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Municipal Corporations - Zoning - Amortization of Existing Noncomforming Uses

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MUNICIPAL CORPORATIONS—ZONING—AMORTIZATION OF EXISTING NONCONFORMING USES—In 1930 defendant Gage acquired several lots in the City of Los Angeles. He constructed a residential building in which he established a wholesale and retail plumbing business, using one room as an office for the conduct of his business. Also used in the business were a garage and racks, bins, and stalls for the storage of materials and supplies. The use to which defendant put the property was permitted under the applicable zoning ordinance of 1930.

Later the ordinance was changed so as to make defendant's use of both lots nonconforming. In 1946 another rezoning ordinance provided that the nonconforming commercial use of a residential building and the nonconforming use of land where no buildings were employed in connection with such use should be discontinued within five years. Five years having elapsed, plaintiff brought suit for an injunction ordering defendant to discontinue the prohibited use of his property. The lower court refused an injunction on the ground that to order defendant to abandon a twenty-year-old user would be a deprivation of property without due process of law. On appeal, *held,* reversed. The requirement that an existing nonconforming use be discontinued within five years from the date of passage of the zoning ordinance is a constitutional exercise of the police power. *City of Los Angeles v. Gage,* (Cal. App. 1954) 274 P. (2d) 34.

Nonconforming uses[1] existing at the time a zoning ordinance goes into effect are carefully protected.[2] There are, however, various techniques employed to secure the gradual elimination of these uses, and in general they are constitutional. Discontinuance of a nonconforming use may constitute abandonment and its resumption may be prohibited.[3] Changes and extensions of use may be prohibited with a view toward gradual natural elimination.[4] The power of eminent domain might also be employed to remove certain uses.[5] Although these methods were at one time considered an adequate solution to the problem of eliminating nonconforming uses, it is now apparent that they are not. There is little hope that such uses will disappear by themselves where the nonconforming use enjoys a monopolistic advantage, protected from further invasion by the zoning ordinance.[6] As a more efficient device to insure the eventual conformity of a zone, a number of states and municipalities have adopted a plan of amortization.[7] This is a plan whereby the nonconforming use must be discontinued

[1] For a discussion of what constitutes a nonconforming use and the proof thereof, see 8 MCQUILLIN, MUNICIPAL CORPORATIONS §25.185 et seq. (1950). See also 102 UNIV. PA. L. REV. 91 at 94 (1953).

[2] To the effect that a zoning ordinance cannot prohibit existing lawful nonconforming uses, see Standard Oil Co. v. Bowling Green, 244 Ky. 362, 50 S.W. (2d) 960 (1932); Jones v. Los Angeles, 211 Cal. 304, 295 P. 14 (1930); 86 A.L.R. 648 (1933). Nonconforming uses are also often protected by special statutory provisions. 1951 WIS. L. REV. 685 at 688.

[3] Where a nonconforming use has been abandoned, all further use of land or buildings must be in conformity with the zoning ordinance. State ex rel. Turner v. Baumhauer, 234 Ala. 286, 174 S. 514 (1937); Beszedes v. Board of Commrs. of Arapahoe County, 116 Colo. 123, 178 P. (2d) 950 (1947). See 18 A.L.R. (2d) 725 (1951).

[4] For two theories as to what limitations may be placed on existing uses, compare In re Gilfillan's Permit, 291 Pa. 358, 140 A. 136 (1927) with Ballercia v. Quinn, 320 Mass. 687, 71 N.E. (2d) 235 (1947).

[5] See Mich. Comp. Laws (1948) §125.583(a); State ex rel. Twin City B. & I. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1919). Cf. Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N.E. 244 (1917).

[6] See 1951 WIS. L. REV. 685. See also Bettman, "A Backward Step in Zoning," 16 JOUR. LAND AND PUBLIC UTILITY ECON. 455 (1940).

[7] See, e.g., Colo. Stat. Ann. (Supp. 1953) c. 45A, §19 (county zoning); Ill. Rev. Stat. (1953) c. 24, §73-1 (city zoning); Kan. Gen. Stat. Ann. (1949) §19-2919 (county zoning); Okla. Stat. Ann. (Supp. 1954) tit. 19, c. 19, §862.16 (county zoning); Pa. Stat.

within a prescribed time. Whether this delayed definite prohibition of an existing nonconforming use constitutes a taking of property without due process of law has not often come before the courts. In two cases[8] the Louisiana Supreme Court has upheld a one year amortization period as applied to a grocery store and a drug store, but the reasoning was confused by the court's views on the law of nuisance. While it is recognized that a legislature may extend the common law nuisance doctrine,[9] to expand it to include such harmless enterprises as grocery stores and drug stores seems arbitrary.[10] More recently, amortization of a filling station was upheld on the ground that it was a reasonable exercise of the state police power,[11] but the court relied on authority upholding statutory expansions of nuisance where the power of the state is conceded to be absolute.[12] The question remains whether the state has the power to require elimination of uses which are not within the permissible expansion of the law of nuisance, but are within the state's power to prohibit in the future under the "zoning power." To require immediate elimination of such a use would be invalid.[13] An amortization of such use within a "reasonable" time has been held to be invalid.[14] An amortization of such use within a "fixed" period of time is upheld in the principal case, the theory being that elimination of nonconforming uses by this particular method is as valid an exercise of police power as elimination by way of discontinuance or limitations on expansion, alteration, and repairs.[15] Thus the principal case provides a better rationale for sustaining amortization of existing uses than any of the earlier cases. The court squarely

Ann. (Purdon, Supp. 1954) tit. 16, §510.14 (county zoning); Utah Code Ann. (1943) §19-24-18 (county zoning); Va. Code (1950) §15-843 (city zoning). Cities with amortization plans (cited in principal case at 41): Los Angeles Mun. Code, §12.123 B&C (1946); Chicago Zoning Ord. §20 (1944); Richmond, Va., Zoning Ord., Art. XIII, §1 (1948); Wichita, Kan., Zoning Ord. §24 (1948).

[8] State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 S. 613 (1929), cert. den. 280 U.S. 556; State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 S. 314 (1929).

[9] Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143 (1915) (elimination of a brick kiln); Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246 (1928) (elimination of disease-carrying trees). In most of the cases in which legislation of this kind has been sustained, the use prohibited has been one of a type causing some tangible harm such as soot, odors, or noise. See 41 COL. L. REV. 457 at 464 (1941).

[10] For criticisms of the Louisiana decisions see O'Reilly, "The Nonconforming Use and Due Process of Law," 23 GEO. L.J. 218 at 226 (1935); 39 YALE L.J. 735 at 737 (1930).

[11] Standard Oil Co. v. Talahassee, (5th Cir. 1950) 183 F. (2d) 410.

[12] In Standard Oil Co. v. Talahassee, note 11 supra, the court relied principally on Hadacheck v. Sebastian, note 9 supra. Whether the court was correct in allowing the elimination of a filling station as a reasonable exercise of the police power because of its proximity to the state capital and a school is questionable. Cf. Standard Oil Co. v. Bowling Green, note 2 supra, where it was held that it was not within the state's police power to require the elimination of a filling station located in a residential neighborhood.

[13] Jones v. Los Angeles, note 2 supra.

[14] Akron v. Chapman, 160 Ohio St. 382, 116 N.E. (2d) 697 (1953), noted in 67 HARV. L. REV. 1283 (1954).

[15] Principal case at 44. The constitutionality of other techniques used to eliminate nonconforming uses is discussed in 147 A.L.R. 167 (1943).

faced the question whether amortization was a reasonable exercise of the police power and decided that under these circumstances it was.[16]

Existing nonconforming uses present a serious problem to city planners.[17] To meet the problem it is necessary to use a device which adequately protects private property,[18] does not unduly discourage future investment, and minimizes economic waste.[19] On the other hand, the device must be effective enough that the eventual elimination of the nonconforming use will be assured. A proper scheme of amortization, designed to take into account this conflict of interests, is the best solution yet proposed.

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[16] The cost of moving was found to be less than one percent of the minimum gross income for the five years.

[17] Oppermann, "Non-Conforming Use and the City Plan," 15 JOUR. LAND AND PUBLIC UTILITY ECON. 94 (1939); Bartholomew, "Non-Conforming Uses Destroy the Neighborhood," id. at 96.

[18] Nectow v. Cambridge, 277 U.S. 183, 48 S.Ct. 447 (1928). See 30 YALE L.J. 735 at 739 (1930).

[19] 102 UNIV. PA. L. REV. 91 (1953).