, "Performance Standards in Residential Zoning," 1952 *Planning* 153; Norton, "Elimination of Incompatible Uses and Structures," 20 *Law & Contemp. Prob.* 305, 314 (1955); O'Harrow, "Performance Standards in Industrial Zoning," 1951 *Planning* 42; Redman, "Performance Standards in Zoning," 1952 *Planning* 150; Ruth, "Is It Legal?," 1950 *Planning* 157, 164. Recent zoning amendments in Chicago and New York employ performance standards in industrial zoning; see Babcock, "The New Chicago Zoning Ordinance," 52 *Nw. U.L. Rev.* 174, 182 (1957); Committee Report, "The City Planning Commission's Proposal for a New Zoning Resolution," 15 *Record of N.Y.C.B.A.* 119, 125, 132 (1960).

⁷¹ The weakness of zoning by use, instead of effect, is shown in the *Carrithers* case where the neighbors of a milk factory complained of 24-hour noise, traffic, smoke, and rats; the court held such evidence to be immaterial to the zoning issue. *A. L. Carrithers & Son v. City of Louisville*, 250 Ky. 462, 63 S.W.

(footnote continued on next page)

was motivated by reasons other than the questionable policy behind use classification since no alternative measure were taken to reduce effects even at which performance zoning is aimed. The statutory change more likely represents a return to the defense of private property rights, in contrast to the great majority of states which has yielded to society's need for control.

When one buys commercial property he expects to be able to change its use, expand it, or make structural alterations as the opportunity for profit demands. Any law which subsequently overturns these expectations is retroactive, and the disease which such legislation is designed to cure must be very serious to warrant cutting off any expectations backed by capital investment. The fundamental question is which of the expectations entertained by the builder or purchaser at the time of his investment should be protected from the application of the new zoning law. The General Assembly has deemed all these expectations entitled to protection, conceding to the societal interests only the prohibition against a "more objectionable" use of property.

Recognizing the conflicting public and private needs, the argument for protecting the expectation of changing use is stronger than that for allowing structural change or expansion. By prohibiting only change to more objectionable uses the emphasis is being properly placed on the harmful effects of the use rather than the mere type of use. And because most investments in commercial property are made in reliance on the expectation of rental value, *regardless of use*, it is unfair to forbid a different but suitable use merely because the existing use failed due to financial difficulty or for some other reason. This, of course, will not hold true for special structures, such as service stations, which the owner expects to use only for its original purpose—his investment was not made on the basis of an expectation of changing use.

On the other hand, allowing structural change or expansion after the effective date of the ordinance is harder to defend on the grounds of expectation, because the owner has not backed up these expecta-

(footnote continued from preceding page)

2d 493 (1933). Performance zoning operates on objective standards, measured by exact scientific instruments, in the areas of smoke, noise, odor, dust and dirt, noxious gases, glare and heat, radiation and fire hazards, wastes, traffic, and aesthetics. O'Harrow, "Performance Standards in Industrial Zoning," 1951 Planning 42. Under such standards, "industry, business, and homes could be located on any site in any zone so long as the intended use met adequate performance standards." Horack, "Performance Standards in Residential Zoning," 1952 Planning 153. Performance standards have long been judicially applied in instances where commercial or industrial uses are allowed to continue only if their injurious effects are eliminated; see *Stevens v. Rockport Granite Co.*, 216 Mass. 486, 104 N.E. 371 (1914).

tions with capital investment at the time the ordinance is passed. That is, a change in use requires no new capital investment, the change being part of what the owner expected to accomplish with his original investment. But a change in structure requires a new capital investment—the owner could not have expected his original investment to accomplish this.

To permit such structural change or expansion would be to allow the owner to invest more money on the basis of needs and opportunities arising *after* the original investment and *after* passage of the zoning restrictions. The expectation of changing use, because originally backed by investment, may be considered a property right which cannot be taken without compensation. But the expectation of structural change or expansion is not a property right because not originally backed by investment and therefore should not be immune to the retroactive effect of the new ordinance. The ordinance, of course, can prospectively prohibit *future* investment; it is the essence of legislation that expectations that a person will be allowed to make some future investment can be cut off at any time.

However, assuming the propriety of Euclidean zoning, and even if the traditional methods of eliminating the nonconforming use were available to Kentucky zoning officials and were strictly enforced by them, it is doubtful whether they afford an adequate solution to the nonconforming use problem. As pointed out, these uses are granted a monopoly and protected from competition by the municipality, and although the structures are forced to physical decay to the point of becoming unsafe, as monopolies they have an uncanny ability to survive. Consequently, these limiting measures disregard the problem of preserving neighborhood property values during the life of the use, whatever effect they may have on long-range improvement. Home owners would prefer to live next to a modern brick grocery store than to a run-down frame structure. What is more, the grocery store may be desirable as a service use in the residential neighborhood, but the restrictions apply alike to all uses.

If Euclidean zoning is to be retained as the means of protecting home environment and property values, there must be assurance that nonconforming uses will be terminated, though termination would necessarily entail greater restriction on the free use of private property. But zoning may be seen as fulfilling the changing needs of a complex society, as well as a restraint on economic freedom. As a revolutionary concept in 1916, zoning was thought justified as a barricade against the effects of the Industrial Revolution, although it required restriction on the free use of private property. In almost a half century of further

industrial and commercial expansion, zoning has demonstrated its inability to cope with the problems it was created to solve. Thus if the community values deemed worthy of protection in 1916 remain unprotected today, an even greater degree of property control would seem justified.

Amortization

To supply this greater degree of control, many cities have resorted to amortization of nonconforming uses as a compromise between immediate termination and gradual starvation.⁷² Under this plan the nonconformist must amortize his investment within a reasonable period, at the end of which he must conform or get out.

Amortization is not new,⁷³ but it is just now coming into its own. In the past decade, there have been numerous decisions upholding this plan. In 1950, a Federal court upheld a Tallahassee ordinance requiring termination of nonconforming service stations within ten years.⁷⁴ In 1954, a California court approved a Los Angeles ordinance requiring termination of a nonconforming plumbing shop in a conforming building within five years.⁷⁵ In 1957, the Maryland Court of Appeals upheld a Baltimore ordinance requiring the removal of billboards from residential districts within five years.⁷⁶ In the same year, the Supreme Court of Kansas upheld a county ordinance requiring an automobile wrecking business to be removed within two years.⁷⁷ In 1958, the New York Court of Appeals upheld the validity of a Buffalo ordinance which required cessation of a nonconforming junkyard within three years.⁷⁸

Writers are acclaiming amortization as "the only positive method of getting rid of nonconforming uses yet devised . . .,"⁷⁹ and pro-

⁷² Norton, "Elimination of Incompatible Uses and Structures," 20 Law & Contemp. Prob. 305, 310 (1955).

⁷³ Amortization was approved as early as 1929 in Louisiana where a non-conforming drugstore and grocery store were forced to close within one year. State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929); State *ex rel.* Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929); the Supreme Court denied *certiorari* in the McDonald case, 280 U.S. 556 (1929).

⁷⁴ Standard Oil Co. v. City of Tallahassee, 183 F. 2d 410 (5th Cir. 1950), *cert. denied* 340 U.S. 892 (1950).

⁷⁵ City of Los Angeles v. Gage, 127 Cal. App. 442, 274 P. 2d 34 (1954).

⁷⁶ Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A. 2d 363 (1957).

⁷⁷ Spurgeon v. Board of Com'rs of Shawnee County, 181 Kan. 1008, 317 P. 2d 798 (1957).

⁷⁸ Harbison v. City of Buffalo, 4 N.Y. 2d 553, 152 N.E. 2d 42 (1958). For cases rejecting amortization provisions, see City of Corpus Christi v. Allen, 254 S.W. 2d 759 (Tex. 1953); City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E. 2d 697 (1953); J. C. James v. City of Greenville, 88 S.E. 2d 661 (S.C. 1955).

⁷⁹ Reifman, "Amortization of Nonconforming Uses," 38 Chi. B.R. 13, 16 (Oct. 1956); Note, 35 Va. L. Rev. 348, 357 (1949); Note, 1 Buffalo L. Rev. 286, 290 (1952); Comment, 26 Chi. L. Rev. 442, 444 (1959).

fessional planners have recently demonstrated their faith in it by its incorporation in the Chicago⁸⁰ and New York⁸¹ zoning amendments.

Kentucky, as early as 1942, made amortization available to cities of the first class by statute.⁸² However, it could not long endure the conservative climate and was repealed in 1948 before ever being tested in the Court of Appeals. In spite of the unfavorable legislative history, at least one Kentucky city has an amortization provision today,⁸³ but the grace period has long since expired and no attempt has been made to enforce it.

Like other elimination devices, amortization has its pros and cons. It must face the objection of being retroactive. The cases answer, that to the extent zoning ordinances affect property which is owned prior to their adoption, they are all retroactive; therefore, immediate termination, amortization, and the customary limitation of existing uses differ only in degree, not in kind,⁸⁴ and all are directed toward the same end—the advantages secured from a well planned community.⁸⁵ Relaxation of our distrust of retroactive legislation to a degree of land-use control capable of effecting the objects of zoning which are beyond the reach of prospective legislation would seem justified.

In a vigorous dissent in *Harbison v. City of Buffalo*,⁸⁶ Judge Van Voorhis argued that amortization is an attempt to gain benefits for the community without compensation—that it is small-time urban redevelopment in the guise of the police power—and that such public advantage may be obtained only by condemnation. But all planning and zoning laws are attempts to obtain benefits for the community; at the same time they protect the community from economic and environmental losses. Benefit and loss are but two sides of the same

⁸⁰ See Babcock, "The New Chicago Zoning Ordinance," 52 Nw. U. L. Rev. 174, 189 (1957).

⁸¹ See Committee Report, "The City Planning Commission's Proposal for a New Zoning Resolution," 15 Record N.Y.C.B.A. 119, 127 (1960).

⁸² Ky. Acts 1942, ch. 176, § 8.

⁸³ Lexington, Ky., Zoning Ordinance-Resolution § 5.21 (1953) provides:

Any building, structure or use lawfully existing at the time of enactment of this Ordinance-Resolution may be continued indefinitely, except that any non-conforming sign, billboard and other similar structure valued at \$750.00 or less, and any nonconforming use of land not involving any structure may be continued for a period not to exceed two (2) years after enactment of this Ordinance-Resolution, where upon such structure shall be removed and such use shall cease and the evidence thereof be removed.

⁸⁴ *City of Los Angeles v. Gage*, *supra* note 75, 274 P. 2d at 44; see Babcock, "The New Chicago Zoning Ordinance," *supra* note 80 at 191.

⁸⁵ Noel, "Retroactive Zoning and Nuisances," 41 Colum. L. Rev. 457, 459 (1941).

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

coin—for every benefit there is necessarily a loss, and for every loss a benefit. Judge Van Voorhis looks only to the past, seeing the benefit amortization would bring by removing the cause of existing blight and congestion, and is blind to the future losses which will result from these same causes. Surely he would not argue that the police power may not be exercised to protect from future loss. In the very case he is deciding, the ordinance attempts to protect the public by eliminating a nonconforming junkyard which destroys economic, health, safety, aesthetic, and perhaps other values of the community. Undeniably it is seeking a benefit by restoring these values, but by the same process it is protecting against future loss.

The critical defect in the amortization concept, as it is *now* applied, lies in fixing the grace period. Under present theory this period is determined by considering such factors as the remaining useful life of the structure, the value of the property for a nonconforming use, the nearest relocation area, and the cost of such relocation.⁸⁷ The cases reason that during the grace period thus set, the nonconformist is given a monopolistic position in his neighborhood to compensate his ultimate loss.⁸⁸ Upon such reasoning rests the whole validity of amortization as a reasonable cutting off of investment expectations; it assumes the loss of these expectations will be recompensed entirely by operation of an ordinance-created monopoly.

But the assumption that a monopoly—at least a period of increased profits sufficient to recover the investment—is granted by operation of the ordinance is questionable.⁸⁹ Although experience has proved that nonconforming uses manage to survive because of their monopolistic position, it has not been established by authoritative study that the profits actually increase. It could well be that a nonconforming store was the only one of its kind in the neighborhood prior to the ordinance, and merely because a zoning ordinance is passed does not guarantee increased profits. Under present variance procedure it is even questionable if the enactment of a zoning ordinance guarantees against a decrease in profits, which might result from the next door neighbor securing a use variance to establish a competitive business.⁹⁰ Whether the so-called monopoly will actually benefit a particular nonconforming business also depends upon the nature of that business. If it is one which depends primarily upon the neighborhood for its

⁸⁷ *Id.* 152 N.E. 2d at 47.

⁸⁸ *City of Los Angeles v. Gage*, *supra* note 75, 274 P. 2d at 44.

⁸⁹ Anderson, "The Nonconforming Use—A Product of Euclidean Zoning," 10 *Syracuse L. Rev.* 214, 238 (1959).

⁹⁰ See Horack and Nolan, *Land Use Controls* 176 (1955); Comment, 48 *Nw. U.L. Rev.* 470, 480 (1953).

patronage, such as a drug store or beauty parlor, increased profits are at least possible, but if the business is not dependent upon the locality for its market, such as a factory or junkyard, few if any additional benefits will accrue from being protected from like uses in the particular neighborhood.

To the complaints of the property owners that the benefits derived from their "monopolistic position" are more imaginary than real, may be added the recent concern of some planners that the amortization period is too long to be of use in effecting the objects of zoning. Because the time increases directly with the size of the investment, grace periods of a hundred years are conceivable in cases of new buildings of modern construction. The prospect of such prolonged periods has prompted one writer to describe amortization as a "postponement rather than a solution."⁹¹ It is generally agreed that amortization cannot serve its designed purpose if more than ten years are necessary to recover the investment.⁹² The late Professor Horack commented that "When amortization is fixed for a period of 10 to 20 years, we are not resolving the problem; we are avoiding it. Recognizing the early zoning philosophy that 'Rome was not built in a day,' I think that it is time that we admit if Rome is to be rebuilt we had better undertake the task immediately."⁹³ As another writer observed, "If a protracted period of amortization is required it will extend beyond the date of accurate prediction of land needs of the community. . . . [The] zoning ordinance has not been devised which will withstand the impact of five years experience."⁹⁴ Because of the protracted period, it is evident that amortization can be effective as it presently operates only as it applies to uses involving limited investment, namely, nonconforming uses in impermanent nonconforming structures, or in conforming structures, or not involving a structure.⁹⁵

Amortization can be a useful tool in reducing the environmental and property-depreciation burdens imposed on the community, and it can effect these results without imposing an intolerable economic burden on the nonconforming property owner—but only if the present formula for determining the grace period is revised to take into consideration the effect of the use on the community as well as the hardship to the individual. The factor usually determinative of the

⁹¹ Anderson, "The Nonconforming Use—A Product of Euclidean Zoning," *supra* note 89.

⁹² Norton, "Elimination of Incompatible Uses and Structures," 20 *Law & Contemp. Prob.* 305, 311 (1955).

⁹³ Horack, "Emerging Legal Issues in Zoning," 1954 *Planning* 146, 151.

⁹⁴ Anderson, "The Nonconforming Use—A Product of Euclidean Zoning," *supra* note 89 at 239.

⁹⁵ Norton, "Elimination of Incompatible Uses and Structures," *supra* note 92.

length of the period is the remaining useful life of the structure. In the *Tallahassee* case,⁹⁶ however, the court evidently did not think it necessary to connect the time limit on the use with its economic life. The court recognized the "considerable" investment in a nonconforming service station, but held that "considerations of financial loss or of so-called 'vested rights' in private property are insufficient to outweigh the necessity for legitimate exercise of the police power of a municipality."⁹⁷ This reasoning would permit incorporation of community effect as an element of the amortization formula and proportionately shorten the grace period.

It should not be shortened indiscriminately to achieve quick results without fairness to the individual. To best serve both public and private interests, the period must be limited to a maximum of ten to fifteen years, and a scheme of assured compensation must be perfected to allow the nonconformist to recover his investment within that time.

During the grace period, the economic burden to be imposed on the owner could be somewhat relieved in advance installments by allowing him a rebate on property taxes. Municipality tax rebates require state legislative approval, but a classification for rebate to those who are forced to terminate their business would be reasonable. This method would have the advantage of spreading the burden to the public beneficiaries without the sudden effect of condemnation on the municipal treasury, and would be noticeable only in cases of large enterprises upon which small communities are revenue dependent. To this compensation may be added whatever increase in profits is found *actually* attributable to the monopolistic position granted by the ordinance. At the expiration of the grace period, there is some authority for deducting the cost of termination as a loss for income tax purposes.⁹⁸ Finally, of course, the owner will recover whatever value his property has as a conforming use; it might be possible to grant him a transferable tax rebate running with his old property so as to increase its sales price.

If the owner is not sufficiently compensated by these means, others must be found; amortization is justified only to the extent it actually pays its way. If amortization proves inadequate even with these compensatory devices, this would be a good place to consider the use of public purchase or eminent domain. It would be neither

⁹⁶ *Standard Oil Co. v. City of Tallahassee*, *supra* note 74.

⁹⁷ *Id.* at 413.

⁹⁸ See *Chesbro v. Commissioner of Internal Revenue*, 21 T. C. 123 (1953), *aff'd*, 225 F. 2d 674 (2d Cir. 1955), where deduction was allowed for loss of a \$10,000 building razed by corporate taxpayer in compliance with city's exercise of its police power (fire regulations).

unreasonable nor impracticable in most cases to assess the neighboring property owners for the uncompensated difference between actual compensation and total value of investment—the purchase price will have become more reasonably related to the public gain.

In addition to its theoretical objections, amortization has its practical difficulties. Commonly amortization, like the traditional methods of eliminating nonconformities, fails to look at the use and consequently operates to eradicate desirable as well as undesirable uses. As previously observed certain educational, religious, recreational, and even business uses may be desirable and not truly incompatible with a residential environment. Discrimination between land uses might raise a problem of equal protection of law, but it is believed that a reasonable classification based on community needs would be valid. The amortization provision upheld in the *Tallahassee* case⁹⁹ applied only to service stations. And the new Chicago zoning ordinance exempts from the amortization requirements such uses as grocery stores, drug stores, beauty parlors, and shoe and hat repair shops.¹⁰⁰

One of the greatest obstacles facing amortization is enforcement, which Babcock has described as "an administrative migraine headache of gigantic proportions."¹⁰¹ Many insubstantial investments such as billboards and out-buildings are classified together for amortization purposes and assigned uniform grace periods which will expire simultaneously. The periods of the larger investments will expire frequently enough that there will be a deluge of complaints and litigation.

Even if the enforcement problem is overcome, there is a resulting problem of what to do with the nonconforming structures after their owners have been forced to abandon them. Should the additional burden of razing his building be imposed on the owner? Obviously, if amortization is to accomplish anything at all, provision must be made for extermination as well as termination.¹⁰²

Conclusion

Unless we are ready to make the swing over to performance standards as a solution to our environmental and property-depreciation problems, we are stuck with the nonconforming uses of Euclidean

⁹⁹ *Standard Oil Co. v. City of Tallahassee*, *supra* note 74.

¹⁰⁰ See Babcock, "The New Chicago Zoning Ordinance," 52 *Nw. U. L. Rev.* 174, 193, n. 74 (1957).

¹⁰¹ Babcock, "Emerging Legal Issues in Zoning," 1954 *Planning* 133, 137.

¹⁰² Note, 30 *Ind. L.J.* 521, 532 (1954).

zoning. The traditional means of eliminating these scourges of the community by restricting their future expansion have proved ineffective as they thrive indefinitely in their present condition. These methods should be abandoned and replaced by an overhauled version of amortization which guarantees full recovery of investment within a relatively short period of time, during which the owner is forbidden only from creating a more objectionable use. By thus balancing the equities, zoning can achieve for the public a better planned community without unreasonably infringing upon private property rights.

Robert G. Zweigart