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A Taking Without Just Compensation? The Constitutionality of Amortization Provisions for Nonconforming Uses

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A TAKING WITHOUT JUST COMPENSATION? THE CONSTITUTIONALITY OF AMORTIZATION PROVISIONS FOR NONCONFORMING USES

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I. INTRODUCTION

Imagine that an adult book store is located on Walnut Street in Anytown. At the time the book store was built, it conformed to the zoning regulations of Anytown. However, five years later, Anytown decided that it wanted to re-zone the Walnut Street area so adult book stores could not be permitted. The decision to rezone arose out of parents' concerns that their children's welfare was threatened since the adult book store was too close to the school.

Anytown could choose to institute an amortization[1] provision in order to eliminate the existing adult book store. Amortization provisions "provide a grace period for nonconforming uses, during which time money spent on the use can be recouped by the operator of the use before the use is terminated."[2] Compensation is not required because the owner is expected to recoup the value of the nonconforming use in the time permitted.[3] Grace periods that are present in amortization provisions are determinant on the nature of the use and can range from a few months to a few decades.[4] It is important that the time period gives the owner ample time to recoup the loss. Moreover, amortization provisions may be tailored to certain types of uses. [5] For example, amortization provisions are often applied to less expensive uses, such as billboards.[6] On the other end of the monetary spectrum, amortization provisions have been applied to multimillion dollar factories.[7]

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1 Amortization is primarily a term used in investments. It is defined as "to arrange to extinguish a [debt] by gradual increments." BLACK'S LAW DICTIONARY 66 (7th ed. 1999). When applied to the land use arena, amortization is defined as:

> [A] grace period, a time during which a land use regulation is not enforced. This interval of time allows the owner of a use not in conformance with the regulation to recover his or her investment, after which the use must be discontinued or brought into conformance. The local government hopes, in adopting an amortization period, to avoid a successful takings challenge. An amortization period does not, however, automatically immunize an ordinance from such challenge. The validity of the amortization period depends on its reasonableness.

1-2 ZONING LAW AND PRACTICE § 2-6 (2000).

2 Jay M. Zitter, Annotation, *Validity of Provisions for Amortization of Nonconforming Uses*, 8 A.L.R. 5th 391 (1992).

3 Margaret Collins, *Methods of Determining Amortization Periods for Non-Conforming Uses*, 3 WASH. U. J.L. & POL'Y 215, 216 (2000).

4 7-41 ZONING AND LAND USE CONTROLS § 41.04[1] (2005).

5 *Id.*

6 Amortization provisions are frequently enacted to remove billboards. For a discussion on this topic, see Charles F. Floyd, *The Takings Issue in Billboard Control*, 3 WASH. U. J.L. & POL'Y 357 (2000).

7 *See, e.g.*, Jennifer Packer, *Plan to Close Batch Plant Advances; Zoning Panel Asked to Set Public Hearings on Buyout Process*, DALLAS MORNING NEWS, Oct. 11, 2001, at 1N.

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The way that an amortization provision would work in this situation is illustrated by the following: First, Anytown would force the adult book store to change the use of property within a certain period of time, such as five years. Second, Anytown would have to make sure that the adult book store would not suffer a complete financial loss by setting an appropriate time period to amortize the loss. Finally, Anytown would have to justify the amortization provision by showing that some public good would outweigh the private property loss. As a result, the adult book store would be forced to amortize, or recoup, its investment over time so it could minimize its losses.[8] The landowner would retain title to the parcel of land, but would have to find some other use for it.

In many communities, residents wish to eliminate a land use that does not fit into its surroundings. This attitude is often present because people are concerned with the health, safety, and/or welfare of the community.[9] One source of this attitude is that most parents do not want their children to attend school across the street from an adult book store or a bar.[10] Another is that citizens grow tired of seeing billboards on their daily commute and demand a change of scenery.[11] In addition, a community often changes, and its citizens seek to make these desired changes become reality through the police power of the local government.[12] When local government administrators are presented with these issues, they try to find ways to eliminate problematic uses that can range from billboards and signs, to gas stations and factories.

There are several methods that are available to local governments when they aim to eliminate nonconforming land uses.[13] Some of these methods include prohibiting the nonconforming use after it is destroyed or damaged to a certain degree or when it is abandoned.[14] However, one of the most controversial techniques is the elimination of the nonconforming use through amortization provisions.[15]

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8 For another hypothetical situation relating to an amortization provision, see Craig A. Peterson & Claire McCarthy, *Amortization of Legal Land Use Nonconformities as Regulatory Takings: An Uncertain Future*, 35 WASH. U. J. URB. & CONTEMP. L. 37, 44-6 (1989).

9 Michael A. Lawrence, *A Proposal to Reform the Michigan Zoning Enabling Act to Allow Amortization of Nonconforming Uses*, 1998 MICH. ST. L. REV. 653, 653 (1998).

10 *See, e.g.*, Mitchell Friedman, Editorial, *Datelines: Southampton*, NEWSDAY, May 14, 2004, at A39; Carmen Paige, Editorial, *Milton Makes Plan to Give Sex-related Businesses Headache*, PENSACOLA NEWS JOURNAL, May 24, 2004, at 1A.

11 For an interesting observation of early public unrest regarding billboards, see RICHARD F. BABCOCK, BILLBOARDS, GLASS HOUSES, AND THE LAW, AND OTHER LAND USE FABLES, 1-10 (1977).

12 David Owens, *Amortization: An Old Land Use Controversy Heats Up*, 57 POPULAR GOV'T 20, 21 (1991).

13 Peterson & McCarthy, *supra* note 8, at 39-41.

14 *Id.*

15 *See, e.g.*, Michael Lewyn, *Twenty-First Century Planning and the Constitution*, 74 U. COLO. L. REV. 651, 700-08 (2003); Deepa Varadarajan, *Billboards and Big Utilities: Borrowing Land*

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Many state courts and even a few federal courts have spoken on this issue.[16] A vast majority of state courts have held that amortization provisions are valid if reasonable.[17] However, a few state courts have held that amortization provisions are *per se* unconstitutional.[18] These courts are of the opinion that they are takings without just compensation, and do not even bother to examine the reasonableness or unreasonableness of the provision.[19]

The divide of opinion regarding the constitutionality of amortization provisions casts uncertainty over the decisions of local governments, lawyers, and legislatures when they are faced with the possibility of dealing with amortization provisions. Local entities that wish to utilize amortization provisions may be hesitant to adopt or use amortization provisions in fear of potential litigation stemming from enforcement. Moreover, lawyers may feel as though they are not giving the best advice to parties affected by amortization provisions.

This Note seeks to clarify these uncertainties and provide information to local governments, lawyers, legislatures, and judges to aid their understanding of amortization provisions. Moreover, this Note provides guidance to local governments that are constructing, or wish to construct, a reasonable amortization provision. This Note also aims to guide courts in determining the reasonableness of an amortization provision so that it does not constitute an unconstitutional taking.

Section II will examine the development and use of amortization provisions in the United States. This Section will also examine the policy considerations that need to be kept in mind when local governments consider using amor-

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Use Concepts to Regulate "Nonconforming" Sources Under the Clean Air Act, 112 YALE L.J. 2553, 2556 (2003); Owens, *supra* note 12.

[16] *See, e.g.*, Zitter, *supra* note 2.

[17] *See* Jay Campbell, *Amortization in the Twenty-Second Century*, 26 NO. 11 ZONING & PLAN. LAW REP. 1, Jan. 2004; Zitter, *supra* note 2, § 2a. *See also* Ga. Outdoor Adver., Inc. v. City of Waynesville, 900 F.2d 783, 786-87 (4th Cir. 1990); Art Neon Co. v. City and County of Denver, 488 F.2d 118, 122 (10th Cir. 1973); Naegele Outdoor Adver., Inc. v. City of Durham, 803 F.Supp. 1068, 1077 (M.D.N.C. 1992), aff'd, 19 F.3d 11 (4th Cir. 1994), cert. denied, 513 U.S. 928 (1994); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1212-13 (N.D. Ga 1981); Bd. of Zoning Appeals v. Leisz, 702 N.E.2d 1026, 1032 (Ind. 1998); Naegele Outdoor Adver. Co. v. Village. of Minnetonka, 162 N.W.2d 206, 213 (Minn. 1968) (holding that amortization period in zoning ordinance constitutional on its face because several conceivable applications of the ordinance are reasonable); Wolf v. City of Omaha, 129 N.W.2d 501, 507 (Neb. 1964); Collins v. Spartanburg, 314 S.E.2d 332, 333 (S.C. 1984) (All supporting the view that amortization provisions are valid if reasonable include the following).

[18] Pa. Nw. Distribs., Inc. v Zoning Hearing Bd. of Moon, 584 A.2d 1372 (Pa. 1991) (holding that amortization provisions for nonconforming uses are unconstitutional because they are a taking of property without compensation). This case is often cited by courts when it is argued that an amortization provision is *per se* unconstitutional under the Fifth Amendment. *See also* Zitter, *supra* note 2, § 3b; Campbell, *supra* note 17.

[19] U.S. CONST. amend. V. (Stating "nor shall private property be taken for public use, without just compensation"). *See also* Zitter, *supra* note 2, at § 3b; Campbell, *supra* note 17.

tization provisions. In Section III, this Note will assess and survey state and federal views on the constitutionality of amortization provisions.

Section IV suggests that courts should utilize the balancing test found in *Penn Central Transportation Co. v. City of New York*[20] when exploring the constitutionality of an amortization provision. This Section will also examine the few cases that use this balancing test when scrutinizing amortization provisions. Finally, Section V recommends factual inquiries that local governments should make in order to construct a reasonable amortization provision. This Section also provides guidance in calculating (1) the unrecoverable costs that the property owner affected by an amortization provision will experience, and (2) the amortization period.

II. TRACING THE USE OF AMORTIZATION PROVISIONS: FROM PAST TO PRESENT

The use of amortization provisions for the gradual elimination of nonconforming uses is unique to the American planning system.[21] This method became available to local governments when the Supreme Court ruled in *Village of Euclid v. Ambler Realty Co.* that a city has a right to zone.[22] Zoning allows a local government to separate a region or municipality into districts, each of which has regulations governing certain land use functions by allowing some permitted uses and prohibiting others.[23] After *Euclid* was decided, the use of amortization provisions increased dramatically.[24] From 1930 to 1967, the number of amortization provisions adopted by local governments increased from 1,000 to 9,000.[25]

A. *Evolving Judicial Opinions*

Amortization provisions may be legally challenged for a variety of reasons. For example, opponents of amortization provisions have argued that they lack authorization under a state enabling statute and that they offend clauses affording state constitutional due process, equal compensation, and just compensation.[26] Cases responding to challenges of amortization provisions usually address federal and/or state constitutional takings clauses. For example, some jurisdictions have ruled that the entire provision is *per se* unconstitutional as a

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[20] 438 U.S. 104 (1978).

[21] Collins, *supra* note 3, at 216.

[22] 272 U.S. 365, 395 (1926) (holding that the enactment of a zoning ordinance is a "valid exercise of authority"). *See also* Collins, *supra* note 3, at 217; Lawrence, *supra* note 9, at 654.

[23] BLACKS LAW DICTIONARY 1307 (7th ed. 1999).

[24] Lawrence, *supra* note 9, at 655.

[25] *Id.* at 656.

[26] Peterson & McCarthy, *supra* note 8, at 41.

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taking.[27] Other courts have held that the time period present in amortization provisions is unconstitutional because it does not allow the property owner to recoup his or her investment, thus offending the principal of just compensation.[28]

In 1954, *The City of Los Angeles v. Gage*[29] was one of the first influential cases regarding the validity of amortization provisions. In this decision, the California Court of Appeals held that a city zoning ordinance that required a five year amortization period for the discontinuance of nonconforming uses was a valid exercise of police power.[30] The court explained that the constitutionality of amortization provisions is dependent on the balance between public gain and private loss.[31] Moreover, a reasonable amount of time must be allowed for the owner to recoup his or her loss.[32] The court explained:

> The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose. Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. [33]

In *Gage*, the California Court of Appeals noted that the public and private rights were properly balanced.[34] The property owners' rights were preserved because monetary loss was minimal, if any, since it was spread over a reasonable time.[35] Moreover, the public gain was preserved because the nonconforming use was eventually eliminated.[36] After *Gage*, many courts in the following decades have held that amortization provisions are valid if reasonable.[37]

A rare and interesting example of changing attitudes towards the constitutionality of amortization provisions can be seen in Indiana. In *Alies v. Deca-*

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[27] *0* Pa. Nw. Distribs., Inc. v. Zoning Hearing Bd. of Twp. of Moon, 584 A.2d 1372 (Pa. 1991).

[28] *See, e.g.*, Art Neon Co. v. City and County of Denver, 488 F.2d 118 (10th Cir. 1973).

[29] 274 P.2d 34 (Cal. Ct. App. 1954).

[30] *Id.* at 45.

[31] *Id.* at 44.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] For information on jurisdictions that find amortization provisions valid if reasonable, see Zitter, *supra* note 2, § 3a; Campbell, *supra* note 17.

tur County Area Planning Commission.,[38] the Indiana Supreme Court held that the use of amortization provisions is *per se* unconstitutional. The Court noted that "an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as a taking of property."[39] The court also suggested that nonconforming uses may still be controlled in a number of ways, such as instating prohibitions on the enlargement or replacement after damage.[40] However, amortization was eliminated from the list of tools used by local governments in Indiana.

Fifteen years later, the Indiana Supreme Court overruled the *Alies* decision in *Board of Zoning Appeals v. Leisz*.[41] On reexamining *Alies*, the court found that it was not only inconsistent with the majority view, but it was also an incorrect interpretation of the Federal Constitution.[42] The court also noted that amortization provisions do not offend the Indiana state constitution.[43] By deciding that amortization provisions are not *per se* unconstitutional, Indiana has now sided with the majority.

B. Public Policy

The main issue facing state and local governments when critiquing amortization provisions is the fragile balance between the rights of private property owners and the health, safety, and welfare of the community.[44] This Note addresses public policy because it is of utmost concern to local government officials whose ultimate responsibility is to act in the interests of citizens.[45] Both positive and negative arguments are presented so that local government officials may consider as many factors as possible before deciding whether to utilize amortization provisions.

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[38] 448 N.E.2d 1057 (Ind. 1983).

[39] *Id.* at 1060.

[40] *Id.*

[41] 702 N.E.2d 1026 (Ind. 1998). *See also* Matthew Smith, *Nonconforming Use Issues: The Supreme Court of Indiana Applies Federal Rather Than State Constitutional Analysis in Determining that the Forfeiture of a Nonconforming Use is not a Taking*, 31 RUTGERS L.J. 1445 (2000).

[42] *Leisz*, 702 N.E.2d at 1032. The court explained:

> With the sole exception of this Court's decision in *Alies*, state courts that have found amortization provisions unconstitutional have done so on the basis of their state constitution. We can only conclude that *Alies*, in holding that amortization provisions are unconstitutional *per se*, incorrectly decided an issue of federal constitutional law. No issue has been raised and we can express no opinion as to any state constitutional point.

Id. (citations omitted).

[43] *Id.*

[44] Lawrence, *supra* note 9, at 653.

[45] *See, e.g.*, 67 C.J.S. *Officers* § 241 (2005).

1. Positive Aspects of Amortization Provisions

A primary purpose of local governments is to regulate for the common good of the public.[46] Thus, when a city is faced with a situation that its citizens find objectionable, the local government is prompted to correct the problem.[47] For example, citizens are often concerned with the deteriorating appearance of the community due to junkyards or storage buildings.[48] Or, an ill-placed factory is bothersome to the community because it is noisy and emits pollution.[49]

Amortization provisions help local governments confront these types of problems while considering the interests of all citizens. For example, even though the person owning the property to be amortized feels a degree of loss, the local government can reduce the detriment by adopting a reasonable amortization period.[50] The citizens of the community benefit because whatever objections they have are remedied. Finally, the local government is able to exercise its police powers and act in the best interest of the community.

Furthermore, amortization provisions allow the zoning authority to maximize the benefits of zoning. One commentator noted that "[a] zoning ordinance cannot achieve its goal of separating incompatible uses in this situation unless it requires the elimination of nonconforming uses."[51] Amortization provisions are better than other methods that aim to control nonconforming uses because they guarantee the future elimination of the use.[52] In addition, amortization provisions allow the orderly and even development of a community by eliminating uses that do not conform with the aesthetic theme of the community.[53]

2. Arguments Against the Use of Amortization Provisions

The strongest argument against amortization provisions is that they infringe on a private property owners use and enjoyment of land.[54] Some argue

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46 Lawrence, *supra* note 9, at 654.

47 *See supra* Part I.

48 *See, e.g.*, Wheeler, *infra* pp. 9-10 and note 62.

49 *See, e.g.*, Mark van de Kamp, *County Supervisors to Determine Fate of Ellwood, California Oil Processing Plant*, SANTA BARBARA NEWS-PRESS, Nov. 29, 2001.

50 *See infra* Part V.

51 DANIEL R. MANDELKER, LAND USE LAW § 5.66 at 205 (3d ed. 1993); *see also* Lawrence, *supra* note 9, at 2.

52 Amortization provisions are better at eliminating nonconforming uses than other land use controls because they are predictable and speedy. For example, grandfather clauses take much longer and are unpredictable. *See* Grant v. Mayor and City Council of Balt., 129 A.2d 363, 365 (Md. 1957); Lawrence, *supra* note 9, at 654-55.

53 Zitter, *supra* note 2, at § 2; Campbell, *supra* note 17.

54 *See* Michael Lewyn, Twenty-First Century Planning and the Constitution, 74 U. COLO. L. REV. 651, n.9 (2003) (claiming that amortization provisions "would trample the rights of private

that amortization provisions deny property owners the "inherent and infeasible right . . . to possess and protect property."[55] Other less extreme theories conclude that amortization provisions will discourage economic growth, since investors do not want to risk developing property that may be subject to amortization.[56] As a result, economic waste can plague a community.[57]

Others argue that amortization provisions, though reasonable on their face, affect some uses more than others. For example, one Texas business owner remarked: "[w]hat are you going to convert mini-storage to? Our self storage facility is the highest and best use of the land."[58] In a situation like this, property owners often loose a large amount of money and are stuck with a piece of vacant property. Many property owners faced with this situation hold the view that amortization provisions are "eminent domain on the cheap,"[59] since they do not require monetary compensation as does eminent domain.[60]

Because property owners can potentially lose a substantial amount of money in some instances, local governments need to carefully balance the rights of the property owner against the health, safety, and welfare of the community. However, there are many other instances where amortization provisions effectively allow the property owner to recoup much of their investment, while benefiting the community. In addition, amortization provisions have generally been found to be an effective way for local governments to thoroughly utilize their police power in order to eliminate nonconforming uses.[61] Based on these reasons, local governments that have not experimented with amortization provisions should seriously consider their implementation, provided that their jurisdiction has not expressly declared them *per se* unconstitutional.

C. *Emerging Public Opinion*

As amortization provisions have become more widely used, ordinary citizens have expressed strong opinions about the impact of amortization provi-

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property owners by seizing their land without the just compensation that our Constitution requires").

55 Pa. Nw. Distribs., Inc. v. Zoning Hearing Bd. of Moon, 584 A.2d 1372, 1376 (Pa. 1991).

56 *Id.* at 1376; *see also* Note, *Nonconforming Uses: A Rational and an Approach*, 102 U. PA. L. REV. 91, 103 (1953).

57 *See Pa. Nw. Distribs.*, 584 A.2d at 1375.

58 Elaine Foxwell, *Land Grab–Legal But Not Ethical*, INSIDE SELF STORAGE MAGAZINE, (April 1, 2003), *available at* http://www.insideselfstorage.com/articles/340/340_341FEAT2.html.

59 *Id.* An example of "eminent domain on the cheap" is as follows: Town uses its powers of eminent domain to force Business A to sell for fair market value in order to make room for a new highway. Meanwhile, Town uses amortization to force Business B to discontinue its existing use. Business A is monetarily compensated while Business B is not.

60 *See supra* notes 2-4 and accompanying text.

61 *See* discussion *infra* Part V.

sions.[62] This is to be expected, since this land use control has a shocking affect on not only people who are directly affected, but also among people who are indirectly affected.[63] Public opinion can be extremely insightful to local governments and legislators who are considering using amortization provisions in their state or community.[64]

In 1991, David W. Owens traced the use of amortization in North Carolina in "Amortization: An Old Land-Use Controversy Heats Up."[65] He notes that, "amortization has moved from being an abstract legal concept to a very real practice that has substantial impacts on both individual landowners and the general public."[66] Owens' observation is very true, considering the surge in case law regarding amortization.

In "Land Grab–Legal But Not Ethical," Elaine Foxwell discusses the effects of an amortization ordinance that was passed in Aurora, Colorado.[67] She explains the effect that amortization has had on several small business owners in the area, including cherished "mom and pop" businesses that have been in a family for sometimes generations, by saying that the ordinance "does not take into account single-use businesses such as self-storage, gas stations or car washes. If these types of businesses cannot be converted to meet zoning, owners will probably have to sell for land value alone, depriving them of the value of the business or improvements."[68] Foxwell's point is a fear that is being felt all over the country,[69] and should be taken into account when an amortization provision is being considered by a legislative body.[70]

Amortization provisions have been recognized by some local governments as a helpful tool to reduce crime stemming from nonconforming uses. Several towns and cities have incorporated the use of amortization provisions into municipal codes. For example, Garden Grove, CA allows for the amortization of adult uses since these types of business have been found to increase

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[62] For an example of how an amortization provision can arouse opinions in a community, *see generally* Sheba R. Wheeler, *Redevelopment-Potential Potholes in Road to Progress: Aurora Cleanup Tactics Questioned; Experts say Amortization Plan for Fitzsimons Area may not Work*, DENVER POST, March 11, 2003, at B1.

[63] *See, e.g.*, Conrad deFiebre, *Amortization: On Fast Track From Obscurity to Outlaw Act; It's a Tool that Cities Use to Get Rid of Eyesores, and a Law Banning it Now Sits on Gov. Jesse Ventura's Desk*, STAR TRIBUNE, April 22, 1999, at 1B.

[64] Owens, *supra* note 12, at 20, 28.

[65] *Id.* at 20.

[66] *Id.* at 21.

[67] Foxwell, *supra* note 58.

[68] *Id.*

[69] *See, e.g.*, *id.* *See also* deFiebre, *supra* note 63; Owens, *supra* note 12, at 28.

[70] *See* Owens, *supra* note 12, at 27. Owens notes that the potential effects of amortization should be taken into account by elected officials. *Id.* More specifically, he focuses on the legislatures need for awareness of the public's opinions on amortization provisions. *Id.*

crime in their community.[71] Also, Santa Monica, CA utilized amortization provisions as a means to control crime stemming from adult uses.[72]

Since *The City of Los Angeles v. Gage* ,[73] amortization provisions have become a popular tool that is used by local governments. Although they can effectively eliminate nonconforming uses, amortization provisions are also criticized for a variety of reasons. The next section discusses the positive and negative aspects of amortization.

III. INCLUDING AN AMORTIZATION PROVISION: IT DEPENDS ON THE JURISDICTION

Most local governments that wish to utilize an amortization provision can easily do so, as long as it is formulated reasonably.[74] A major reason for this is that a majority of state courts have held that amortization provisions are *per se* constitutional, and that they are valid if reasonable.[75] On the other hand, some state courts have held that amortization provisions are *per se* unconstitutional.[76] The federal courts that have been presented with amortization cases hold that amortization provisions are *per se* constitutional.[77]

A handful of state legislatures have passed state enabling statutes expressly authorizing the amortization of nonconforming uses, while some state courts have held that amortization provisions are beyond the scope of a municipalities' legislative power.[78] However, this Note only seeks to address judicial interpretation of the constitutionality of amortization provisions.

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71 GARDEN GROVE, CAL. CODE § 9.08.070 (1996), *available at* http://ch.ci.garden-grove.ca.us/cgi-bin/municode_public/code.cgi?display=SECTION47624.

72 SANTA MONICA, CAL. CODE §§ 9.44.010, 9.44.040 (2005), *available at* http://www.qcode.us/codes/santamonica/view.php?topic=9-9_44&frames=on.

73 274 P.2d 34 (Cal. Ct. App. 1954).

74 *Id.* at 38 (quoting Lockard v. Los Angeles, 202 P.2d 38 (Cal. 1949)).

75 Zitter, *supra* note 2, § 2a; *supra* note 17.

76 *See* People Tags, Inc. v. Jackson County Leg., 636 F. Supp. 1345, 1358 (W.D. Mo. 1986) (federal court applying state law); Hoffman v. Kinealy, 389 S.W.2d 745, 755 (Mo. 1965); N. Ohio Sign Contractors Ass'n v. Lakewood, 513 N.E.2d 324 (Ohio 1987); Akron v. Chapman, 116 N.E.2d 697, 700 (Ohio 1953); Aristo-Craft, Inc. v. Evendale, 322 N.E.2d 309, 311 (Ohio Ct. App. 1974); Sun Oil Co. of Pa. v. Upper Arlington, 379 N.E.2d 266, 273 (Ohio Ct. App.1977); Concord Twp. v. Cornogg, 9 Pa. D. & C.2d 79, 86-88 (1956).

77 *See* Ebel v. Corona, 767 F.2d 635, 639 (9th Cir. 1991); Major Media of Se., Inc. v. Raleigh, 792 F.2d 1269, 1273-74 (4th Cir. 1986); Art Neon Co. v. City and County of Denver, 488 F.2d 118, 122 (10th Cir. 1973); World Wide Video of Wash. v. City of Spokane, 227 F. Supp. 2d 1143, 1167 (E.D. Wash. 2002).

78 Campbell, *supra* note 17.

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A. *Courts Holding that Amortization Provisions are Constitutional if Reasonable*

A majority of states have held that amortization provisions used for land use planning are valid if reasonable.[79] Typically, a reasonable amortization provision is formulated so that the public gain outweighs the private loss.[80] Moreover, a reasonable amortization provision gives the property owner enough time to recoup his or her investment and is tailored to the use. In order to be considered reasonable, an amortization provision should also address the "nature, location, and the character of the nonconforming use . . . [the] part of the owner's total business . . . concerned, the salvage value and remaining useful life, depreciation value for tax and other purposes, the length and remaining term of a lease, and monopoly advantage because other uses are prohibited."[81]

An example of a potentially unreasonable amortization period can be seen in *Rives v. Clarksville*.[82] There, the court found that an amortization period of five years as applied to a salvage yard could be found unreasonable.[83] The Tennessee Court of Appeals remanded the case because the lower court did not take into account the location, cost, or the structures on the property when analyzing the provision.[84] Because of this, the property owner may not have been able to properly recoup the loss.[85] The court noted that although the five year period may seem facially reasonable, the impact on the particular piece of property was not taken into consideration by the lower court.[86] Thus, the court suggests that an amortization provision could be considered unreasonable if the individual characteristics of the junkyard were not taken into consideration.[87]

State courts began finding amortization provisions valid if reasonable fairly early. This point is illustrated in *LaChapelle v. Goffstown*, a New Hampshire case decided in 1967.[88] Much of the Supreme Court of New Hampshire's opinion focused on the positive attitudes of courts towards amortization provisions.[89] In its analysis, the court recognized the trend of upholding amortization provisions, provided that the ordinance was based on reasonable legislation:

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79 For a list of jurisdictions holding that amortization provisions are valid if reasonable, see Zitter, *supra* note 2, § 3a; Campbell, *supra* note 17.

80 *See, e.g.*, Zitter, *supra* note 2, § 3a; Campbell, *supra* note 17.

81 Zitter, *supra* note 2, § 2a.

82 618 S.W.2d 502 (Tenn. Ct. App. 1981).

83 *Id.* at 510.

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 225 A.2d 624 (N.H. 1967).

89 *Id.* at 626.

> The trend of decisions is clearly in favor of approving the amortization theory as a tool necessary for orderly community development. There is a clear, though as yet not decisive, movement to approve reasonable legislation requiring the elimination of all non-conformities. The courts are slowly, but persistently, upholding amortization provisions in comprehensive zoning ordinances.[90]

It is easy to see that, early on, this court has jumped on the proverbial bandwagon that looks at amortization provisions in a positive light.

As mentioned in Section II, *supra*, Indiana also recently jumped on the bandwagon when it overruled its precedent in *Board of Zoning Appeals v. Leisz*.[91] Like the court in *LaChapelle*,[92] the *Leisz* court also looked to trends in other jurisdictions before making its decision.[93] With a large number of courts looking favorably toward the use of amortization provisions as a tool for community planning, the trend is likely to continue in future cases.[94]

B. *Jurisdictions that View Amortization Provisions as Per Se Unconstitutional*

Despite the seemingly well settled view that amortization provisions are *per se* constitutional, the minority views amortization as *per se* unconstitutional.[95] The courts in these states have found that amortization provisions are *per se* unconstitutional because they constitute takings without just compensation, offending the Fifth Amendment's takings clause or their state's respective equivalent.[96]

In *Hoffman v. Kinealy*, the Supreme Court of Missouri refused to find amortization provisions constitutional.[97] The court explicitly stated that it would not decide the case at hand "simply by counting foreign cases and then falling off the judicial fence on the side on which more cases can be found."[98] Next, the court reasoned that amortization provisions were no better than uncompensated takings simply because they were not immediate.[99] Justice Stone,

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[90] *Id.* (citing Joseph A. Katarnic, *Elimination of Non-Conforming Uses, Buildings, and Structures by Amortization*, 2 DUQ. L. REV. 1, 38, 43 (1963)).

[91] 702 N.E.2d 1026, 1027 (Ind. 1998).

[92] 225 A.2d at 626.

[93] *Leisz*, 702 N.E.2d at 1031.

[94] *See supra* Part II.

[95] *See supra* note 76.

[96] *Id.*

[97] 389 S.W.2d 745, 755 (Mo. 1965).

[98] *Id.* at 752.

[99] *Id.* at 754.

quoting Justice Holmes,[100] stressed that "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[101]

Pennsylvania also refused to join the majority by viewing amortization provisions as valid if reasonable. In the often cited case of *Pennsylvania Northwestern Distributors v. Zoning Hearing Board of Moon,*[102] the Pennsylvania Supreme Court decided that amortization provisions were confiscatory takings and thus violated the state constitution.[103] Here, an amortization provision forced an adult bookstore owner to change the use of the property.[104] The court rejected the notion that the owner could relocate to a zone that would permit the specified use by saying: "[a] lawful nonconforming use establishes in the property owner a vested property right which cannot be abrogated or destroyed, unless it is a nuisance, it is abandoned, or it is extinguished by eminent domain."[105]

Moreover, the *Pennsylvania Northwestern* court pointed out important policies when considering its decision.[106] One policy that the court wished to safeguard was the deterrence and prevention of economic waste, since amortization provisions could seriously hamper the limited use of property.[107] In addition, the court reasoned that investment could be deterred since investors may become wary of the possibility of amortization provisions that would eradicate much of their economic planning for a particular piece of property.[108]

As seen in the highlighted cases, courts that take the minority view on amortization provisions view them as being a confiscatory taking. There is no way to predict if these courts will change their attitudes in the future. However, there is a possibility that these courts will overrule their precedents, as did the Indiana Supreme Court in *Alies v. Decatur County Area Planning Commission.*[109]

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[100] Justice Stone, writing for the Missouri Supreme Court, cited Justice Holmes' opinion in the landmark case of Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[101] *Hoffman*, 389 S.W.2d at 753.

[102] 584 A.2d 1372, 1372 (Pa. 1991).

[103] *Id.* at 1374-75.

[104] *Id.* at 1373.

[105] *Id.* at 1375.

[106] *Id.* at 1376.

[107] *Id.*

[108] *Id.*

[109] 448 N.E.2d 1057 (Ind. 1983), *overruled by* Bd. of Zoning Appeals v. Leisz, 702 N.E.2d 1026 (Ind. 1998).

C. *Federal Courts Look to Reasonableness: Will it Get to the Supreme Court?*

Cases brought before the federal courts regarding the constitutionality of amortization provisions have generally been held valid if reasonable, thus conforming with the majority view in state courts.[110] The reasoning that the federal courts use in determining the reasonableness of amortization provisions is similar to that found in state court opinions. For example, the Tenth Circuit Court of Appeals, in *Art Neon Co. v. City and County of Denver*,[111] reasoned that an amortization provision for outdoor advertising signs requiring a maximum of five years for removal was reasonable. The amortization provision did not constitute a taking because there was not a complete exhaustion of value: "[T]he mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation."[112] Furthermore, the use of the municipality's police power was reasonable because the public benefit of safety outweighed hurt to the private sector.[113]

The Supreme Court has consistently denied certiorari in cases involving the constitutionality of amortization provisions.[114] It is probably unlikely that it will hear a case on this topic in the near future since the Supreme Court gives great deference to state legislatures.[115] However, if the Supreme Court does decide to hear a case[116] on an amortization provision, it will likely follow the balancing test found in *Penn Central Transportation Co. v. City of New York*,[117] which is discussed in Section IV, *infra*. The Court may also look to their decision in *Pennsylvania Coal Co. v. Mahon*[118] to see if the questioned regulation has gone "too far."[119]

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110 *See* Major Media of Se., Inc. v. Raleigh, 792 F.2d 1269 (4th Cir. 1986); Ebel v. Corona, 767 F.2d 635 (9th Cir. 1985); Art Neon Co. v. City and County of Denver, 488 F.2d 118 (10th Cir. 1973); World Wide Video of Wash., Inc. v. City of Spokane, 227 F. Supp. 2d 1143 (E.D. Wash. 2002).

111 488 F.2d 118, 122 (10th Cir. 1973).

112 *Id.* (citing United States v. Cent. Eureka Mining Co., 357 U.S. 155 (1958)).

113 *Art Neon Co.*, 488 F.2d at 122.

114 Lewyn, *supra* note 15, at 702.

115 DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 188-89 (Ellen Frankel Paul ed., State University of New York Press 1993).

116 *See* City of New London v. Kelo, 545 U.S. 469 (2005). The possibility that the United States Supreme Court will hear a case on the constitutionality of an amortization seems to be increasing. Even though past precedent shows that the Supreme Court tends to stay out of cases that are reserved to the states, it has recently heard a controversial case on physical takings. *Id.*

117 438 U.S. 104 (1978).

118 260 U.S. 393 (1922).

119 *Id.* at 415.

The evidence suggests that there is a good chance that the Court would validate the majority view of holding amortization provisions valid if reasonable. For example, the courts that use federal takings jurisprudence to analyze the constitutionality of amortization provisions find that they are valid if reasonable.[120] In contrast, the courts that find amortization provisions *per se* unconstitutional mainly rely on their state's constitution.[121] Since the court would apply federal takings jurisprudence in their analysis, it will likely come to the same conclusion as the majority.

IV. A Suggestion to the Courts: Applying *Penn Central* to Amortization Litigation

A very small minority of states are quick to decide that amortization provisions are *per se* unconstitutional.[122] These states use their constitutions, domestic and foreign precedent, and policies in making this decision.[123] Similarly, the majority of jurisdictions that find amortization provisions valid if reasonable also use similar sources to make their decision.[124] What most courts are missing is the important framework of federal case law that would greatly help in deciding the constitutionality of amortization provisions.[125] Perhaps one of the most important cases that state courts should use for guidance is *Penn Central Transportation Co. v. City of New York,*[126] a 1978 Supreme Court case that is considered by many "is the most important regulatory taking opinions ever handed down by the Supreme Court."[127] Only a handful of courts use *Penn Central* in their analysis of the constitutionality of amortization provisions.[128]

A. Penn Central *Three Part Test*

The Supreme Court devised a three part test in *Penn Central* in order to determine if a New York City regulation preventing the expansion of a designated historic landmark was a regulatory taking.[129] Justice William Brennan, writing for the majority of the Court, explained that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and

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[120] *See infra* Part IV.C.

[121] *See infra* Part IV.B.

[122] *See supra* Part III.

[123] *See infra* Part IV.B.

[124] *See infra* Part IV.A.

[125] Lewyn, *supra* note 15, at 703-06.

[126] 438 U.S. 104 (1978).

[127] Robert Meltz et al., The Takings Issue: Constitutional Limits on Land use Control and Environmental Regulation 130 (Island Press 1999).

[128] *See* Zitter, *supra* note 2, at § 3b; Campbell, *supra* note 17.

[129] 438 U.S. 104.

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fairness' require that economic injuries caused by public action [demand compensation.]"[130] In order to develop some sort of guidance in determining if a regulation is a taking, the following factors were offered:

> 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 government action. A "taking" may more readily be found when the interference with the 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.[131]

Even though the Supreme Court offered some important and useful factors to determine if an action is a regulatory taking, it did not explicitly say that the factors offered were exclusive.[132] Despite this, the Court has never seemed to accept any more factors outside of the trilogy offered in *Penn Central.*[133]

1. Economic Impact of the Regulation

Perhaps the most important of the three factors offered in *Penn Central's* takings analysis is the examination of the economic impact of the regulation.[134] There is no exact formula that indicates how much of an economic impact is needed to constitute a taking.[135] However, one guiding principal is the reasonable return rule.[136] The Court in *Penn Central* illustrated this principal.[137] For instance, the Court held that the fact that a reasonable return could be earned on Grand Central Terminal, despite the regulation, helped it to conclude that the New York regulation was not a taking.[138] Moreover, the Supreme Court has also found that the barring of the most profitable use of property through regula-

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130 *Id.* at 124.

131 *Id.* (citation omitted).

132 MELTZ, *supra* note 127.

133 *Penn Central,* 438 U.S. at 132.

134 *Id.*

135 *See generally* GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT: JUDICIAL OVERSIGHT OF THE REGULATORY STATE'S ACQUISITION, USE AND CONTROL OF PRIVATE PROPERTY 52 (David A. Schultz ed., Peter Lang Publishing 1998).

136 MELTZ, *supra* note 127, at 132.

137 *Penn Central,* 438 U.S. at 136-37.

138 *Id.*; *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498-99 (1987) (determining that the failure to claim that a coal mine had been made unprofitable helped to illustrate the regulatory impact did not constitute a taking).

tion is, alone, not a taking.[139] Thus, even though most amortization provisions disallow the most profitable use of a particular piece of property, this alone would not convince courts that there has been a taking.[140]

Finally, courts have looked at the diminution of a property's fair market value in determining if there has been a regulatory taking. Illustrative of this fact is the Court's opinion in *Hadacheck v. Sebestain,*[141] in which the Court determined that a 87.5 percent[142] reduction in property value alone did not show that there had been a taking. However, this notion may be changing. For example, in *Lucas v. South Carolina Coastal Council,*[143] the Court has shown in dicta that a regulation that falls short of totally diminishing economic use of a piece of property may still be considered a taking.

2. Direct Investment Backed Expectations

The next factor that the Supreme Court examined was the extent that the government regulation interfered with the investment backed expectations of the property owner.[144] The phrase "investment backed expectations" has been used for some time in takings analyses.[145] However, there has never been any certainty as to the extent of its parameters.[146]

The Court in *Penn Central* did not prominently use the investment backed expectations prong in its analysis. But, one Supreme Court regulatory takings decision that heavily analyzed this factor is *Ruckelshaus v. Monsanto Co.*[147] In this case, Monsanto submitted trade secrets in an application to the government in order to register a pesticide.[148] There was a duty of confidentiality held by the government to not disclose information present in the application.[149] However, the government breached the duty of confidentiality, thus partially diminishing the investment backed expectations of Monsanto Com-

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[139] Andrus v. Allard, 444 U.S. 51, 66 (1979).

[140] *Penn Central*, 438 U.S. at 131.

[141] 239 U.S. 394 (1915).

[142] This percentage was presented in *Penn Central*, 438 U.S. at 131. The court in *Hadacheck*, 239 U.S. 394, did not specify the numerical reduction in the property's value.

[143] 505 U.S. 1003, 1019 n.8 (1992).

[144] *Penn Central*, 438 U.S. at 124.

[145] The phrase "investment backed expectations" was first introduced in an early law review article on inverse condemnation law. Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1233 (1967).

[146] MELTZ, *supra* note 127, at 134.

[147] 467 U.S. 986 (1984). *See also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1034 (1992); MELTZ, *supra* note 127, at 134.

[148] *Ruckelshaus*, 467 U.S. at 998.

[149] *Id.* at 999.

pany.[150] The United States Supreme Court held that the trade-secrets were considered property of Monsanto Company, and were protected by the Fifth Amendment.[151]

Several state courts have extensively used the investment backed expectations prong endorsed by *Penn Central* in regulatory takings cases.[152] However, the Federal Circuit has not found this criterion to be as helpful in many instances.[153] But, the court in *Florida Rock Industries v. United States*[154] has provided some advice to courts who wish to utilize the investment backed expectations prong. The Federal Circuit explained that "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" should be taken into consideration.[155] Moreover, the court noted that "in determining the severity of the economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored."[156]

3. Character of the Government Action

The third factor that the Court devised in *Penn Central* is the character of the government action.[157] Even though this factor may seem more straightforward than the first two factors, it does not amount to an easy or predictable application.[158] The Court indicates this by saying: "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."[159] The Court also notes that "in instances which . . . 'the health, safety, morals, or general welfare' would be promoted by prohibiting contem-

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150 *Id.*

151 *Id.* at 1003-04.

152 *See, e.g.*, Alegria v. Keeney, 687 A.2d 1249 (R.I. 1997); Gazza v. N.Y. State Dept. of Envtl. Conservation, 89 N.Y.2d 603 (1997); E. Cape May Assocs. v. New Jersey Dep't of Envtl. Prot., 693 A.2d 114 (N.J. Super. Ct. App. Div. 1997).

153 Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1564-68 (Fed. Cir. 1994) (suggesting that the investment backed expectation prong of *Penn Central* is not conducive to the courts determination if there has been a regulatory taking); *see also* MELTZ, *supra* note 127, at 135.

154 18 F.3d at 1567.

155 *Id.*

156 *Id.*

157 Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104, 123-24 (1978).

158 MELTZ, *supra* note 127, at 135.

159 *Penn Central*, 438 U.S. at 124.

plated uses of land, this court has upheld land use regulations that destroyed or adversely affected recognized real property interests."[160]

Despite the uncertainty found in the plain reading of the phrase "character of the government action," a trend can be found among subsequent Supreme Court cases regarding what kind of government action constitutes a taking.[161] For example, the Court has been skeptical of regulations that restrict the rights of private property owners to devise property or to exclude the public from their property.[162] On the other hand, the Court has often found government programs that try to correct or prevent nuisances as not constituting a taking.[163] However, despite the patterns discussed, it is not clear if regulations that fall somewhere in between "harm-preventing" and "benefit-conferring" will offend the takings clause.[164]

B. *Applying* Penn Central *to Amortization Provision Analysis*

Only a handful of state and federal cases discussing amortization provisions bother to consider the *Penn Central* balancing test.[165] These cases note that amortization provisions do not amount to "total takings,"[166] which are facially unconstitutional since they deprive the property owner of "all economically beneficial or productive use of the land."[167] Instead, amortization provisions amount to partial takings because they do not deprive the property owner of all economical use or value of the property.[168] Partial takings require the ap-

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[160] *Id.*; *see also* THOMAS J. MICELI & KATHLEEN SEGERSON, COMPENSATION FOR REGULATORY TAKINGS: AN ECONOMIC ANALYSIS WITH APPLICATIONS 16 (Nicholas Mercuro ed., Jai Press Inc. 1996).

[161] MELTZ, *supra* note 127, at 136.

[162] *See id. See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831-32 (1987); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[163] *See* MELTZ, *supra* note 127, at 136. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987) (state prohibition on mining that caused subsidence to surface structures did not violate the takings clause); United States v. Cent. Eureka Mining Co., 357 U.S. 155, 184 (1958) (order compelling the close of nonessential gold mines in order to free up labor during wartime did not constitute a taking); Miller v. Schoene, 276 U.S. 272, 279-81 (1928); (statute requiring the destruction of fungus contaminated trees did not constitute a taking).

[164] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1024-25 (1992); *see* MELTZ, *supra* note 127, at 136.

[165] *See* Naegele Outdoor Adver., Inc. v. City of Durham, 19 F.3d 11 (4th Cir. 1994); Ga. Outdoor Adver., Inc. v. City of Waynesville 900 F.2d 783 (4th Cir. 1990); Eller Media Co. v. City of Houston, 101 S.W.3d 668, 681 (Tex. App. 2003); Adams Outdoor Adver. v. City of East Lansing, 614 N.W.2d 634, 641-42 (Mich. 2000); Bd. of Zoning Appeals v. Leisz, 702 N.E.2d 1026, 1030 (Ind. 1998). *See also* Lewyn, *supra* note 15, at 703; Smith, *supra* note 41.

[166] Lewyn, *supra* note 15, at 703.

[167] City of Des Moines v. Gray Bus., L.L.C., 124 P.3d 324, 330 n. 28 (Wash. Ct. App. 2005).

[168] John A. DeVault III & Jane A. Lester, *The Saga of Florida Rock: Illegiti Non Carborundum*, SC43 A.L.I.-A.B.A. 365, 378 (1998).

plication of the *Penn Central* three part test to determine if the regulation has amounted to a violation of the Fifth Amendment.[169]

The court in *Naegele Outdoor Advertising Co. v. City of Durham* provides a good analysis of the validity of a city ordinance that limited off-premise signs when the *Penn Central* balancing test was applied.[170] Referring to the first prong of the *Penn Central* test, the economic impact of the regulation, the court noted that "the benefit conferred by the grant of an amortization period may be taken into account in considering the economic impact of the regulation."[171] The court expanded on this by observing that the specific terms of the amortization provisions did not deprive Naegele of all economic use of its property.[172] The court concluded that the investment backed expectations prong of the *Penn Central* test was not offended because Naegele's expectations were unreasonable or nonexistent.[173] Finally, the court held that the amortization provision was instituted for the legitimate purpose of improving aesthetics in the city of Durham.[174]

Some courts have prominently stated that the *Penn Central* test must be applied in amortization cases. For example, in *Eller Media Co. v. City of Houston*, the Texas Court of Appeals found that the state district court should have relied on *Penn Central* in making its decision.[175] The Court of Appeals for the Fourth Circuit also corrected a district court by ordering it to apply the *Penn Central* balancing test to an amortization provision prohibiting the presence of outdoor signs after a maximum period of four years.[176]

C. *All Courts Should Adopt* Penn Central *Analysis when Analyzing Amortization Provisions*

As noted previously, partial takings do not amount to a *per se* taking.[177] When a federal court is confronted with a partial taking case, it uses the *Penn Central* balancing test to make its determination.[178] Since amortization provisions amount to partial takings that deprive the owner of less than 100% of his or her property, courts should apply the *Penn Central* test in takings clause

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[169] Lewyn, *supra* note 15, at 703. For further explanation of partial and total takings, *see* Adams Outdoor Adver. v. City of E. Lansing, 232 Mich. App. 587, 601-03 (1998).

[170] *Naegele*, 803 F. Supp. at 1074-80.

[171] *Id.* at 1078.

[172] *Id.* at 1080.

[173] *Id.* at 1079.

[174] *Id.* at 1080.

[175] 101 S.W.3d 668, 680 (Tex. App. 2003).

[176] Ga. Outdoor Adver., Inc. v. City of Waynesville, 900 F.2d 783, 787 (4th Cir. 1993).

[177] *See supra* Part IV.B.

[178] Lewyn, *supra* note 15, at 703.

analysis.[179] This test is particularly effective in determining if amortization provisions are constitutional because it allows judges to apply an objective test to ordinances that are highly fact intensive.

It would seem that the states viewing amortization provisions as *per se* unconstitutional are flawed in their analysis. However, state courts analyze ordinance issues under their state's jurisprudence.[180] Therefore, the minority of states that fail to recognize the constitutionality of amortization provisions are justified in doing so, since their jurisprudence tends to be very protective of the property owners in takings clause issues.[181] For example, while examining its prior decision holding that amortization provisions are unconstitutional, the Pennsylvania Supreme Court noted that "in *Pennsylvania Northwestern*, the majority . . . did not turn to federal precedent for guidance, but relied instead on the long-standing Pennsylvania law that 'municipalities lack the power to compel a change in the nature of an existing lawful use of property.'"[182] The Missouri and Ohio courts also look to their states' tradition of heavily protecting the interests of the property owner when deciding that amortization provisions are *per se* unconstitutional.[183]

The minority of courts that view amortization provisions as *per se* unconstitutional should reconsider their position and use the *Penn Central* test in their analysis. Perhaps the main argument that the minority should use *Penn Central* is the widely accepted view that amortization provisions are partial takings because they do not always deprive the owner of the total value of their property.[184] Under this view, partial takings are not *per se* unconstitutional, and require the use of a balancing test to determine if there has been a regulatory taking.[185]

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179 *Id.*

180 *See generally* Brian W. Ohm, *Towards a Theory of Wisconsin Regulatory Takings Jurisprudence*, 4 WIS. ENVTL. L.J. 173, 175 (1997), in which the author notes:

> The states are left to experiment with these tenants and attempt to achieve some level of consensus on answers to the questions raised by the Supreme Court's takings jurisprudence. Given that most land use actions are brought in state courts, these courts may be a better barometer of the constitutional limits of public control over private property rights. Significant developments will occur at the state court level as state courts try to harmonize their own takings jurisprudence with the ambiguous decisions of the Supreme Court.

Id.

181 *See* Pa. Nw. Distribs. Inc. v. Zoning Hearing Bd. of Moon, 584 A.2d 1372, 1375 (Pa. 1991); Hoffman v. Kinealy, 389 S.W.2d 745, 753 (Mo. 1965); Akron v. Chapman, 116 N.E.2d 697, 700 (Ohio 1953).

182 United Artists' Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612, 618 (Pa. 1993) (quoting *Pa. Nw. Distribs.*, 584 A.2d at 1375).

183 *See also Hoffman*, 389 S.W.2d. at 754; *Akron*, 116 N.E.2d at 700.

184 Lewyn, *supra* note 15, at 702-03.

185 *Id.*

To summarize, courts should use the *Penn Central* three part test in determining if an amortization provision is reasonable. This test is particularly helpful because it offers an objective framework that allows courts to analyze the unique aspects of amortization provisions. Furthermore, courts that view amortization provisions as *per se* unconstitutional should reconsider their position. Amortization provisions amount to a partial taking, requiring the use of a balancing test to determine their reasonableness. The minority should not easily dismiss the use of amortization provisions for this reason. Thus, the *Penn Central* balancing test should be applied since it allows courts to determine the reasonableness of amortization provisions on a case-by-case basis.

V. A SUGGESTION TO LOCAL GOVERNMENTS: CONSTRUCTING A REASONABLE AMORTIZATION PROVISION

Constructing a reasonable amortization provision can be tricky.[186] Local administrators must take into consideration many complex factors relating to a business or structure in a unique area before drafting the ordinance.[187] This job would normally require the knowledge of experts skilled at determining the best possible way for a land owner to recoup his or her loss.[188] Luckily, there are several helpful cases and formulas available to local administrators that will help ease this process.[189] Perhaps the most helpful resources available to local administrators are past methods used by local governments that have been challenged in court. These opinions provide local administrators with a plan that has been tested and analyzed by judges. This section recommends that local governments engage in a highly factual process tailored to individual nonconforming uses when constructing a reasonable amortization provision.

A. *Helpful Guidance:* AVR, Inc. v. City of St. Louis Park

The Minnesota Supreme Court, in upholding a two year amortization ordinance for a concrete batch plant, analyzed a detailed process for constructing amortization provisions in *AVR, Inc. v. City of St. Louis Park.*[190] In *AVR, Inc.*, the City of St. Louis Park's ordinance mandated the completion of several

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186 *See* Collins, *supra* note 3, at 217 ("The amortization technique is perhaps more art than science. Indeed, there is no universally-accepted approach to amortization. Approaches used vary widely and have been subjected to court tests of reasonableness from a variety of perspectives.").

187 Russell P. Schropp, Comment, *The Reasonableness of Aesthetic Zoning in Florida: A Look Beyond the Police Power*, 10 FLA. ST. U. L. REV. 441, 455 (1982) (noting that "[t]he standard of 'reasonableness' is very flexible . . . ."). The reasonableness standard in examining amortization provisions is appropriate because it allows local governments to adapt and/or construct ordinances that fit the complexity (or lack) of the nonconforming use.

188 *See generally* Collins, *supra* note 3. Collins devotes an entire article to the discussion of determining amortization periods for non-conforming uses.

189 *See generally* Zitter, *supra* note 2; Campbell, *supra* note 17.

190 585 N.W.2d 411, 412 (Minn. 1998).

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fact intensive steps before an amortization provision was formulated.[191] First, the owner(s) of non-conforming uses had to register with the city within a one year time period.[192] After this step was completed, the zoning administrator met with the property owner(s) to review their registration form and determine a proper amortization period.[193] In order to assist the zoning administrator, he or she was to consider the following factors when determining what time frame was proper to amortize the property:

> a. Information relating to the structure located on the property;
>
> b. Nature of the use;
>
> c. Location of the property in relation to surrounding uses;
>
> d. Description of the character of and uses in the surrounding neighborhood;
>
> e. Cost of the property and improvements to the property;
>
> f. Benefit to the public by requiring the termination of the non-conforming use;
>
> g. Burden on the property owner by requiring the termination of the non-conforming use;
>
> h. The length of time the use has been in existence and the length of time the use has been non-conforming.[194]

Additionally, the zoning administrator could consider anything else she or he felt was conducive to determining an amortization period.[195]

Upon completion of the aforementioned process, the city council and planning commission were to hold a joint public hearing regarding the amortization of each specific property owner.[196] During the hearing, the report prepared by the zoning administrator was reviewed, and the property owner was permitted to present evidence.[197] After all of these steps are completed, the amortization ordinance could be formulated and either adopted or rejected.[198]

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[191] *Id.* at 412-13.

[192] *Id.* at 412.

[193] *Id.*

[194] *Id.* at 411-12.

[195] *Id.* at 412.

[196] *Id.* at 415.

[197] *Id.*

[198] *Id.*

The Minnesota Supreme Court ultimately upheld the ordinance outlining the process for determining a reasonable amortization provision.[199] In addition, the court rejected AVR's argument that the city council offended Minnesota precedent by giving too much deference to public input.[200] Instead, the court verified the council's receptivity and use of public opinion when deciding whether or not it should impose an amortization provision.[201]

The fact intensive process found in *AVR, Inc.* provides helpful guidance to local governments wishing to institute amortization provisions. Not only does the application of this test make an amortization provision reasonable, but it also ensures that the interests of the property owner are protected.

B. *Applying* AVR, Inc.: KOB-TV, L.L.C. v. City of Albuquerque

In examining a one year amortization provision for a helipad, the Court of Appeals of New Mexico surveyed various tests for reasonableness found in a number of jurisdictions in *KOB-TV, L.L.C. v. City of Albuquerque*.[202] The court noted that the ultimate question in examining an amortization provision is its reasonableness.[203] In doing so, the court recognized and endorsed the seven factors outlined in *AVR, Inc. v. City of St. Louis Park* that were used to determine a reasonable amortization period.[204] The court also named other factors that are used to determine reasonableness, including "ability and cost of reloca-

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199 *Id.* at 416-17.

200 *Id.* at 416.

201 *Id.* AVR argued that the city offended *Trisko v. City of Waite Park*, a case concerning a city's decision to deny a conditional use permit. 566 N.W.2d 349, 351 (Minn. Ct. App. 1997). *Trisko* held that "something more concrete than neighborhood opposition and expression of concern for public safety." *Id.* at 355 (quoting Chanhassen Estates Residents Ass'n v. City of Chanhassen, 342 N.W.2d 335, 340 (Minn. 1984)). However, the Minnesota Supreme Court distinguished the current case with *Trisko* by saying:

> But even if *Trisko* were applied to the city's adoption of the ordinance establishing a two-year amortization period, the record shows that the city's decision was based on more than neighborhood opposition to AVR's plant and expression of concern for public safety. For example, the city found that the quality of life for surrounding residents will increase by allowing the city to improve the general appearance and image of the city. The city also found that amortization of AVR's plant will create redevelopment opportunities that will help satisfy a demand for certain housing needs and increase property values in the immediate vicinity, which, in turn, will increase real estate taxes and benefit the entire community.

AVR, Inc., 585 N.W.2d at 416.

202 111 P.3d 708, 719-20 (N.M. Ct. App. 2005).

203 *Id.* at 720. *See also* Art Neon Co. v. City and County of Denver, 488 F.2d 118, 121 (10th Cir. 1973) (indicating that a termination provision for a nonconforming use must be reasonable).

204 *KOB-TV*, 111 P.3d at 719 (noting that the seven factors found in *AVR, Inc.* are to achieve the ultimate purpose of balancing the public gain against the private loss).

tion, the ability of the business to continue to operate, the depreciation value of the asset, and the useful life of the use."[205]

In regard to the reasonableness of the one year amortization provision, the court found that the city did not perform enough research to determine a reasonable amortization period.[206] The court cited *AVR, Inc.* in coming to its conclusion.[207] Even though city council discussed the factors and evidence necessary for determining a reasonable amortization provision, no provision was actually presented.[208] Thus, the court reversed and remanded the case to the city so that a reasonable amortization provision could be determined with the guidance of the *AVR, Inc.* factors.[209]

As noted above, the application of the *AVR, Inc.* factors have been considered a suitable way for local governments to uncover information about a nonconforming use in order to construct a reasonable amortization provision. In addition to these interactive factors, local governments should consider using the technical steps recommended in the following subsection when formulating an amortization period. The use of the steps outlined below will help to ensure that the amortization provision is reasonable if challenged in court.

C. *The Nuts and Bolts: Constructing the Amortization Period*

Many people would agree with the phrase "[m]athematics is written for mathematicians."[210] This statement illustrates the reluctance that many local government administrators and planners may feel when considering amortization periods. Despite this fear, amortization should not be discounted simply because people are afraid to use it. This subsection aims to provide information to local governments and planners so that mathematically determining a reasonable amortization provision loses its intimidating qualities. Accordingly, there are two steps that need to be taken when determining an amortization period: (1) calculating unrecoverable costs (the costs of the property owner to be amortized) and (2) the establishment of an amortization period to recover these costs.[211]

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205 *Id. See also* Harbison v. City of Buffalo, 152 N.E.2d 42, 47 (N.Y. 1958); Zitter, *supra* note 2.

206 *KOB-TV*, 111 P.3d at 719.

207 *Id.*

208 *Id.*

209 *Id.* at 220.

210 Nicholas Copernicus, Famous Quotes, Math Quotes, http://home.att.net/~quotations/math.html (last visited Oct. 19, 2006).

211 Collins, *supra* note 3, at 217.

1. Unrecoverable Costs

The first step in constructing an amortization period, calculating unrecoverable costs, can be determined by either a fixed ordinance (which specifies one consistent method for calculating unrecoverable costs), or on a case-by-case basis.[212] If a fixed ordinance is used, then there is a higher threat of the amortization provision being rendered unreasonable.[213] Thus, it is suggested that a case-by-case analysis is used when determining unrecoverable costs, because this method allows more flexibility in allowing the provision to best suit the property owner.[214]

In using the case-by-case approach, there are three main methods that local governments can use to determine unrecoverable costs: "(1) [t]he owner's investment in the premises; (2) [t]he fair market value as determined by recent sales of comparable properties; and (3) [t]he replacement cost–for the purposes of amortization [this] is defined as the cost of comparable premises in a different location."[215] The following table illustrates the implementation of the three methods, as well as the different results that each yields:

Application of Three Alternative Methods to the Same Case to Assess the Basis for Valuing Unrecoverable Costs [216]

Fair Market Value	
Fair Market Value of Building	$100,000
Minus the Value of the Land	($10,000)
Minus Salvage Value of Building	($15,000)
Base Unrecoverable Costs	$75,000
Owner's Investment	
Owner's Investment in Building	$70,000
Minus the Value of the Land	($10,000)

212 *Id.* at 218.

213 *Id.*

214 *Id.*

215 *Id.*

216 *Id.* at 219.

Minus Salvage Value of Buildings	($15,000)
Base Unrecoverable Costs	$45,000
Replacement Cost of Premises	
Land at New Location	$10,000
Construction Costs	$50,000
Base Costs	$60,000
Minus Salvage Value of Buildings	($15,000)
Minus Resale Value of Land	($10,000)
Base Unrecoverable Cost	$35,000

As the table illustrates, the recoverable costs vary when each of the three bases are applied. Accordingly, local governments should take the individual aspects of the property into mind when determining which basis would be more appropriate for a nonconforming use.[217]

2. The Establishment of the Amortization Period

Next, the amortization period must be formulated. There are two methods for determining amortization periods: (1) fixed periods,[218] which are time periods assigned to categories of uses,[219] and (2) case-by-case periods,[220] which are periods determined after a specific examination of what would best work for each use at issue.[221] Fixed periods are not appropriate for application to all nonconforming uses.[222] Courts are more likely to invalidate an amortization provi-

[217] Collins, *supra* note 3, at 218.

[218] *See generally* City of Los Angeles v. Gage, 274 P.2d 34, 35 (Cal. Ct. App. 1954), where the district court reversed the judgment of the superior court and held that a fixed amortization period of five years, when applied to a plumbing business, was a constitutional exercise of the police power.

[219] Collins, *supra* note 3, at 229 (use categories include nonconforming uses in conforming buildings, minor structures and open storage, and major structures).

[220] *See generally* Neighborhood Comm. on Lead Pollution v. Bd. of Adjustment, 728 S.W.2d 64 (Tex. App. 1987), for an example of the recoupment of investment method, a common approach used in case-by-case determinations of amortization periods.

[221] Collins, *supra* note 3, at 228, 233-34.

[222] *Id.* at 232-33.

sion assigning fixed periods to categories of nonconforming uses because the individual aspects of each use are not thoroughly considered.[223] Thus, courts may view these types of periods as "unreasonable and arbitrary."[224] Instead, they should only be applied to nonconforming uses that involve little or no construction investments.[225] For example, fixed amortization periods are most appropriate when applied to uses such as billboards or signs. However, this does not discount the lack of predictability that a local government may face when faced with litigation over the constitutionality of a fixed period.[226]

The case-by-case method allows local governments to tailor a custom made period to the nonconforming use at issue.[227] Thus, the local government is better able to avoid, or win, a constitutional takings clause challenge.[228] The most commonly used method for case-by-case determinations of amortization periods is the "Recoupment of Investment" method.[229] This method uses "basic financial calculus to determine the amount of time necessary to realize the value of an investment plus any return that is required by the investor."[230] The following table provides the formula to determine an amortization period, and its application to a hypothetical nonconforming use:

Recoupment of Investment Model for Determining Amortization Periods For Nonconforming Uses[231]

n = log n (1-Pi/A)
log n (1/1+ i)
where,
n = amortization period

[223] *See* Rives v. Clarksville, 618 S.W.2d 502, 510 (Tenn. Ct. App. 1981), for an example of a court criticizing amortization provisions that do not consider the unique aspect of properties.

[224] Collins, *supra* note 3, at 236.

[225] *Id.* at 233.

[226] *But cf.* City of Los Angeles v. Gage, 274 P.2d 34, 35 (Cal. Ct. App. 1954) (upholding a fixed amortization ordinance applied to the plumbing business). This Note does not suggest that fixed amortization provisions will always be found unconstitutional. Instead, this Note suggests that, in order to best assure the constitutionality of the amortization provision, a case-by-case approach should be used.

[227] Collins, *supra* note 3, at 233-34.

[228] *Id.* at 236; *see also* Varadarajan, *supra* note 15, at 2573 (recognizing that the recoupment of investment method lends general support to the constitutionality of amortization provisions).

[229] Collins, *supra* note 3, at 234; *see* Christine Venezia, Comment, *Looking Back: The Full Time Baseline in Regulatory Takings Analysis*, 24 B.C. ENVTL. AFF. L. REV. 199, 212 (1996); *see also* Heidi Gorovitz Robertson, *If Your Grandfather Could Pollute, So Can You: Environmental "Grandfather Clauses" and their Role in the Environmental Inequity*, 45 CATH. U. L. REV. 131, 175 (1995) (recognizing the "Recoupment of Investment" model as a prominent player in amortization provisions).

[230] Collins, *supra* note 3, at 234.

[231] *Id.* at 235.

P = base cost (adjusted value of business investment)
A= Annual Income
i = rate of return

Hypothetical Case Assumptions

Non-Conforming Use: Car repair shop on the ground floor of an apartment building

Investment:	$200,000
Date of Zoning Change:	1997, 3 years ago
Useful Life of Equipment:	7 years
Method of Depreciation:	Straight line
Depreciated Value:	$114,285
Annual Income from Shop:	$30,000
Required Return on Investment:	5%
Amortization Period Prescribed:	6 years

This method is much more complicated in comparison to the fixed period approach.[232] However, as previously suggested, the case-by-case approach provides adequate assurance that the amortization period will not amount to a taking.[233]

In summary, it is recommended that local governments use, at minimum, the seven factors set forth in *AVR, Inc. v. City of St. Louis Park* to gather information about a nonconforming use.[234] Next, local governments should

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232 Collins, *supra* note 3, at 235.

233 *Id.* at 236.

234 585 N.W.2d 411, 411-12 (Minn. 1998). *See also* Naegele Outdoor Adver., Inc. v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1986), where the Court of Appeals for the Fourth Circuit provided a list of factual inquiries that should be made when constructing an amortization provision for billboards:

> 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

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determine the unrecoverable costs of the nonconforming use. After all of this information is gathered and examined, an amortization period should be formulated using the case-by-case approach. Consequently, this is an inherently difficult process. Therefore, it is recommended that local governments complete these steps with the help of an expert.[235] If these steps are followed, it is likely that the amortization provision will be considered reasonable if subjected to judicial scrutiny.

VI. CONCLUSION

As one author noted, "[l]and-use regulation . . . has given birth to one technique that, in many cases, has successfully resulted in the elimination of nonconforming uses--amortization."[236] By using amortization provisions, local administrators are able to weigh the benefits to the public against the loss to the private property owner. Also, amortization provisions work better than most tools that aim to eliminate nonconforming uses because they ensure the future elimination of the use by the time period present in the ordinance. The benefits of zoning will also be accentuated because nonconforming uses that detract from the general welfare of the community will eventually be removed. Thus, when a local government determines that the public gain outweighs the private loss, an amortization provision should be instituted, provided such provisions are permitted in the jurisdiction involved.

This Note argues that courts should utilize the *Penn Central* three part balancing test when analyzing amortization provisions. This test allows courts to effectively analyze the reasonableness of amortization provisions. Furthermore, the courts that find amortization provisions to be *per se* unconstitutional should reconsider such a position. Instead, these courts should recognize that such provisions are partial takings requiring the use of a balancing test to determine their reasonableness.

Finally, this Note suggests the completion of several steps before constructing an amortization provision. First, local administrators should engage in the fact intensive process endorsed by *AVR, Inc. v. City of St. Louis Park*[237] to uncover details about the specific property that will be amortized. Then, local

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> 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.

[235] *See* Paul E. Tauer, *Aurora Ordinance Carefully Considered*, ROCKY MOUNTAIN NEWS, January 3, 2003, at 48A, for an example of a municipalities use of experts in determining amortization provisions.

[236] Varadarajan, *supra* note 15, at 2556.

[237] 585 N.W.2d at 411-12.

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administrators should (1) determine the unrecoverable costs that will be experienced by the property owner, and (2) establish the amortization period. If these steps are completed, the court will likely find the subject amortization provision to be reasonable.

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