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Craig A. Peterson

Claire McCarthy

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AMORTIZATION OF LEGAL LAND USE NONCONFORMITIES AS REGULATORY TAKINGS: AN UNCERTAIN FUTURE

*CRAIG A. PETERSON**
*CLAIRE McCARTHY***

I. INTRODUCTION

A. *The Need for a New Look*

Eventual termination of land use nonconformities by "amortization" has been a widely, though not universally sanctioned approach to common land use control problems since the early 1900s. Despite challenges since the procedure's inception,[1] state courts have generally upheld amortization provisions since the 1950s.[2] However, several recent United States Supreme Court decisions, although involving different land use regulatory techniques, have a potentially significant impact on whether amortization ordinances violate the just compensa-

* Professor of Law, John Marshall Law School. B.A. 1963, Cornell; J.D. 1966, Harvard.

** Land Use Writer. B.A. 1965, Wellesley.

Mr. Peterson and Ms. McCarthy are co-authors of numerous articles and the book HANDLING ZONING AND LAND USE LITIGATION: A PRACTICAL GUIDE (1982).

1. In one of the earliest cases, Hottinger v. New Orleans, 42 La. Ann. 629, 8 So. 575 (1890), an ordinance provision requiring dairies to move out of certain districts within one year from the effective date of the ordinance was upheld. In Hadacheck v. Sebastian, 239 U.S. 394 (1915), the Supreme Court upheld an ordinance requiring the immediate termination of nonconforming brick kilns in certain parts of the city.

2. *See generally* 4A N. WILLIAMS, AMERICAN LAND PLANNING LAW § 116 (1986).

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tion clause of the fifth and fourteenth amendments to the United States Constitution, either facially or as applied to a particular property.

This Article analyzes the effect that recent developments in "takings" jurisprudence might have on the constitutionality of amortization of nonconformities and how the rapidly evolving standards imposed by the Court might be applied to amortization techniques. Part I describes how nonconformities arise and the various techniques that have been developed to cope with them. Part II briefly distinguishes the different types of nonconformities and discusses amortization as a tool to deal with them. Part III presents a hypothetical situation, involving three separate nonconformities, which serves as a practical example for analyzing how an amortization ordinance may apply to a specific piece of property and how a regulatory taking claim might be triggered by that application. Part IV deals with the variance process — a traditional, administrative "safety valve" designed to alleviate the severity of land use restrictions or requirements in compelling situations. Recent case law explicitly requires that regulatory taking claims be ripe for adjudication; in situations involving amortization schemes, this usually would require the landowner to apply for a variance. Part IV also uses the hypothetical to illustrate the criteria for variance proceedings. Part V analyzes the current takings jurisprudence and its application to amortization provisions, including illustrative reference to the hypothetical. Part VI concludes with a brief discussion of trends in takings jurisprudence that are most likely to be significant in attacking or defending amortization programs.

B. *Birth of Nonconformities*

Amendments[3] to local zoning ordinances present a variety of complex legal problems. One of the most interesting and significant is the creation of "nonconformities": uses and "site development features"[4]

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3. The most common amendment is a change in the zoning "map," which specifies which regulations apply to particular parcels of land. The second, less usual form is a change in the text of the regulations, generally imposing greater restrictions. In a comprehensive amendment, both the text and the map are changed.

4. The regulations governing the site development are often referred to as "bulk and density" regulations. They often control the maximum building height, minimum lot size, minimum ground floor area, minimum yard size or a ratio of ground floor area to open space, minimum front and side setbacks permitted in each district. They may control the number of individuals and families who may occupy a dwelling in residential districts. *See generally* D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT ch. 3(C) (1985).

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that were once in conformity with the zoning regulations, but, as a result of an amendment, no longer comply. Notwithstanding such nonconformity, and in part for reasons of fairness,[5] pre-existing uses and aspects of development are always to some extent "grandfathered" so that the new ordinance is not applied retroactively to require either immediate termination of a use or sudden conformity with the more restrictive rules.[6]

In the unusual case of an ordinance not explicitly providing such a grandfather clause, courts have not been hesitant to impose one judicially:

> [m]any enabling acts and zoning ordinances permit nonconforming uses to continue. Where not so allowed, some courts have held retroactive application invalid as having no substantial relation to the public health, safety and welfare, or as not authorized by enabling acts, or courts have construed the ordinance as permitting preexisting uses to continue in order to save the ordinance constitutionally, or they have declined to issue an injunction as a discretionary remedy permitting the courts to do equity. Courts have upheld zoning ordinances which permitted existing uses to continue, while prohibiting the same kind of uses in the future on the ground that such a classification was valid.[7]

C. *Techniques for Coping with Nonconformities*

Not surprisingly, local governments are eager to encourage conformity with updated zoning regulations. The governing body (usually a city council or county board) presumably adopted each amendment because it concluded that the community's welfare would be promoted by land uses permitted by the new enactment and undermined by the prohibited uses. For that reason, several techniques often are employed to eliminate nonconforming uses over time. The least controversial approach is the termination of legal nonconforming use status when the use is "abandoned."[8] This method theoretically imposes no

5. It would be unfair to require immediate termination of a use or site feature in the case of a landowner who initiated the development (often with substantial expenditure in the construction of a building) or who purchased the parcel in reasonable reliance on its legality.

6. Retroactive application of an ordinance that creates a nonconformity has for years been held to require payment of compensation. *See* Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930).

7. D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING 115-116 (2d ed. 1987).

8. In determining whether a use has been abandoned, many jurisdictions look to the

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economic burden on the landowner because he voluntarily "abandoned" the nonconformity, an action not required by the zoning ordinance. Another common technique is to provide for termination whenever a nonconforming use is changed.[9] Here the rationale is that when a landowner decides to terminate his existing nonconformity, he, like any other property owner, cannot establish a nonconforming use or development under the current zoning ordinance. A third method is to bar expansion of the nonconforming use.[10] This technique allows a legal nonconformity to continue, but recognizes that to the extent its use or development is incompatible with the surrounding uses, or perhaps even harmful to the community (the rationale for no longer permitting the nonconformity), any expansion would contravene the purposes of the zoning ordinance. Because this method does not limit the existing nonconformity, it does not impose a particular economic burden on the landowner. Finally, a nonconforming use that involves a structure, as opposed to a nonconforming activity on the property, generally is terminated when the structure is destroyed or damaged to a particular degree, usually based on the relationship between fair market value and the cost of repair.[11] This termination technique is based

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intent of the landowner. City of Dallas v. Fifley, 359 S.W.2d 177 (Tex. Civ. App. 1962). Others rely primarily on a set period of cessation of the use. *See, e.g.*, City of Des Plaines v. La Salle Nat'l Bank of Chicago, 44 Ill. App. 3d 815, 358 N.E.2d 1198 (1976). *See* Annotation, *Occupation of Less Than All Dwelling Units as Discontinuance or Abandonment of Multifamily Dwelling Nonconforming Use*, 40 A.L.R.4th 1012 (1985); Annotation, *Right to Resume Nonconforming Use of Premises after Voluntary or Unexplained Break in the Continuity of Nonconforming Use*, 57 A.L.R.3d 279 (1974); Annotation, *Right to Resume Nonconforming Use of Premises after Involuntary Break in the Continuity of Nonconforming Use Caused by Difficulties Unrelated to Governmental Activity*, 56 A.L.R.3d 14 (1974).

9. *See* Town of Belleville v. Parrillo's, Inc., 83 N.J. 309, 416 A.2d 388 (1980); City of Baton Rouge v. Hebert, 378 So.2d 144 (La. Ct. App. 1979); Annotation, *Construction of New Building or Structure on Premises Devoted to Nonconforming Use as a Violation of Zoning Ordinance*, 10 A.L.R.4TH 1122 (1982); Annotation, *Changes, Repairs, or Replacements in Continuation of Nonconforming Use*, 87 A.L.R.2d 4 (1963); Annotation, *Change in Ownership of Nonconforming Business or Use as Affecting Right to Continuance Thereof*, 9 A.L.R.2d 1039 (1950).

10. Expansion may involve adding another building, perhaps an accessory building, increasing the area of an undeveloped lot being used for the nonconformity, or increasing the amount of internal space being devoted to the nonconforming use. *See* State *ex rel.* Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923); Austin v. Older, 283 Mich. 667, 278 N.W. 727 (1938); City of Baton Rouge v. Hebert, 378 So. 2d 144 (La. Ct. App. 1979).

11. *See In re* O'Neal, 243 N.C. 714, 92 S.E.2d 189 (1956); Palazzola v. City of Gulfport, 211 Miss. 737, 52 So. 2d 611 (1951); State *ex rel.* Covenant Harbor Bible Camp of the Central Conference of the Evangelical Mission Covenant Church of Am. v.

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on the assumption that when the cost of repair is too great, it would not be economically reasonable to rebuild; therefore, it would not be an economic burden on the landowner to prohibit the rebuilding.

D. *Amortization as a Technique*

Amortization is a technique often utilized[12] in conjunction with those tools previously mentioned in an effort to terminate nonconformities. The details of amortization schemes embodied in local zoning ordinances vary considerably. They all require, however, "the compulsory termination of a nonconformity at the expiration of a specified period of time — the time period, in theory, being equal to the useful economic life of the nonconformity."[13]

Amortization ordinances are often attacked, facially or as applied, on such state law grounds as failure to be authorized under the applicable state enabling statute[14] and failure to comply with state constitutional due process, equal protection and just compensation clauses. Plaintiffs seek invalidation and/or monetary damages on federal

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Steinke, 7 Wis.2d 275, 96 N.W.2d 356 (1959); Annotation, *Right to Repair or Reconstruct Building Operating as Nonconforming Use, after Damage or Destruction by Fire or Other Casualty*, 57 A.L.R.3d 419 (1974).

12. The practical significance of amortization as a technique to achieve the eventual termination of nonconformities depends upon the frequency of its use and its effect on owners of nonconforming buildings and/or land. Very little empirical evidence is available on these two matters. Nevertheless, as to the frequency of use, a 1972 study provides some insight at least as of that date. The study reviewed 489 communities, of which only one-third had enacted amortization provisions. Further,

> [w]ithin those communities with amortization programs, the most commonly amortized use concerned signs and billboards—54% of the communities reported amortizing them. The incidence of amortization for other uses does not exceed 25%, followed by nonconforming uses in conforming buildings with 18%; buildings and junkyards each show 17%. There was a negligible incidence of amortization among other uses. . . .

Scott, *The Effect of Nonconforming Land Use Amortization*, ASPO PLAN. ADVISORY SERVICE REP. No. 280 (May 1972). Informal discussions with planning lawyers and a recent modest investigation suggest that these schemes are presently more common than reported by Scott in 1972.

13. New Castle v. Rollins Outdoor Advertising, Inc., 459 A.2d 541 (Del. Ch. 1983), *rev'd*, 475 A.2d 355 (Del. 1984).

14. Some statutes explicitly authorize amortization of nonconforming uses. *See, e.g.*, ILL. REV. STAT. ch. 24, para. 11-13-1 (1984). Some statutes expressly prohibit it, while many others do not expressly address this technique. *See generally* R. ANDERSON, AMERICAN LAW OF ZONING § 6.71 (2d ed. 1976); *see also* N. WILLIAMS, AMERICAN LAND PLANNING LAW § 18.08 (1986) (table of state statutes on this subject).

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grounds, particularly under the due process[15] and just compensation[16] clauses.

II. Classifications of Nonconformities

A. *The Analytical Need for Classifications*

Land planning and legal analyses with respect to nonconformity problems should reflect differences among types of nonconformities but often fail to do so.[17] Local zoning ordinances that do not provide treatment tailored to these different categories not only are insufficiently sensitive to balancing the legitimate interests of landowners and the public, but also run unnecessary legal risks of judicial invalidation. For example, an ordinance that provides for a very short amortization period for a nonconforming building might well be unconstitutional because only a small portion of the landowner's investment in that building would be recovered before its required demolition. The same

15. This protection is contained in the fourteenth amendment: "Nor shall any state deprive any person of. . .property without due process of law. . . ." U.S. Const. amend. XIV. Due process claims argue that amortization deprives the landowner of his property without due process of law. Landowners argue that amortization unreasonably requires them to destroy or eliminate some aspect of the use of their property in order to achieve the public benefit of greater consistency of land uses with the zoning ordinance. The "integrity" of a residential zone is not necessarily threatened by the existence of a two-flat in a single-family neighborhood. The landowner may own a building that is more structurally sound than those in the immediate neighborhood, with more attractive landscaping, but which must be demolished or substantially reduced because it violates a newly enacted setback requirement. The argument is that the burden forced upon the individual property owner is too great for the limited benefit to the public. This theory is also used to argue against the reasonableness of the time periods established by amortization provisions: Why does a billboard have a five-year amortization period rather than a four-year or a six-year period? *See* Modjeska Sign Studios v. Berle, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977), *appeal dismissed*, 439 U.S. 809 (1978). For a list of how states have ruled on the constitutionality of amortization, see 4 N. Williams, American Land Planning Law 553-555 (1974).

16. The fifth amendment prohibits the taking of "private property. . .for public use, without just compensation." U.S. Const. amend. V. It is applicable to states and local governments by incorporation into the fourteenth amendment.

17. A Vermont court recently showed its own confusion concerning different types of nonconformities in Town of Brighton v. Griffin, 532 A.2d 1291 (Vt. 1987). Here, a filling station was nonconforming on two grounds: it did not have a conditional use permit, which was required under the zoning ordinance; and its pumps and storage tanks were too close to the property line. Although the Vermont statute was clear that there could be "nonconforming uses" and "noncomplying structures," the court referred to both nonconformities as "nonconforming uses" and enjoined operation of the filling station as long as the nonconformity of location of the pumps continued.

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amortization period for a small and relatively inexpensive sign, however, might allow the sign owner to recoup his entire investment.

B. *Types of Nonconformities*

1. Uses and Site Development Standards

One type of nonconformity might be called a "nonconforming lot." Such a lot was legally created under previous zoning regulations, but the new enactment would not permit it to be developed because of inadequate yard and setbacks, street frontage, or lot area.

A second category is a "nonconforming use of land." Here, there is either no building employed in connection with the now-illegal use or the building is of very low value. This could include such nonconformities as gravel pits, junkyards, grazing areas for animals, and various agricultural uses.

A third type is a "nonconforming use of a nonconforming building." In this case, there are two nonconformities: first, the use itself is nonconforming, such as a commercial use in a newly established residential zoning district; second, the dimensional features of the site or building in which the use is located are nonconforming, as in the case of a building that is too high and also located on a site so as to violate minimum yard area or setbacks from the street.

A fourth category might be called a "nonconforming use of a conforming building." Here, the building would be permitted to be constructed under the new zoning regulations because of compliance with all site dimensional standards such as setbacks and yard, but the use to which the building is put conflicts with the new use restrictions. An example of this category would be a doctor's office operating from the first floor of a home in a newly created single-family residential district.

A final type of nonconformity is a "conforming use of a nonconforming building." In this situation, the new site dimensional standards are violated, but the use itself is in conformity with the amended ordinance.

2. Nuisances and Other Uses

Aside from those five categories of nonconformities, distinctions should be made among uses themselves. Some uses such as automobile junk yards or slaughterhouses in residential districts are traditionally regarded as nuisances or quasi-nuisances. Conversely, some uses, such as hospitals and churches, are beneficial to a community but require locations with adequate parking, street frontage, and vehicular access

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because of the intensity of their use. Between the nuisance and the obvious beneficial uses are those uses that are implicitly deemed by the new zoning regulations to be incompatible with the surrounding uses, but that pose no serious threat to the health, safety, or welfare of the community. A barber shop in a residential area is one such use.

III. ILLUSTRATIVE HYPOTHETICAL FACTS

Understanding the operation and impact of an amortization program is the first step in analyzing its constitutionality under the just compensation clause. Unfortunately, anecdotal experience suggests there is often only marginal understanding of the actual effects of such measures by planners who propose and government officials who enact them.

The following hypothetical situation reflects the attempt of a community to terminate some legal nonconformities. The fact situation involves a landowner whose property has three separate legal nonconformities and the economic impact of the proposed amortization scheme on her. Part IV(C) will analyze the hypothetical in terms of a request by the landowner for a variance from the strict application of the zoning regulations, a step often required in connection with possible later litigation under a regulatory taking theory. Part V will analyze the hypothetical in terms of a claim that the amortization ordinance, on its face and as applied to the property, constitutes a regulatory taking.

Hypothetical:

> Laura Landowner owns a two-family home and a small coachhouse, both located on a single lot. The coachhouse, at the rear of the lot, has its own private driveway access. When the two structures were built, the development complied with the use and site development requirements of the applicable zoning ordinance. Landowner purchased the property in 1985, after a city building official advised her attorney that it was a "legal nonconforming use," which could continue subject only to limitations on expansion, change of use, or rebuilding in the event of fire. The coachhouse was a nonconforming building, which violated the side yard set-back requirements; the two-flat was a nonconforming use in a single-family residential district; and both buildings created a third nonconformity as to development by violating the maximum percentage of the lot that could be covered by structures.

In 1986, Landowner spent 20,000 dollars repairing and improv-

ing the structures and landscaping, after which the property was appraised at 250,000 dollars. The homes then had an estimated useful remaining life of fifty years.

The neighborhood is made up primarily of single-family homes, but there are four other two-family homes on the street and two coachhouses. Some single-family homes in the area have not been as well maintained as Landowner's buildings.

In 1987, the city adopted a Comprehensive Plan to guide city decisions in land use and other matters.[18] Among the many goals expressed in the plan were:

> to maintain a heterogeneous residential community of high quality; to maintain a physical, social and economic setting conducive to the happiness of its citizens of all ages; to conserve and maintain the attractive and varied existing housing stock; to facilitate housing for those who contribute to the city's well being — public employees, storekeepers and retirees; to encourage an adequate supply of rental housing.

In 1988, the city adopted a comprehensive amendment to the zoning ordinance that included an amortization of nonconformities provision:

> Any nonconforming building or nonconforming use of a nonconforming building shall be entirely discontinued and shall cease operation no later than fifteen (15) years from the date of this ordinance (1988).

Another ordinance provision set forth criteria for obtaining a variance from the strict application of the zoning ordinance (including the amortization section):

> where the strict application would result in a clearly demonstrable, practical difficulty or particular hardship and the proposed activity would not be contrary to the health, safety, or welfare of the city.

Landowner obtained bids averaging 75,000 dollars from local

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18. "Comprehensive plans historically have included land use maps that projected a precise 'end-state' to which the community was supposed to conform at the close of the planning period. The mapped, end-state plan has been subject to growing criticism as an overly rigid and not very useful technique for the statement of community planning goals. It has been replaced in many communities by a more flexible policy plan that deemphasizes mapping in favor of textual statements delineating the community's general planning policies. As it has dropped its function of projecting optimal land development strategies, planning has also established a more intimate relationship with the political process. In some areas it has limited itself to informing policy makers, such as local governing bodies, of the planning consequences of alternative strategies in order to facilitate intelligent choice." Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 900, 918-19 (1976).

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contractors for converting the two-family home to single-family use. Upon any immediate conversion of the two-family home and cessation of use of the rear coachhouse, the total rentals would decline by sixty-five percent. Landowner did not obtain an estimate of the cost of demolition of the coachhouse. Landowner obtained a new appraisal of the property, which showed an immediate diminution of fair market value from 250,000 to 136,000 dollars since a purchaser, informed of the amortization requirement, would pay far less for the property than before its enactment.

Landowner talked with town officials about how the amortization provisions would apply specifically to her property. Following these conversations, she contacted an attorney to discuss what legal avenues were open to her. On his advice, Landowner decided to apply for variances from both the site development and the use regulations that created the three nonconformities, or alternatively, from the amortization provisions. If she is denied the variances, she may assert a claim of a regulatory taking under the just compensation clause.

IV. Relation of Variance Application to Possible Subsequent Claim of Regulatory Taking

A. *Need to Ensure that the Claim is Ripe for Adjudication*

As more fully discussed in Part V below, one of the important factors in determining whether a particular governmental enactment, such as the hypothetical amortization program, constitutes a regulatory taking as applied to a particular piece of property for which compensation must be paid is the economic impact of the measure on the landowner. Until that impact is determinable, the claim is not ripe for adjudication. This was the United States Supreme Court's reasoning in *MacDonald, Sommer & Frates v. County of Yolo,*[19] a 1986 case in which the Court declined to decide whether a county's refusal to permit a particular development proposal was a taking on the grounds that another proposal might have received approval or that the government might have offered compensation for a denial. The Court held: "It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject

19. 477 U.S. 340, *reh'g denied,* 478 U.S. 1035 (1986).

property."[20]

A factually closer case enunciating the same principle is *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[21] where the takings claim was fatally defective because the landowner-plaintiff had failed to apply for a variance from the strict requirements of the amended zoning ordinance. The Court reasoned that had such an application been made, a variance might have been granted and some development permitted.[22] There would then be no grounds for claiming that the ordinance effected a regulatory taking. The burden is on the landowner to receive "final and authoritative determination" concerning permitted development before filing suit.[23]

B. *Variance Standards*

Variances are designed to be granted where literal enforcement of the zoning ordinance would be a hardship to the landowner and where the variance would not contravene the spirit and intention of the ordinance as a whole.

Case law determining whether variances should have been granted often requires proof that the hardship or difficulties encountered by the landowner are caused by unique physical aspects of the parcel. This judicial gloss occasionally is incorporated into the ordinance itself, as recommended by the American Society of Planning Officials in its 1966 Model Zoning Ordinance: "[The board must find that] the lot is exceptionally irregular, shallow, narrow, or steep, or that the land, or building, or structure, is subject to other exceptional physical conditions peculiar to it."[24]

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20. 477 U.S. at 348.

21. 473 U.S. 172 (1985).

22. The Ninth Circuit Court of Appeals recently reversed a decision which found a scenic easement ordinance to have worked a taking. The Ninth Circuit held that the claim was not ripe for adjudication for failure to seek a variance of the ordinance. Lai v. City and County of Honolulu, 841 F.2d 301 (9th Cir. 1988).

23. The landowner, however, need not go through a variance or permit application procedure when any such application would be futile. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 352 n.8 (1986). *See also* Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988), where the Fourth Circuit Court of Appeals, in a billboard amortization case, observed that the defendant city appeared to concede that a variance would probably not be granted. The Court remanded the case in part for a determination of whether the taking claim was mature.

24. AMERICAN SOCIETY OF PLANNING OFFICIALS, MODEL ZONING ORDINANCE art. V(2)(D)(1) (1975).

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In some jurisdictions, use variances are distinct from area variances. Some courts prohibit use variances entirely, reasoning that permitting a nonconforming use in a differently zoned district effectively amends the zoning ordinance and usurps legislative power.[25] Whether a landowner can seek a use variance depends largely on the applicable state case law.

C. *Variance Standards As Applied to the Amortization Hypothetical*

Following the advice of her attorney, Laura Landowner is seeking variances from the amortization provisions triggered by setback and bulk regulations (as to the coachhouse location and the existence of both structures on one lot) and the use restrictions (as to the multifamily use of the two-flat). In most jurisdictions, such arguments would be addressed to an administrative board, often called the "Board of Zoning Appeals" or a similar name. In some localities, the zoning ordinance may also require approval by the local governing body.

The variance standards governing the hypothetical include "practical difficulty or particular hardship." Especially under the second of these two alternative criteria, the absence of a reasonable economic return is the key focus.[26] Landowner would seek to establish a substantial and immediate diminution of value caused by the amortization provision, a substantial cessation of rental income on the last day of the amortization period, the cost of demolition of the coachhouse, and the absence of a reasonable return for the fifty-year remaining useful lives of the buildings.[27] Evidence should include: Landowner's testimony

25. *See* Koch v. Bd. of County Comm'rs of County of Sedgwick, 185 Kan. 259, 342 P.2d 163 (1959); Township of Dover v. Board of Adjustment of Dover, 158 N.J. Super. 401, 386 A.2d 421 (1978).

26. "Situations will arise where the application of zoning to a particular piece of property . . . greatly decreases its value for any permitted use to which it can reasonably be put and where the application of the ordinance bears so little relationship to the purposes of zoning that, as to that property, the regulation is, in effect, confiscatory or arbitrary. . . . [In such a case the board] may vary the terms of the ordinance, provided, of course, that the variance does not materially impair the effectiveness of the zoning regulations as a whole and provided, further, that the Board's action promotes substantial justice." Culinary Inst. of Am. v. Board of Zoning Appeals, 143 Conn. 257, 261-62, 121 A.2d 637, 639 (1956). *See generally* C. PETERSON & C. MCCARTHY, HANDLING ZONING AND LAND USE LITIGATION: A PRACTICAL GUIDE § 7-3 (1982).

27. In cases involving commercial uses, economic factors include the availability of other locations, the cost of moving, the financial ability of the owner to relocate, the possible loss of business and the prospects for success at a new location, the actual harm caused to the neighborhood by the current use, and possible modifications of any harm-

concerning the initial cost of the land and buildings, the cost of improvements made on them, the current rentals, and similar matters; a real estate appraiser's testimony concerning the fair market value of the property before and after enactment of the amortization provision;[28] a contractor's testimony concerning its bid for conversion and demolition; and the estimated remaining useful lives of the buildings.

Other arguments on "particular hardship" can stress fairness. Prior to her purchase of the property, Landowner personally and through her attorney checked the building department files to ascertain the property's then-legal nonconforming use status.[29] The cost and scope of improvements to the parcel were substantial. Many of the improvements were approved by the city when it granted building permits for the changes. The improvements enhance livability and the quality of the neighborhood; the parcel is well maintained and is not a nuisance. The buildings themselves were originally designed and constructed specifically to serve the uses to which they are now devoted, rather than having undergone past conversion to those existing uses. Landowner followed every regulation and made no changes that were not approved by the city. She is seeking not to maximize possible return but to avoid a major economic loss. "Changing the rules" by amending the ordinance creates a particular hardship in her case and is essentially unjust and unfair.

In the Landowner hypothetical, the common law requirement of proving some exceptional physical condition peculiar to the parcel might be addressed by contending that the physical condition, configuration, and site location of Landowner's buildings are each "peculiar" to her parcel. A real estate broker could testify that the separate driveway access for the coachhouse is unique to this parcel; that all coachhouses in the neighborhood are converted garages or second-floor apartments in garages; that Landowner's coachhouse is the only one built originally as a single-family residence; and that no other lot in the community has a coachhouse and a two-flat.

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ful use. *See* Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958).

28. *See generally* AMERICAN INSTITUTE OF REAL ESTATE APPRAISAL, THE APPRAISAL OF REAL ESTATE (8th ed. 1983).

29. Although such verification is special, or unique to Landowner, it does not relate to a particular physical feature of the parcel. For that reason, verification might be discounted by the Zoning Board in hearing the variance application. On the other hand, the board may well choose to allow the proof under the generally, though legally suspect, relaxed hearing practices.

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Another criterion in the variance section of the hypothetical ordinance is that the proposed activity — here, continuation of the existing uses without application of the amortization provisions — would not be contrary to the health, safety, or welfare of the city. One aspect of compliance with this very broad standard is whether the use is detrimental to the neighborhood.[30] A land use planner or real estate broker could testify that: the neighborhood includes several different housing types, with some houses inferior to Landowner's in physical maintenance; most residences are built on parcels of a similar size; the lot coverage by large, single-family buildings is often similar to Landowner's parcel; and the existing uses are compatible with other nearby uses. Also, because the variance would merely authorize a continuation of existing uses, there would be no additional impairment of light and air to adjacent property. A continuation of uses would not increase risks such as fire, which are manageable through excellent fire and emergency vehicle access from the front and side streets bordering the parcel. Additionally, absence of amortization will not increase traffic or produce congestion because of adequate on-site and street parking and because the variance merely seeks continuation of an existing use.

Alternatively, Landowner could argue that if the variances are not granted, there will be no incentive to maintain the coachhouse as the end of the amortization period approaches. An owner might allow it to fall into disrepair, since it will have to be demolished anyway and will have no market value. This condition of disrepair would harm rather than improve the neighborhood.

Landowner could contend that the terms of the city's own Comprehensive Plan support the conclusion that continuation of the existing uses would not be contrary to the health, safety or welfare of its citizens. On the contrary, amortization would run at cross purposes to the Comprehensive Plan.[31] Testimony of the land use planner and affected

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30. Examples of proofs establishing no such harm include Yahnel v. Board of Adjustment of Jamesburg, 79 N.J. Super. 509, 192 A.2d 177 (1963) and Tidewater Utils. Corp. v. City of Norfolk, 208 Va. 705, 160 S.E.2d 799 (1968). But detriment to the neighborhood was found in such cases as Amberley Swim & Country Club, Inc. v. Zoning Bd. of Appeals of Amberley Village, 117 Ohio App. 466, 191 N.E.2d 364 (1963) and Marion County Bd. of Zoning Appeals v. Sheffer & Clark, Inc., 139 Ind. App. 451, 220 N.E.2d 543 (1966).

31. Inconsistency between an officially adopted Comprehensive Plan and a zoning regulation does not, except in a few jurisdictions, require a judicial finding of zoning invalidity. Illustrative examples of cases so holding are DeKalb County v. Albritton Properties, 256 Ga. 103, 344 S.E.2d 653 (1986) (Comprehensive Plan not determinative,

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residents, particularly elderly owners or renters, single parents, and the like, could support this argument in several respects. First, amortization would narrow housing opportunities, thus undermining the Plan goal of promoting a "heterogeneous residential community of high quality." Also, the goal of maintaining a "physical, social and economic setting conducive to the happiness of its citizens of all ages" is impeded by amortization. Empty nesters, the elderly, and others would be less able to find small, suitable living space. Young adults, newlyweds, single parents, and others who lack funds to purchase living units would also find their housing choices narrowed. Furthermore, amortization provisions undermine the goal of conserving and maintaining existing housing stock by deterring owners of nonconformities from improving properties where these nonconformities must eventually be terminated. Moreover, Laura Landowner expended substantial sums to conserve and maintain her property, thus promoting the Plan's goal and thereby improving the community as a whole. Finally the future termination of two of the three Landowner rental units would impede the Plan's goal of facilitating housing for public employees, storekeepers, and retirees, many of whom would be living on moderate incomes that might preclude ownership of residential housing. That consequence would adversely affect the final goal of providing an adequate supply of rental housing.

The land use planner could also point to other techniques set forth in the city's zoning ordinance that deal with nonconformities: stringent restrictions concerning change, expansion, repair and reconstruction,

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especially where the character of the surrounding land has changed); Balser v. Kootenai County Bd. of Comm'rs, 110 Idaho 37, 714 P.2d 6 (1986); Chapman v. Montgomery County Council, 259 Md. 641, 271 A.2d 156 (1971). On the other hand, since the 1970s, courts have increasingly held that conformity of zoning and comprehensive planning is a factor in determining the validity of zoning decisions. Examples include Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969); Goffinet v. County of Christian, 65 Ill.2d 40, 357 N.E.2d 442 (1976); Apfelbaum v. Town of Clarkstown, 104 Misc.2d 371, 428 N.Y.S.2d 387 (Sup. Ct. 1980); and Lathrop v. Planning & Zoning Comm'n of the Town of Trumbull, 164 Conn. 215, 319 A.2d 376 (1973). The leading, although by now somewhat dated, article in the field is Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976). *See also* Counts, *New Directions — Plan Implementation Zoning*, 1985 INST. ON PLAN. ZONING & EMINENT DOMAIN 51; DiMento, *The Consistency Doctrine: Questions About the Role of Comprehensive Plans*, 1984 ZONING & PLAN. HANDBOOK ch. 4; O'Connell, *More Effective Implementation of Comprehensive Plans and Land Development Regulation*, 1981 INST. ON PLAN. ZONING & EMINENT DOMAIN 33.

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and abandonment.[32] Continued operation of the highly regulated nonconforming use would present no adverse effect to the city. To the contrary, the use would in many ways benefit its citizens, especially in light of the goals set forth in the Comprehensive Plan.

If the Zoning Board were to grant Landowner the variances she seeks, there would be no occasion for her to consider judicial remedies.[33] She may wish to seek judicial relief, however, if the Zoning Board were to deny any variance, thereby allowing the amortization scheme to operate against Landowner's parcel, or if the Board were to grant a limited variance extending the amortization period as to the parcel in recognition of the facts unique to Landowner's situation. Under either scenario, she might claim that the amortization ordinance on its face and as applied to her property constitutes a taking without just compensation under the fifth and fourteenth amendments.

V. AMORTIZATION OF NONCONFORMITIES AS REGULATORY TAKINGS

A. *Overview*

1. *Penn Central* Standards

A structured approach to analyzing amortization schemes under the just compensation clause requires a general familiarity with the often elusive and rapidly evolving contours of takings criteria. Land use controls techniques, which include amortization of nonconformities, are sometimes attacked as regulatory takings. Although takings normally do not involve governmental or public possession, the effect on the landowner in some cases is so substantial that it violates the just compensation clause of the fifth amendment,[34] made applicable to the states and their political subdivisions through the fourteenth amendment.[35] Such enactments are occasionally attacked as violations of state just compensation clauses,[36] a topic beyond the scope of this

32. For a discussion of these alternative techniques, see *supra* Part I(C) and accompanying footnotes.

33. Where the amortization period expired and the nonconforming uses terminated prior to the variance request, there may be theories for recovery of monetary damages for lost profits for the temporary discontinuance of the use. Such inquiry is beyond the scope of this Article.

34. The fifth amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

35. Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897).

36. *See, e.g.*, Corrigan v. City of Scottsdale, 149 Ariz. 533, 720 P.2d 528 (Ct. App.

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Article.

The underlying purpose of the federal just compensation clause is to promote fairness and justice to property owners and the public,[37] and "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[38] Regulations designed to protect the public from a special harm are often insulated from takings challenges.[39] The issues become more complex in regard to regulations that confer a public benefit, but at substantial cost to the private landowner. In the landmark case, *Penn Central Transportation Co. v. New York City*,[40] the Supreme Court recognized that to withstand a takings claim, a regulation must be "reasonably necessary to the effectuation of a substantial public purpose."[41] Beyond this requirement, the Court for the first time in one opinion set forth standards for deciding takings cases:

> [In] engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The *economic impact* of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct *investment backed expectations* are, of course, relevant considerations. So, too, is the *character of the governmental action*. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[42]

The Court further refined these criteria:

1985), *cert. denied*, 479 U.S. 986 (1986) (regulatory taking by reason of rezoning of 74% of land as nonbuildable open space).

37. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), a case generally covered in at least three law school courses: property, constitutional law, and land use controls. Justice Holmes' famous majority opinion found that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. The traditional criticism is that the opinion failed to articulate criteria for deciding in future cases when a regulation went "too far" and therefore constituted a regulatory taking.

38. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1984).

39. Such regulations would include important health and safety measures. *See infra* Part V(D)(3) and accompanying footnotes.

40. 438 U.S. 104 (1978).

41. *Id.* at 127.

42. *Id.* at 124 (citations omitted, emphasis supplied).

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"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .[43]

2. *Agins* Standards

Although *Penn Central* provided the analytical framework for most U.S. Supreme Court regulatory taking cases,[44] a different, but not analytically inconsistent formulation was curiously set forth by the Court only two years after *Penn Central.* In *Agins v. Tiburon,*[45] which involved an open space zoning ordinance, the Court stated that a taking occurs whenever an "ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."[46]

The first of these alternative tests was dramatically expanded in 1987 by another leading case, *Nollan v. California Coastal Commission.*[47] In *Nollan,* the Supreme Court closely examined the nexus or fit of a building permit condition to certain stated governmental goals. The building permit required an easement across the landowners' property to allow public access to the beach. The goals of this requirement included protecting the public's ability to see the beach, preventing congestion on public beaches, and providing access to the beach. The Court examined these goals in light of the permit conditions to see how closely they meshed. They considered, for example, the goal of permitting the public to see the beach despite the building of a larger house. If the condition had limited the height or width of the building or prohibited a fence, the connection between the condition and the goal

43. *Id.* at 130-31.

44. *See, e.g.,* Andrus v. Allard, 444 U.S. 51 (1979); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264 (1981); Ruckelshaus v. Monsanto, 467 U.S. 986 (1984); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Hodel v. Irving, 107 S.Ct 2076 (1987).

45. 447 U.S. 255 (1980).

46. *Id.* at 260.

47. 107 S. Ct. 3141 (1987).

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would have been sufficiently close. The Court was also unconvinced that the building of a larger house would have any relation to increased public congestion on the beach. Although the goal of alleviating congestion by providing additional beach access may be a valid one, if the building of a larger house did not directly intensify congestion, there was no rationale for tying a condition aimed at diminishing the problem to the building permit. The Court therefore struck down the requirement for lateral beach access as not "substantially advancing" legitimate state goals. Under this test, there must be a clear and substantial relationship between each land use regulatory provision and a legitimate state purpose. Unless there is an "essential nexus," the regulation is confiscatory.

The second prong of the *Agins* formulation — the "economically viable use" test — was addressed forcefully in the landmark "temporary taking" case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[48] In *First English*, the Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." The issue before the Court was limited. It involved the validity of California's rulings that the only remedy for "inverse condemnation" was invalidation of the ordinance rather than monetary damages. Therefore, the Court had no occasion to decide whether the ordinance at issue actually denied appellant all use of its property. The Court then remanded the case for trial on this issue. We have had no further clarification from the Court as to what constitutes denial of *all* economically viable uses.

B. *Nonconformities Must Have Been Introduced Legally to be Protectable Property Interests*

The just compensation clause applies only to "property." In many regulatory taking cases, the parties take opposing positions as to whether the plaintiff has a requisite property interest. One example is *MacDonald, Sommer & Frates v. County of Yolo*.[49] The county asserted that the owner of farmland which was denied public services by the county did not have a legal entitlement to the services. Instead, the owner had only a hope or unilateral expectancy that these services

48. 107 S. Ct. 2378 (1987).

49. 477 U.S. 340 (1986).

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would be extended. As the landmark case defining property interests states:

> [Protectable property interests] are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[50]

These problems rarely arise in amortization situations. "Litigation of an inverse condemnation claim on this issue differs from that in the vested rights[51] context in that there is no question about the existence of a property right in the established use."[52] An exception arises where the previously established use was illegal. A landowner could not assert a violation of the just compensation clause without a reasonable expectancy that the nonconformities could be continued. The landowner cannot state a claim if the nonconformities were initially introduced illegally, as would be the case if they violated the then-applicable zoning ordinance[53] or the building code.[54] The Supreme Court recognized this important principle[55] in dictum in *Keystone Bituminous Coal Association v. DeBenedictis*. The Court stated that courts "have con-

50. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

51. Legal nonconformities and vested rights are similar in that the basic issue for both is the legal effect of a land use regulation on an activity or development that existed prior to the effective date of the amendment. Vested rights cases normally turn on questions of the degree to which a landowner has relied in good faith on an act of a government (e.g. the granting of a permit) and the degree to which a landowner has substantially changed his position by incurring substantial expenditures or financial obligations. The inquiry seeks to establish whether "property," rather than merely a unilateral expectation, has been created. Also at issue is fairness: When has a landowner progressed far enough in construction and expenses, based on good faith reliance on governmental approvals, that to preclude further development would be unjust? *See* C. SIEMON & W. LARSEN, VESTED RIGHTS (1982); Cunningham & Kramer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625 (1978); Heeter, *Zoning Estoppel: Application of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63.

52. D. HAGMAN & J. JUERGENSMEYER, *supra* note 7, at 443-44.

53. Schaefer v. Neumann, 561 S.W.2d 416 (Mo. Ct. App. 1978) (landowner failed to meet burden of proving salvage business established prior to zoning ordinance amendment prohibiting auto salvage businesses).

54. State v. Stonybrook, Inc., 149 Conn. 492, 181 A.2d 601, *cert. denied and appeal dismissed*, 371 U.S. 185 (1962).

55. This principle is equally applicable to nuisance activities such as hazardous waste operations, unsafe buildings, and fire and safety hazards as more fully discussed in Part V(D)(3) *infra*.

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sistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity."[56] The notion is consistent with the cases that deny due process or just compensation protections when the plaintiff asserts merely a "unilateral expectation" rather than a protectable property interest.[57]

C. *Analysis of an Amortization Program Under the "Nexus" Test*

As noted in Part V(A)(2) above, Justice Scalia's opinion in *Nollan* suggests a dramatic new approach to regulatory taking analysis. In *Nollan*, the Court struck down a building permit requirement that compelled the landowners to allow lateral beach access across their property, despite the California Coastal Commission's assertion that the requirement furthered stated governmental goals. The majority ridiculed the claimed connection between the measure and its purported purposes as grossly imprecise. The dissenting Justices Brennan and Marshall correctly concluded that the Court was applying strict scrutiny rather than the "rational relationship" test traditionally used in regulatory taking cases. If the strict scrutiny test is applied generally, governmental units will have more difficulty proving that a land use regulation substantially advances a legitimate goal.

1. Facial Attacks in "Nexus" Cases

Landowners may find it easier to attack an amortization program on its face as not "substantially advancing a legitimate state interest" than to contend the program denies the owner all "economically viable use." This is because the first prong requires identification of the true ends sought and an essential nexus, or "fit," between the land use regulations and those ends. These matters are not directed to site-specific facts, but rather focus on governmental purposes and techniques. Justice Scalia took this position in his dissent in *Pennell v. City of San Jose*.[58] In *Pennell*, the majority regarded as premature, and thus not ripe for adjudication, a facial attack on a tenant hardship provision in a rent control ordinance. The ordinance required the Hearing Officer, in

56. 107 S. Ct. 1232, 1246 n.22 (1987). The Court cites such illegal activity cases as Kuban v. McGimsey, 96 Nev. 105, 605 P.2d. 623 (1980) (brothel), Pompano Horse Club Inc. v. State *ex rel.* Bryan, 93 Fla. 415, Ill So. 801 (1927) (gambling facility), and People *ex rel.* Thrasher v. Smith, 275 Ill. 256, 114 N.E. 31 (1916) ("bawdyhouse").

57. *See* Board of Regents v. Roth, 408 U.S. 564, 572 (1972) and Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).

58. 108 S. Ct. 849 (1988).

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granting a landowner relief from rent controls, to consider, among many factors,[59] the degree to which such relief would constitute a hardship to the tenant. The majority decided that there could be no taking absent a concrete exercise of the Hearing Officer's discretion as to tenant hardship. Justice Scalia, joined by Justice O'Connor, vigorously argued that the tenant hardship provision was an improper governmental method of reaching a legitimate state end. According to Scalia, the state end was to "provide financial assistance to impecunious renters," which was improperly furthered by regulating land. Scalia reasoned that once the other factors had been considered, the rent allowed to be charged was merely a "reasonable rent" and not an exorbitant one. The landlord therefore neither caused a high rent market nor excessively profited from high rents. To decrease a reasonable rent because it would cause a hardship to a tenant "too poor to afford even reasonably priced housing" would be unfair to the landlord, who did not cause the problem. Scalia concluded that because the hardship factor actually constituted a subsidy in the guise of a regulation, it was an improper method of solving the problem of low income renters.

In regard to amortization programs, facial attacks should not necessarily be the uphill battles destined to defeat as suggested in *Keystone*. Justice Scalia's analysis suggests that each element of the enactment itself must be closely scrutinized, without regard to the impact on a particular property, to determine whether each such element actually furthers the various ends set forth in the ordinance. Thus the Court must examine elements such as whether the ordinance distinguishes among types of nonconformities, the type of uses or physical aspects of development impacted, the period or method of calculating the period of amortization, and the relation of exempted circumstances. Imprecise or inflexible ordinances may not achieve the required nexus. If an ordinance requires that all nonconforming buildings be amortized in a twenty-year period, for example, it fails to distinguish among various types of construction or rates of decay. A legitimate purpose of the ordinance may be to eliminate neighborhood blight, but if the ordinance allows a dilapidated and poorly built shack to remain for the same period as a well-constructed and designed brick building, a facial

59. The factors were designed to determine a reasonable rent level. They take into account debt service, rental history of the unit, the physical condition of the unit, changes in housing services, other financial information provided by the landlord, and market value rents for similar units.

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attack may succeed.[60]

2. Is There a "Legitimate State Interest"?

If there is no legitimate public purpose in requiring the termination of a nonconformity, then even if the "fit" between the measure and the goal survives the *Nollan* analysis, the measure would be a regulatory taking. In *Nollan*, Justice Scalia candidly admitted that "[o]ur cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest'. . . ."[61] At the same time, he recognized that previous cases have upheld "a broad range of governmental purposes"[62] such as scenic zoning, landmark preservation, and residential zoning.[63] Neither the Supreme Court nor many federal courts have addressed amortization of nonconformities, perhaps because it is a technique of considerably less general utility and applicability than the land use control techniques enumerated in the *Nollan* opinion.

A number of state cases have upheld the purposes of amortization schemes, usually on the grounds of providing eventual harmony with the land uses permitted by the current zoning ordinance. The leading case is *City of Los Angeles v. Gage*,[64] where an amortization provision required any nonconforming commercial or industrial use of a conforming building in a residential zone to be discontinued within a five-year period. Gage operated a wholesale and retail plumbing supply business in part of the first floor of a two-flat building. He also stored

60. In a recent case attacking an amortization ordinance as working an unconstitutional taking as applied, Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988), the court distinguished *Nollan*. The ordinance at issue required commercial billboards in certain locations to be amortized after a five and one-half year period, on the grounds of traffic safety and aesthetics. Because the court found "the prohibition of certain billboard advertising [to be] directly related to the city's interest in aesthetics," *Nollan* did not apply. *Id.* at 174. This is an interesting conclusion in light of the location of the signs in "heavy commercial or industrial uses."

61. 107 S. Ct. 3141, 3145 (1987).

62. *Id.* at 3147.

63. State courts have applied *Nollan* to uphold various regulations as legitimate state purposes. *See, e.g.*, Rodgers v. City of Cheyenne, 747 P.2d 1137 (Wyo. 1987) (height limitations on trees); Jonathan Club v. Cal. Coastal Comm'n, 197 Cal.3d 884, 243 Cal. Rptr. 168 (Cal. Ct. App. 1988) (increased public beach access); Westwood Homeowners Ass'n v. Tenoff, 155 Ariz. 229, 745 P.2d 976 (1987) (integration of group home into community).

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

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plumbing supplies in a garage. Upholding the amortization scheme, the court explained:

> The theory in zoning is that each district is an appropriate area for the location of the uses which the zone plan permits in that area, and that the existence or entrance of other uses will tend to impair the development and stability of the area for the appropriate uses. The public welfare must be considered from the standpoint of the objective of zoning and of all the property within any particular use district. It was not and is not contemplated that preexisting nonconforming uses are to be perpetual. The presence of any nonconforming use endangers the benefits to be derived from a comprehensive zoning plan. . . .There would be no object in creating a residential district unless there were to be secured to those dwelling therein the advantages which are ordinarily considered the benefits of such residence.[65]

Amortization ordinances governing signs and billboards are frequently upheld on the grounds that the government has a legitimate interest in the aesthetics of a community,[66] protecting natural beauty,[67] and preventing blight and the deterioration of neighborhoods.[68] Some uses, such as automobile wrecking and junkyards, are deemed to be nuisances when they exist in residential districts. Amortization of these nonconforming uses has been upheld as furthering the public safety[69] and diminishing neighborhood blight.[70]

The few existent federal cases generally support the concern for achieving eventual harmony with the zoning ordinance.[71] Other valid governmental purposes include concern with aesthetics,[72] traffic

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65. *Id.* at 458-59, 274 P.2d at 43.

66. *See* Suffolk Outdoor Advertising Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 403 N.Y.S.3d 368 (1977).

67. *See* Village of Skokie v. Walton on Dempster, Inc., 119 Ill. App.3d 299, 456 N.E.2d 293 (1983); City of Fayetteville v. McIlroy Bank & Trust, 278 Ark. 500, 647 S.W.2d 439 (1983); County of Cumberland v. Eastern Federal Corp., 48 N.C. App. 518, 269 S.E.2d 672 (1980); Ackerley Communications v. City of Seattle, 92 Wash.2d 905, 602 P.2d 1177 (1979); State of Maine v. Nat'l Advertising Co., 409 A.2d 1277 (Me. 1979); Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (N.Y. App. 1977).

68. Donnelly Advertising Corp. v. Mayor of Baltimore, 279 Md. 660, 370 A.2d 1127 (Md. 1977)

69. Rives v. City of Clarksville, 618 S.W.2d 502 (Tenn. Ct. App. 1981).

70. Lachapelle v. Town of Goffstown, 107 N.H. 485, 225 A.2d 624 (1967).

71. Art Neon Co. v. City and County of Denver, 488 F.2d 118 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974).

72. Standard Oil Co. v. City of Tallahassee, 87 F. Supp. 145 (N.D. Fla. 1949), *aff'd*,

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safety,[73] and preservation of the quality of urban life.[74]

3. Assuming the Legitimacy of the Purposes of an Amortization Program, Do the Details "Substantially Advance" Those Goals?

The new Supreme Court approach in taking cases now requires that the regulation substantially advances the legitimate state interest sought to be achieved, not that the State *could rationally have decided* the measure adopted might achieve the State's objective.[75] As a recent evaluation of the *Nollan* case points out: "This analysis is reminiscent of the strict judicial scrutiny doctrine developed by the Warren Court in its application of the equal protection clause to strike down governmental regulations and laws which were racially suspect or which imposed limitations on a citizen's ability to vote."[76]

In the hypothetical situation, the immediate goal of the amortization provisions was consistency with the zoning ordinance. The city could contend that the more intense use — two families in the two-flat and a single family in the coachhouse — was inappropriate to the neighborhood. Zoning ordinances normally distinguish between single-family residential zones and multifamily residential zones. Some multifamily zones permit only two- and three-flats while others permit apartment buildings. The legislature clearly intended to treat single-family and multifamily uses differently. The city would argue that the benefits traditionally associated with a single-family zone, such as larger lots, less noise and traffic, and fewer people in the neighborhood, are threatened by denser residential use. The nonconforming use allows more people to live on a single lot, which causes increased traffic, visitors, congestion, and noise. Allowing the continuation of Landowner's nonconformities would amount to spot zoning. In addition, one property owner would benefit economically from inconsistency with the zoning ordi-

183 F.2d 410 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950) (amortization ordinance upheld as to a filling station, an eyesore in residential zone).

73. Major Media of the Southeast v. City of Raleigh, 792 F.2d 1269, 1271 (4th Cir. 1986) (citing Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981)).

74. SDJ, Inc. v. City of Houston, 636 F. Supp. 1359 (S.D. Tex. 1986) (six-month amortization of nonconforming sexually oriented businesses upheld where options for relocation).

75. Nollan v. Cal. Coastal Comm'n, 107 S. Ct. 3141, 3147 n.3 (1987) (citations omitted).

76. Falik & Shimko, *The 'Takings' Nexus — The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359 (1988).

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nance, while others would suffer the burdens imposed by conformity to the ordinance.

Because her nonconforming use is a residential use in a residential zone, and not, for example, a commercial use in a residential zone, Laura Landowner could argue that her use does not contravene the intentions of the zoning ordinance. Also, because each of her rental units currently houses only two people, her three units do not contain more people than many of the larger single-family homes in the neighborhood. Furthermore, each of her tenants has one car per couple, totaling three cars, whereas some of the families in the neighborhood have three or four cars. Her property provides off-street parking for four cars, while many of the single-family homes have garages for only one or two cars, thus necessitating on-street parking. As to noise, she might argue that her tenants tend to be couples with no children, both of whom work during the day, or divorced mothers with one child. Most of the noise in the neighborhood is generated by families with teenagers who often have weekend parties.

Landowner could assert that the terms of the amortization provision contravene the city's own Comprehensive Plan.[77] She could also argue that the amortization provision requiring termination of all nonconforming buildings and nonconforming uses in nonconforming buildings within fifteen years fails to make reasonable distinctions among nonconformities.[78] A building could be nonconforming because its side yard setback was one foot too short, while another could be nonconforming because it was built at the corner edge of its lot, thus blocking motorists' view of oncoming pedestrians and traffic. The first nonconformity would not endanger the community, while the second would.

Also, under the terms of the ordinance, a nonconforming use that is not housed in a nonconforming building does not need to be amortized. Thus, a junkyard could continue indefinitely in a residential district, while Landowner's residential use must terminate after fifteen years. Similarly, a nonconforming use in a conforming building also is not subject to the amortization provision, so any business operating out of a conforming house could also continue indefinitely, regardless of the increased traffic and congestion it might cause. Finally, under the ordinance a Mom-and-Pop grocery store and a small dry-cleaning establishment, both located within but at the edge of a multifamily zone,

77. For a discussion of the Comprehensive Plan, see *supra* note 31 and accompanying text.

78. For a discussion of distinctions among nonconformities, see *supra* Part II(B).

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would be required to terminate those uses even though neighborhood residents might consider them beneficial and convenient.

D. *Analysis of an Amortization Program Under the "All Economically Viable Use" Test*

1. Special Problems with Facial Attacks in No "Economically Viable Use" Cases

Use of the second *Agins* alternative test presents difficult problems if an amortization program is contested as a regulatory taking in all its applications rather than as applied to a particular parcel. If the landowner claims the enactment on its face denies the owner all economically viable use of his land,[79] rather than that it fails to substantially advance a legitimate state interest, the owner faces an "uphill battle." The landowner must prove that the mere enactment of the regulation destroyed economically viable use of the property without resorting to the ad hoc, factual inquiries concerning the effect of the regulation on a specific piece of property, as referred to in *Penn Central.* A number of very recent United States Supreme Court cases indicate the significant hurdles faced in such facial challenges.

The most instructive case in this line is *Keystone Bituminous Coal Association v. DeBenedictis,*[80] where the Court found no taking. The Court reached this conclusion in part because the pleadings failed to include allegations that the regulation made mining impracticable or impossible. The pleadings also revealed that the surface rights and nonsupport coal were economically viable. Thus the plaintiffs failed to meet the "heavy burden" of a facial attack.

A similar case is *Connolly v. Pension Benefit Guaranty Corporation,*[81] also a facial attack. The Court again found no regulatory taking: the enactment's effect depended on employer plan experience, which could differ in each situation, and there were certain mitigating provisions that would minimize the economic impact in some cases. In a facial

79. The Court has used differing language in regulatory taking cases. Thus far there is little clarity as to whether denial of "economically viable use" is substantially equivalent to denial of "all economic use" in the sense of absolutely no financial return, or denial of "all *reasonable* economic use" or "substantially all beneficial use" in the sense of an inadequate, unreasonably low return, or denial of "all use" resulting in "no value" in the sense that the property itself is worthless.

80. 480 U.S. 470 (1987).

81. 475 U.S. 211 (1986).

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attack, the regulation must effect a taking without regard to specific situations.

Finally, in *Hodel v. Virginia Surface Mining & Reclamation Associations, Inc.*,[82] the Court upheld a surface mining regulation statute against a facial taking claim:

> [T]he Act does not categorically prohibit [surface mining]; it merely regulates the conditions under which such operations may be conducted. The Act does not purport to regulate alternative uses to which lands may be put. Thus, in the posture in which these cases come before us, there is no reason to suppose that "mere enactment" of the . . . Act has deprived appellees of economically viable use of their property.[83]

2. Determination of No "Economically Viable Use"

Even if the enactment substantially advances a legitimate governmental interest, it will — at least absent a strong public health or safety reason for the limitation — constitute a regulatory taking if it destroys all economically viable use. If the property could not be put to any economically viable use, then fairness and justice require compensation. This was the theory of the church landowner in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.*[84] The church contended that an emergency flood control ordinance barring the rebuilding of flood damaged structures left the land without economic use; this claim is subject to trial court proof on remand. A more sophisticated assertion was successful at trial in *Hamilton Bank v. Williamson County Regional Planning Commission.*[85] The landowner contended its undeveloped land had no value because the cost of complying with the challenged conditions, which were attached to development permission, was so high under current market conditions that a completed development would have resulted in a loss. A third example is *Florida Rock Industries v. United States*,[86] where the landowner had been denied a permit to extract limestone deposits on its land in order to protect wetlands against disturbance. The landowner argued that the land could be used only for limestone mining; without a permit, it contended, there was no immediate use for the land and

82. 452 U.S. 264 (1981).

83. *Id.* at 296-97.

84. 107 S. Ct. 2378 (1987).

85. 729 F.2d 402, 406 (6th Cir. 1984), *rev'd on other grounds*, 473 U.S. 172 (1985).

86. 791 F.2d 893 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

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therefore no value. The landowner's expert witness testified that the only persons who would buy the land subject to the regulations prohibiting mining would be "foreigners, unaware of the physical nature of the property and of the legal restriction on its use, victims of fraud or self-deception."[87] In remanding the case, the court noted that if this was the case, then the landowner suffered a regulatory taking and was sustaining "a permanent obligation to maintain property for public benefit, to carry the taxes and other expenses, and not to receive business income from the property in return."[88]

An essential element in analyzing whether there has been deprivation of all economically viable use is determining precisely which property has been affected. This inquiry has traditionally focused on the economic impact of the regulation on the entire parcel, rather than on a particular segment. The Supreme Court articulated this inquiry in *Penn Central*: "Takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[89]

The whole parcel approach usually defeats a taking challenge because the parcel normally retains some residual value. A taking may be found, however, if there is a permanent physical possession by the public,[90] if the governmental unit fails to keep an explicit assurance upon which the property owner reasonably relied,[91] or if the regulation does not substantially advance legitimate state interests.

The whole parcel doctrine, however, has recently undergone revision by some members of the Supreme Court. In *Hodel v. Irving*,[92] the

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87. 791 F.2d at 896. The court noted the government's expert testified that there were other potential buyers: investors or speculators willing to forego an immediate income in the hope of a long-term gain should the regulations be lifted or changed. The court followed *Penn Central* standards and, in remanding the case, instructed the lower court to consider the "relationship of the owner's basis or investment, and the fair market value before the alleged taking, to the fair market value after the alleged taking. In determining the severity of economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored." *Id.* at 905.

88. *Id.* at 904.

89. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130 (1978).

90. Physical invasion would of itself constitute a regulatory taking. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

91. *See* Ruckleshaus v. Monsanto Co., 467 U.S. 987 (1984) where reliance upon a governmental assurance resulted in the deprivation of "reasonable, investment-backed expectations." *See also infra* Part V(E)(2) and accompanying footnotes.

92. 107 S. Ct. 2076 (1987).

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Court unanimously evaluated the effect of a regulation on one aspect of the property owners' rights, rather than on the effect on the whole parcel. The Court focused on the property owners' right to devise, which was barred by an escheat statute, rather than the entire property rights in low-value Indian lands owned in fractional shares. The right to devise was regarded as a separate and distinct property right from the lands as a whole.[93] Thus, the future vitality of the whole parcel approach is in considerable doubt. Although reinforced by a slim five-justice majority in *Keystone*, it was strongly attacked in dissent by the Chief Justice, joined by Justices Powell, Scalia, and O'Connor. The dissent proposed the test employed in *Hodel v. Irving*, which inquires whether all economic use has been taken of "an identifiable segment of property."[94]

In a facial challenge to a greenbelt ordinance, a recent state case found a taking even though only a portion of land was affected. In *Allingham v. City of Seattle*,[95] an ordinance superimposed an overlay zone on approximately 900 acres, much of it residential. The ordinance required that a large portion of the land remain in an undisturbed state and mandated the replanting of additional land. The court noted that the ordinance advanced "[n]umerous legitimate public interests," including a provision for a buffer between incompatible uses, mitigation of the effects of noise and water pollution, maintenance of a wildlife habitat, and limitations on the development of ecologically and environmentally delicate areas.

The court also found, however, that the ordinance "deprives certain landowners of all profitable use of a substantial portion of their land," in some cases between fifty and seventy percent of each lot. The court reasoned:

> The owner of a lot located within a greenbelt zone cannot make any profitable use of that portion of his land required to be reserved under the ordinance: he cannot build a home on it, drive his vehicles across it, or cut down the trees and plant a garden on it. Although he still holds title to the property reserved as greenbelt land, he is denied the control over his property typically accorded landowners.[96]

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93. *Id.* at 2082.

94. Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1258-59 (1987). Justice Scalia regarded the lateral easement conditions in *Nollan* in a similar way, although the case did not involve the second *Agins* test.

95. 109 Wash.2d 947, 749 P.2d 160 (1988).

96. *Id.* at 952-53, 749 P.2d at 163.

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The city's argument that thirty percent or more of the land could still be put to profitable use was unpersuasive. This analysis is inconsistent with the *Penn Central* "whole parcel" approach.

In an unusual recent amortization case involving regulation of billboards, the Fourth Circuit applied *Keystone* and *Penn Central* to determine the entire unit of property affected. In *Naegele Outdoor Advertising, Inc. v. City of Durham*[97] the property owner rented its billboards for advertising and often rented several billboards throughout an area to a single customer to carry the same advertisement. The court stated that the billboards themselves, like the coal in *Keystone*, were not an identifiable segment of property for taking purposes. The city argued that the billboards themselves constituted the affected property. The city claimed that because the owner could use the signs for noncommercial advertising or move them to other permitted locations they had not been "taken." The court framed the issue as whether the "entire parcel" was Naegele's business in the immediate area or, because of shared national contracts, its business in a more broadly defined market. The Fourth Circuit remanded to the district court for an evidentiary hearing to determine the appropriate property unit, oddly defined as "that one which is substantially affected by the ordinance."[98]

Another intriguing set of difficulties surrounds the elusive terminology used by the Supreme Court in discussing economic impact. Is there a constitutional difference between the terms "economically viable use" (*Agins*),[99] "reasonable beneficial use" (*Penn Central*),[100] "substantially all reasonable use" (*San Diego Gas & Electric Co. v. City of San Diego*),[101] and "all use" (*First English Evangelical Church*)?[102] In *First English Evangelical Church*, the Court held, and even the strong dissenters agreed, that the complaint stated a cause of action under the just compensation clause by alleging deprivation of "all use." What if some reasonable uses remain, but they are not "economically viable"?

These cases suggest a broad range of conceptual and practical difficulties facing landowners in the amortization context, both in pleading and proving regulatory takings based upon denial of "economically vi-

97. 844 F.2d 172 (4th Cir. 1988).

98. 844 F.2d at 178.

99. *See supra* notes 45-46 and accompanying text.

100. *See supra* notes 40-43 and accompanying text.

101. 450 U.S. 621 (1981).

102. *See supra* notes 48 and 84 and accompanying text.

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able use." In our ongoing hypothetical, Laura Landowner could argue, as the developer did in *Hamilton Bank v. Williamson County Regional Planning Commission*,[103] that the cost of complying with the ordinance requirements — conversion of the two-family home to a conforming single-family home and demolition of the smaller nonconforming coachhouse — would be greater than or equal to the sales price of the property. Thus, the ordinance would destroy all economic use of the land.

It is difficult to predict whether this argument would succeed. Landowner first must apply for and be denied the variances that would allow her to retain the coachhouse and the nonconforming uses on the property. If Landowner were denied the variances and subsequently made the costly changes, there would still be a large single-family home on a conforming lot in a single-family residential district. This home would constitute an economic use for the property. Moreover, the city could stress that Landowner need not make the changes for fifteen years. During that period, she could continue to rent all three units and gain the same financial benefits whether or not the amortization ordinance existed. She could collect rents, take depreciation on the buildings, and enjoy tax benefits and rising property values in the neighborhood. The conversion and demolition requirements would clearly minimize her final economic gain, but it might be difficult to interpret them as denying all economically viable use of the property.

The case for denial of economically viable use is easier to make if the impact is measured against separate segments rather than the whole parcel. Landowner could argue that by requiring the demolition of the coachhouse, the city is destroying a distinct segment of her property. The amortization provision will destroy all economic value of the coachhouse when it takes effect, and Landowner will be left with nothing.

The city would respond that the property should more properly be viewed as a whole. When the nonconformities terminate, Landowner will be left with an economically viable parcel of land together with a single-family house.

3. Effect of Health and Safety Rationale

The *Agins*[104] case established two alternative criteria for challenging

103. *See supra* note 82 and accompanying text.

104. *See supra* notes 45-46 and accompanying text.

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a regulation as a taking: either it did not substantially advance a legitimate public purpose, or it denied the owner economically viable use of his land. But what if the property owner pleads and proves absence of all economic use in a case where the public interest in health and safety is compelling? That arguably might be the case under the facts of *First English Evangelical Church*,[105] where the county imposed a moratorium on rebuilding in a floodplain after a flood. There is a compelling argument that the moratorium was necessary to protect the lives of the handicapped children served by the church on the site, as well as the lives and property of persons downstream from the parcel who could be harmed by faster flood waters and more debris resulting from any permitted rebuilding. The Court stated:

> We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations.[106]

The Court in *Keystone* also suggested that when regulations are enacted to prevent harm to the public, they may be insulated from takings challenges. When a government acts to "protect the public interest in health, the environment, and the fiscal integrity of the area,"[107] it is using its police power to prevent a danger to its citizens; therefore, compensation is not required. The Court stated:

> Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.[108]

Close reading of *First English Evangelical Church*, *Keystone*, and other recent Supreme Court cases suggests that governments may be insulated from takings claims, even if all viable economic use has been prohibited, so long as there is a clear and convincing health and safety rationale for the enactment.[109] One leading article argues that the mat-

105. *See supra* notes 48 and 84 and accompanying text.

106. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2384-85 (1987).

107. 107 S. Ct. at 1243.

108. *Id.* at 1245 (citations omitted).

109. In Orion Corp. v. State, 109 Wash.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 108 S. Ct. 1996 (1988), the Supreme Court of Washington offered a well-reasoned anal-

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ter is properly viewed as a critical unresolved issue.[110] One solution is to consider whether deprivation of all economic use constitutes a regulatory taking for abatements of public nuisances.[111] As mentioned earlier in connection with illegal nonconformities,[112] courts have repeatedly permitted severe diminutions of value, and even destructions of all value, when "health and safety" are seriously threatened, as in the case of traditional public nuisances like hazardous waste operations,[113] unsafe buildings,[114] and fire hazards.[115] For example, the Supreme Court found no taking when a prohibition law required the

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ysis of this issue. The court noted that Mugler v. Kansas, 123 U.S. 623 (1887), adopted the position that "a prohibition on injurious uses must be tested not under principles governing eminent domain, but rather under the due process guarantee." Under this analysis, a regulation cannot result in an eminent domain taking unless "the nature of the encumbrance imposed by the regulation went beyond preventing harm to actually enhance a publicly owned right in land." 109 Wash. 2d at 650-51, 747 P.2d at 1078. Discussing *Keystone*, the Washington Supreme Court noted that opinion's determination that a taking does not occur when the police power is used to safeguard the "public interest in health, the environment, and the fiscal integrity of the area." *Id.* at 654, 747 P.2d at 1081. The court interpreted the *Mugler*, *Keystone*, *Agins*, and *First English* opinions as suggesting that "regulations safeguarding the public's interest in being protected from injurious uses would obviously be insulated from characterization as a taking," even in those cases where a regulation denies a landowner all economically viable use of his property. *Id.*, 747 P.2d at 1080. One looks to the *Nollan* nexus test and to the *Agins* and *Penn Central* inquiries only if the regulation is not thus insulated.

110. Falid & Shimko, *The 'Takings' Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359, 361 (1988).

111. Among the many formulations of "public nuisance" is:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

RESTATEMENT (SECOND) OF TORTS § 821B (1977).

112. *See supra* Part V(B) and accompanying footnotes.

113. Nassr v. Commonwealth, 394 Mass. 767, 477 N.E.2d 987 (1985).

114. MacLeod v. Tacoma Park, 257 Md. 477, 263 A.2d 581 (1970).

115. Eno v. Burlington, 125 Vt. 8, 209 A.2d 499 (1965).

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closing of a brewery[116] and when a state required a landowner to cut down all his cedar trees to protect apple orchards from disease.[117] The Court in *Keystone* was quite clear on this point:

> Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by . . . abating a public nuisance. As Professor Epstein has recently commented: "the issue of compensation cannot arise until the question of justification has been disposed of. In the typical nuisance prevention case, this question is resolved against the claimant."[118]

A recent California decision[119] applied both *First English Evangelical Church* and *Keystone* in a nuisance case. In *Duffy v. City of Long Beach*, the court held that "when a property owner has been given ample notice and opportunity to correct or repair a structure constituting a nuisance, but has failed to do so, demolition of the structure by the government to abate the nuisance is a regulatory action within the police power, not a taking of property which requires compensation of the owner."[120] *First English Evangelical Church* does not apply, the court reasoned, because all use has not been destroyed. The landowner is still free to use his land in compliance with the applicable zoning and building codes; he is merely enjoined from continuing a nuisance on it. Citing *Mugler*, *Keystone*, and *Penn Central*, the court held that such abatement of a nuisance does not constitute a taking.

A nonconforming auto salvage yard attracting young children in a residential district might well constitute a nuisance of this sort, whereas Laura Landowner's two-family home with coachhouse in a single-family neighborhood, while different from most of the surrounding uses, is hardly a nuisance. Amortization provisions for such nuisances, even those allowing short periods before termination, should survive taking challenges.

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116. Mugler v. Kansas, 123 U.S. 623 (1887).

117. Miller v. Schoene, 276 U.S. 272 (1928).

118. Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1246 n.22 (1987) (citations omitted).

119. Duffy v. City of Long Beach, 201 Cal. App. 3d 1352, 247 Cal. Rptr. 715 (1988).

120. *Id.* at 1355, 247 Cal. Rptr. at 718.

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E. *Analyzing the Penn Central Factors to Determine Whether an Amortization Program Works a Regulatory Taking*

Although the analysis in *Nollan* was based on the *Agins* two-prong test, the Court in *Keystone* and *Hodel v. Irving*[121] based much of its analyses on the three factors enunciated in *Penn Central* and refined in subsequent cases.[122] These factors are more often used in as applied attacks on land use regulations rather than in facial attacks. As applied attacks require what the Court noted as "essentially ad hoc, factual inquiries into the impact of a regulation upon a landowner." Under the *Penn Central* approach, they are to be considered only once it has been determined that the regulation is "reasonably necessary to the effectuation of a substantial public purpose."[123]

1. Economic Impact

The first of these three criteria is the economic impact of the regulation on the landowner. *Penn Central* holds that this test is not violated merely by severe diminution caused by an enactment.[124] Also, the impact on the entire parcel, rather than on a single part of the property, must be considered.[125] Finally, the governmental unit must have made a final determination concerning any development, variance, building permit, or other request before the Court will assess the precise eco-

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121. It is fascinating and frustrating to note that the majority opinions of the trio of 1987 Supreme Court takings decisions, decided within months of each other, (*Keystone, First English Evangelical Church* and *Nollan*) never refer to one another. Only dissenting opinions refer to the holdings of the other cases. Taken as a whole, these cases are as confusing as they are clarifying. As Justice Stevens noted in his dissent in *Nollan*, "[E]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's taking jurisprudence." Nollan v. Cal. Coastal Comm'n, 107 S. Ct. 3141, 3163 (1987).

122. Interestingly, the strong and well-reasoned dissent in *Nollan* based its approach on *Penn Central*. The dissent first found that the access condition attached to the building permit furthered a legitimate state purpose, and then proceeded to apply the three *Penn Central* criteria. First, it found the economic impact to be minimal; although an easement was required by the permit condition, the permit allowed a house four times as large as the original to be built, enhancing rather than diminishing the value of the property. Second, any investment-backed expectations of the owners for condition-free development would have been unreasonable in a state with such strong coastline development standards as California. Finally, the government action was a permit condition, which required a narrow easement along a portion of the property and which the dissenters found was a minimal intrusion. 107 S. Ct. at 3163.

123. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978).

124. *Id.* at 125.

125. *Id.* at 130. *See supra* Part V(D)(2).

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nomic impact on the landowner.[126] How recent cases have interpreted these factors and how they would apply to the hypothetical is discussed to some extent in the earlier examination of "the denial of economically viable use."[127]

State courts have been widely inconsistent with regard to the proper method of evaluating the economic consequences of amortization.[128] Should the court compare the fair market value of the property before and after passage of the amortization provisions?[129] Should the inquiry focus on the size of the actual investment made by the owner up to the time of the enactment?[130] Should the cost of demolition of a nonconforming structure or its replacement cost be included? Should the cost of converting a nonconforming structure to comply with existing regulations or ordinances be included? Is the cost of relocating a nonconforming use and perhaps advertising it a legitimate consideration of economic impact?[131] Should investments made subsequent to the passage of an amortization ordinance be considered?[132] Is the "economic life of the structure" a relevant factor?[133] Has the full investment been recouped if the owner has depreciated all the costs for income tax purposes?[134] Should the issue be framed in terms of the

126. *Id.* at 136-137. *See supra* Part IV(A).

127. *See supra* Part V(D)(2) and accompanying notes.

128. A recent Texas case did uphold an amortization ordinance requiring the termination of the nonconforming operation of a smelter with a *major* financial investment. Neighborhood Comm. on Lead Pollution v. Bd. of Adjustment of City of Dallas, 728 S.W.2d 64 (Tex. Ct. App. 1987).

129. This was the approach suggested by the court in Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986).

130. This was the determination in Murmur Corp. v. Bd. of Adjustment of City of Dallas, 718 S.W.2d 790 (Tex. Ct. App. 1986) (termination of a smelter, nonconforming use and structure).

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

132. This was one argument of the landowner in Neighborhood Comm. on Lead Pollution v. Bd. of Adjustment of City of Dallas, 728 S.W.2d 64 (Tex. Ct. App. 1987). Following passage of an amortization ordinance, Dixie Metals was required to make certain changes to comply with environmental regulations. The court held that these costs were no more than normal costs of staying competitive in an industry where technology is rapidly changing. Because the costs were not relevant to the issue of termination of a nonconformity, they would not be considered in determining the amortization period. *Id.* at 70.

133. Grant v. Mayor, 129 A.2d 363 (1957).

134. National Advertising Co. v. County of Monterey, 1 Cal.3d 875, 464 P.2d 33, 83 Cal. Rptr. 577 (1970).

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return of investment in an asset?[135] Should the courts look for guidance to cases such as *First English Evangelical Church* to measure damages when a temporary taking has been found?[136]

In *Naegele Outdoor Advertising, Inc. v. City of Durham*,[137] the court remanded the case to the district court to determine the economic impact on the basis of the following factors:

> The court should make findings pertaining to every aspect of Naegele's business that will be affected by the ordinance, including the number of billboards that can be economically used for noncommercial advertising, the number that are economically useless, the terms of Naegele's leases for billboard locations, the land Naegele owns for locations and whether it has any other economic use, the cost of billboards that cannot be used, the depreciation taken on these billboards and their actual life expectancy, the income expected during the grace period, the salvage value of billboards that cannot be used, the loss of sharing revenue, the percentage of affected signs compared to the remaining signs in Naegele's business unit, the relative value of affected and remaining signs, whether the amortization period is reasonable, and *any other evidence presented by the parties that the court deems relevant.*[138]

Unfortunately, there is no uniform judicial approach to the determination of the economic impact of amortization provisions. However, the lack of a set formula, together with some courts' tendency to look to the parties involved to frame the financial debate, allows landowners and governments greater flexibility in developing creative financial strategies.

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135. For an interesting approach to establishing a fair and reasonable amortization period for nonconforming structures using financial analysis, see Schwiesow, *A Suggested Means of Determining the Proper Amortization Period for Nonconforming Structures*, 27 STAN. L. REV. 1325 (1975).

136. The court in Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987), established a formula for measuring damages for a temporary taking. It involved a determination of precisely what interest in property was taken, the value of that interest as a component of the fair market value of the entire property, and "the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction." *Id.* at 271. Compensation would not be allowed for lost profits or for the increased cost of development following the lifting of the restriction because those factors would be included in the fair market value of the property prior to the imposition of the restriction.

137. 844 F.2d 172 (4th Cir. 1988).

138. *Id.* at 178 (emphasis added). *See supra* note 60 for the facts of this case.

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2. Deprivation of Reasonable Investment-Backed Expectations

The second factor to be considered under the *Penn Central* analysis is whether the enactment constitutes a deprivation of "investment-backed expectations." This prong addresses the owner's "distinctly crystallized expectation"[139] for use of the parcel. This is not mere hope for particular levels of profit.[140] Expectations worthy of protection under the just compensation clause have been found, for example, where a government has given explicit assurances. In *Ruckelshaus v. Monsanto Company*,[141] the Court held that federal government's promises that trade secrets revealed during certain years would never be disclosed compelled the conclusion that the subsequent release of this data was a taking because it deprived the company of its reasonable investment-backed expectations to nondisclosure. On the other hand, expectations that property will never be affected by future governmental actions are not "reasonable" and do not merit protection by the just compensation clause. Reasonable landowners are aware that they operate in a regulated environment where rules change. The risk of such changes should be regarded as a cost of benefitting from land ownership in a civilized society.[142]

This factor has frequently been applied in amortization provisions concerning signs and billboards. The amortization period often reflects what is perceived as the reasonable life of the object. If a billboard normally lasts for five years, for example, then it is reasonable to require its termination after a five-year period. The owner will have realized whatever benefit he reasonably could have expected from his investment in the sign or billboard.

Under the *Penn Central* analysis, however, investment-backed expectations do not include the landowner's hopes for future gain, and the Court has largely ignored arguments based on loss of future profits. "Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains

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139. Michaelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1230-34 (1967).

140. Andrus v. Allard, 444 U.S. 51, 66 (1979).

141. 467 U.S. 986 (1983).

142. *See* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) (likelihood of changes in multi-employer pension plans, including new withdrawal liabilities); *Monsanto*, 467 U.S. at 1007 (possibility of change in pesticide regulations where area was long a source of public concern and regulation).

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has traditionally been viewed as less compelling than other property-related interests."[143] Consequently, in our ongoing hypothetical Laura Landowner would not be successful if she argued that she expected to lease the property at a specified rate, and then sell in it in the future at a particular price.

To the extent that her investment-backed expectations related to the use of the property, the rental of three separate units, the amortization provision impinges upon those expectations. The *Penn Central* opinion noted that the landmarks preservation ordinance in question did not interfere with the primary use of the property as a railroad terminal and therefore did not interfere with the essential investment-backed expectation of the transportation company owner. Similarly, the *Keystone* opinion noted that although the restriction reduced slightly the amount of coal that could be mined, the primary use of the land for coal mining was not severely impeded. Landowner's distinct investment-backed expectations will be interfered with to the extent that her use will be reduced from three rental units to one.

The extent of the interference is an auxiliary issue. Landowner would argue that her rental use would be severely limited by the reduction of rental units from three to one. The city could argue that despite this reduction the value of the single-family house with a large, private yard would exceed the value of any one of the rental units. In fact, the house's value might equal the total value of all of the previous rental units. The city would argue, therefore, that the diminution in value is insufficiently severe to cause a taking. Moreover, Landowner could continue her current use for fifteen years, thus recovering a portion of her investment. At most, the effect would be a reduction of profit she could otherwise realize from the sale, especially because purchasers would be advised of the amortization provisions.

Because investment-backed expectations relate to each specific landowner and differ from case to case, facial attacks of amortization ordinances under this prong are much more difficult to prove than as applied attacks. The plaintiffs in *Keystone* failed primarily because they did not allege that mining operations became impracticable following the imposition of the regulations. Perhaps the very fact of a delay in the application of termination provisions in amortization ordinances will undermine a facial attack. Potential future interference

143. Andrus v. Allard, 444 U.S. 51, 66 (1979).

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with investment-backed expectations may require "ad hoc, factual inquiries" concerning the specific piece of property.

3. Character of the Governmental Action

Most land use control techniques, such as amortization programs, do not involve physical invasions by government or the public. If they did, the physical invasion alone would normally effect a taking.[144] On the other hand, *Penn Central* and other cases support the notion that regulatory programs under the police power are less likely to trigger a regulatory taking when they are designed to adjust "the benefits and burdens of economic life to promote the common good."[145] Land use enactments are most easily defended when there are clear health and safety issues or when public nuisances are involved.[146] In most cases, however, the inquiry into the character of the governmental action requires analysis of how "the benefits and burdens of economic life" are adjusted. Determining whether the adjustment is fair and just (the twin requirements of the just compensation clause) often compels an examination of the precise effect of the action on the property[147] as well as an examination of the effect on the public. To the extent that the courts must look to the facts involved in each situation, facial attacks in this context are once again more difficult to sustain than as applied claims.

In amortization settings, the "character of the governmental action" is the ordinance requirement that nonconformities terminate on certain dates. The benefits to the public include: ensuring consistency with the zoning ordinance or the comprehensive plan; minimizing neighborhood blight (removal of junkyards from residential zones); promoting traffic safety (removal of signs and billboards from intersections); pro-

144. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 417 (1982) (regulation required apartment building owners to permit physical cable television hookups for fee set by Commission); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (government required public access to lagoon to which access had been denied).

145. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citations omitted) (promoting aesthetic and historical values); Keystone Bituminous Coal Ass'n v. DeBenedictis, 450 U.S. 470 (1987) (restrictions to prevent subsidence, thus promoting health, the environment, and economic stability); Miller v. Schoene, 276 U.S. 272 (1928) (promoting apple industry by requiring cutting of cedar trees carrying disease); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (barring existing brick yard because of adverse spillover effects on neighborhood).

146. *See supra* Part V(D)(3).

147. *See supra* Parts V(E)(1) and (2).

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tecting the aesthetic quality of a community (removal of billboards); and maintenance of the quality of life (termination of sexually oriented uses).[148] The burdens upon the public in all cases would include the continued existence of the nonconformity for the period prior to termination. To the extent that a zoning ordinance represents the legislative determination of what land uses are beneficial to the community, any nonconformity is in some measure detrimental to the welfare of the community. As more and more states require local comprehensive plans and zoning in accordance with those plans, nonconformities are less likely to be viewed as minor inconsistencies and more likely to be perceived as harmful to the planned development of the community. This argument might be a persuasive defense in a facial attack on an amortization ordinance. The contention that there is a fair adjustment of benefits and burdens may be harder to sustain, however, without reference to a specific application.

In our ongoing hypothetical, Laura Landowner could contend that her use of the property does not contravene the purposes of the zoning ordinance. The city would argue that the denser residential use of her property distinguishes her use from single-family use. Both sides could make the same arguments they would have made when Landowner applied for a variance.[149]

Landowner could argue that the only burden to the public would be the existence of a denser residential use in a residential neighborhood, with a potential for a slight increase in noise, traffic, and congestion. In comparison with the economic burden placed upon her, she would argue, the city has only the minor burdens of inconsistency with the zoning ordinance. She would argue that the adjustment of benefits and burdens demanded by the amortization provision is essentially unjust and unfair.

The city could contend that the goal of consistency is important, and that the fifteen-year period in which the nonconformity is allowed to continue constitutes a major burden for the community as a whole. In most cases where the main benefit to the public is conformity to the zoning ordinance rather than elimination of a noxious use, the success of a taking claim decided according to *Penn Central* standards will depend on the economic impact of the amortization ordinance on the

148. *See generally supra* Part V(B)(2).

149. *See supra* Part IV(C).

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landowner and the severity of the economic burdens the landowner can prove.

VI. An Uncertain Future

Despite victories by landowners in several of the latest Supreme Court cases, takings challenges to amortization ordinances remain costly and difficult. Except in those few cases where it would be futile, landowners should first apply for a variance or similar administrative relief before filing suit. Once a claim is ripe for adjudication, imprecision about the governing criteria, especially as to possible distinctions between "economic viability," "economic impact," and "all economic use," generates uncertainty as to the outcome of a takings challenge. It is also unclear what economic proofs are sufficient in an amortization context to document an impact severe enough to constitute a taking. The lack of judicial guidance is regrettable, but it also extends great potential latitude for innovative financial analysis by landowners and governments.

Despite the ambiguity concerning the standards of proof, facial challenges to amortization ordinances under any of these economic formulations will clearly be much harder to sustain than as applied attacks. Proof that amortization results in an unjust economic burden on a landowner will, in almost all cases, require a factual inquiry into specific economic details beyond the parameters of a facial challenge.

The recent Supreme Court cases suggest, however, that amortization ordinances might be found to be unconstitutional under two developing standards. As to the first, courts are not likely to find a denial of all economic use where amortization ordinances simply require property to conform to the same zoning and building standards imposed on other property within the same district. Though costly, conformity is possible in most cases. However, denial of all economic use of an identifiable segment of property is much more easily argued in some amortization cases, such as the one involving Laura Landowner's coachhouse. When defining the impacted property, landowners will benefit if courts apply the "recognizable segment of property" test articulated in *Hodel v. Irving* rather than *Penn Central's* "whole parcel" test.

The second criterion is likely to be even more significant in amortization settings. If the amortization ordinance is inflexible, overbroad, or imprecise, a government may have difficulty meeting the *Nollan* Court's requirement of an essential nexus between the regulation and a

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legitimate state goal.[150] In *Nollan*, the government had detailed planning studies and factual findings from the California Coastal Commission supporting its goals and the imposed condition; nevertheless, the Court found a taking. Few municipalities have well-designed, voluminous, documented, factual support for zoning decisions, perhaps because such decisions are normally accorded a presumption of validity and subjected only to the "fairly debatable" standard of review. It is likely that many local zoning decisions would fail the strict scrutiny test imposed by the *Nollan* Court.

Challenges to amortization ordinances on a takings theory are most likely to succeed by focusing on the nexus requirement. If local and state governments wish to reduce the risk of successful attack, they must study the nonconformity problem and draft their ordinance provisions with great care, distinguishing among nonconformities, identifying the precise purposes for their termination, justifying each amortization period, and providing for mechanisms to alleviate hardship.

150. Will the defendant government have the burden of proof on this issue once it is raised by plaintiff? *Nollan* suggests an answer in the affirmative.

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