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# Non-Conforming Uses: Problems and Methods of Elimination

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# NON-CONFORMING USES: PROBLEMS AND METHODS OF ELIMINATION

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INTRODUCTION

In light of the recent property-use regulations set forth in the new city zoning ordinance, an examination of the various problems raised by such change became pertinent. The growth of a city promulgates revision and planning and, "City planning is the best tool available for re-forming the physical machinery of the modern city to accommodate it to its new functions and to gear into the city technological changes which make for a more orderly, economical, convenient, and productive municipal corporation."[1] Thus, only through city planning, and specifically through zoning, can we achieve the advantages secured from a well planned community.[2]

Despite the progress of zoning, it has not yet reached the desired expectation of its advocates.[3] We must attempt to see what are some of the difficulties which stand in the way of effective administration of modern zoning ordinances. One difficulty, and by far the most serious, is the continuation of the non-conforming use without any effective provision for its elimination.[4] Until some method is devised to permanently eliminate the non-conforming use from our cities and towns, effective city planning cannot be achieved.

There has been much effort extended toward the solution of this problem. Writers and city managers have suggested many methods which would eventually, if legislated by councils and sustained by the courts, eliminate the non-conforming use from our society. Among the suggested solutions are: (1) Elimination by condemnation through eminent domain; (2) Provisions for abandonment, both voluntary and involuntary; (3) Limiting the extension and repair of the non-conforming use; (4) Immediate elimination without compensation; and (5) Gradual elimination over a

[1] Oppermann, "Non-Conforming Use and the City Plan," 15 J. of LAND & P. U. ECON. 96 (1939).

[2] Zoning regulations have been adopted in over 583 cities and towns which represents a population of over 31,000,000 people. For a short article on the growth of zoning see, Chamberlain, "Zoning Progress," 15 A.B.A.J. 535 (1929).

[3] Bettman, "A Backward Step in Zoning," 16 J. LAND & P. U. ECON. 455 (1940); Tugwell, "The Real Estate Dilemma," 2 PUB. ADMIN. REV. 27 (1942); 35 VA. LAW REV. 348 (1949).

[4] The non-conforming use is defined in almost all zoning ordinances as a building or land occupied by a use which does not comply with the regulations of the use district in which it is situated. Chicago Munic. Code, (Hader, 1939) § 194 A-2 (n). See Bartholomew, "The Zoning of Ill. Municipalities," 17 ILL. MUNIC. REV. 221, 232 (1938) where the author states, "It has always been assumed that non-conforming uses would gradually eliminate themselves from the district in which they exisit if they were not permitted to expand. Such has not proven to be the case." See also 1 YOKLEY, ZONING LAW AND PRACTICE, § 148 (1953). For a good analysis of the shortcomings of zoning see, MacLaurin, "Where Zoning Fails," 17 NAT. MUNI. REV. 257 (1928).

Some authority has questioned whether the problem of eliminating the non-conforming use is necessory. For such an article stating why elimination should not be mandatory see, 102 PA. L. REV. 91 (1953). However, for the purpose of this article, it must be assumed that the elimination of the non-conforming use is not merely desirable but a necessity to effective city planning. As a legal problem when the legislature zones uses into various districts it is the task of the court to enforce these ordinances within constitutional bounds. The writer firmly believes that a non-conforming use in any district is a menace to city planning—like a fly in the ointment; some methods, which will be discussed in detail subsequently, must be found to eliminate this problem.

period of years—generally called "amortization." The major portion of this paper will be concerned with a study of the legal and social problems which present themselves when one or more of the above methods are considered for adoption.

## Validity of Zoning in General

Zoning finds its validity in the reasonable exercise of the police power;[5] a zoning ordinance may be justified if it protects the health, safety, and morals of the community. Zoning ordinances are no different from other police power regulations; however, they, too, require reasonableness and fairness in application: their reasonableness being a test of their legality.[6]

The leading case in this area is the historic decision of *Euclid v. Amber Realty Co.*[7] The Supreme Court here unequivocally upheld the right of a city to pass a comprehensive zoning ordinance and to enforce it, even though some of the consequences would be to thrust a heavy financial loss upon property owners. This decision has since been followed by a majority of the states.[8] Also because of this decision zoning has received wide acceptance in our cities and towns. However, a municipality in the absence of an enabling statute has no authority to establish a comprehensive zoning ordinance.[9] It is only upon a delegated right by statute, and a reasonable exercise of such right, directed toward promoting the health, safety, and morals of a community, that a municipal corporation can put into effect a comprehensive zoning system.

Our discussion thus far has concerned only the traditional zoning ordinance which controls the future use of property. But what of the zoning ordinance which attempts the removal of already existing enterprises, which because of their existence, hinder the realization of some plan for a better organized community. These are the types of ordinances and the problems arising from such ordinances to which we shall now turn our attention. We must first, however, distinguish between the traditional nuisance and the non-conforming use in the context of methods which may be utilized to eliminate them from our communities. Specifically, are any differences in the treatment which must be accorded to these uses of property required by the courts to satisfy traditional concepts of due process?

## Nusiance Distinguished From Non-Conforming Use

" . . . No greater fallacy could exist than that zoning is restricted to or is identical with nuisance regulation."[10] Property regulation by means of zoning is not restricted to what is dis-

[5] Village of Euclid v. Amber Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926). 1 YOKLEY, ZONING LAW AND PRACTICE, § 1 (1953); BAKER, THE LEGAL ASPECTS OF ZONING, p. 113 (1922); 8 McQUILLIN, MUNICIPAL CORPORATIONS, § 25.05 (1950). See also Freud, "Some Problems in the Law of Zoning," 24 ILL. LAW REV. 135 (1924); Anderson, "Zoning in Minnesota—Eminent Domain v. Police Power," 16 NAT. MUN. REV. 624 (1927). For a collection of the cases see, 1 YOKLEY, ZONING LAW AND PRACTICE, § 20, note 14 (1953).

[6] People v. Scrafano, 307 Mich. 655, 12 N.W. (2d) 325 (1943); Kinney v. City of Joliet, 411 Ill. 289, 103 N.E. (2d) 473 (1952). See Byrne, "The Constitutionality of a General Zoning Ordinance," 11 MARQUETTE L. REV. 189 (1926).

[7] 272 U.S. 365, 47 S.Ct. 114 (1926).

[8] The cases are collected in 1 YOKLEY, ZONING LAW AND PRACTICE, §§ 20-22 (1953).

[9] State v. DuBose, 99 Fla. 812, 128 So. 4 (1930); Wertheimer v. Schwab, 124 Misc. 822, 210 N.Y. Supp. 312 (1925).

[10] City of Los Angeles v. Gage, (Cal. App. 1954), 274 P. (2d) 34, ably noted in 53 MICH. L. REV. 762 (1955). See Bettman, "Constitutionality of Zoning," 37 HARV. L. REV. 834, 841 (1924).

orderly or offensive. Zoning not only includes, but supplements, nuisance regulation. Zoning, therefore, is a much broader concept than nuisance abatement. Although there is a similarity in the problem of eliminating the non-conforming user and the abatement of the nuisance, the achievement of each must be handled in a different manner.

Traditionally, certain uses of property which were classified as nuisances could be abated immediately and drastically.[11] Thus, if it were possible to get the non-conforming use into the category of a common law nuisance, the court could abate that nuisance, despite the fact that great property losses would be incurred. Here again we must determine when a particular use is a common law nuisance, and when it is merely a statutory non-conforming use.

The line separating these two classifications is not clear. Generally, at common law a nuisance was some noxious, offensive, detrimental use of land which caused some *physical damage* to the property of others.[12] When such a use existed, abatement followed almost as a matter of course. Abatement was allowed where livery stables were maintained in certain areas, [13] or where

[11] Brown v. Grant, (Tex. Civ. 1928), 2 S.W. (2d) 285. Noel, "Retroactive Zoning and Nuisances," 41 COL. L. REV. 457 (1941); 1951 WIS. L. REV 685.

[12] Generally a public nuisance is created by any enterprise which endangers the health, safety or property of a considerable number of persons. See MILLER, CRIMINAL LAW, § 132 (1934). The enterprise will constitute a private nuisance, giving rise to a civil action for damages, whenever it interferes with the use and enjoyment of private land. See 4 RESTATEMENT, TORTS, c. 40 (1939); Noel, "Retroactive Zoning and Nuisances," 41 COL. LAW REV. 457 (1941).

[13] Reinman v. Little Rock, 237 U.S. 171, 35 S.Ct. 511 (1915).

premises were used as a brickkiln,[14] or where a large brewery was maintained in a residential area.[15] The Supreme Court in these cases was careful to point out that the right to eliminate prior use of property was one which would be narrowly limited, and the exercise of such right would be carefully scrutinized by the courts.[16]

The leading American case which distinguished the nuisance from the ordinary non-conforming user was *Jones v. City of Los Angeles.*[17] The court said that " . . . the distinction between the power to prohibit nuisances and the power to zone is exceedingly important. The power over nuisances is more circumscribed in its objects; but once an undoubted menace to public health, safety or morals is shown, the method of protection may be drastic."[18] The court was rather categorical in its analysis of the problem, determining that a zoning statute which is retroactive[19] would be struck down unless it eliminated that which was a nuisance; it rested its decision on the theory that such a zoning ordinance was an "unreasonable use of the police power." Cases from other jurisdictions and legal writers support this distinction between the nuisance and the non-conforming use.[20]

In addition to ascertaining when a common law nuisance does in fact exist, we must determine whether the same treatment accorded the common law nuisance can be applied to a nuisance so designated by statute. This problem involves the study of two questions: (1) Does the fact that a use does not conform to the ordinance *ipso facto* make it a nuisance, and (2) Will the statutory declaration that a use is a nuisance allow the court to apply the principles so frequently utilized in abating common law nuisances?

The great weight of authority seems to hold that merely because a use does not comply with the zoning requirement, i.e., is non-conforming, does not in itself make it a nuisance.[21] Unless the use was a nuisance under common law doctrines, or perhaps made

[14] Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143 (1915). For a more detailed discussion of this case see infra.

[15] Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273 (1887).

[16] In O'Reilly, "The Non-conforming Use and Due Process of Law," 23 GEO. L. J. 218, 225 (1935), the author in discussion of these cases said, . . . "It is notable that in each of the instances cited, the prohibited use contained an element of common law nuisance in that it was the cause of *physical annoyance and discomfort* to neighboring landowners or to the community at large. . . ." (Emphasis Supplied).

[17] 211 Cal. 304, 295 P. 14 (1930).

[18] Ibid p. 316.

[19] It is questionable whether the term "retroactive" as used by the court in the Jones Case is technically correct. Retroactive traditionally means an application of a present statute which extends in effect to acts done prior to enactment. The statute in the Jones Case, upon close examination, seems only to deal with the future use of property, i.e. "it shall be unlawful for any person, firm or corporation to erect, establish, *operate, maintain or conduct* any hospital, asylum. . . ." (Emphasis Supplied). Although the use of the term "retroactive" is not technically correct, perhaps the court used this to fortify their reasoning that the ordinance was invalid. In an effort to protect the vested property rights of the people, this term may have been utilized; for to convince a court that an ordinance is retroactive is a big step to a successful attack on this ordinance. This, however, is only speculation why the courts use this term; the fact still remains that they do use it.

[20] Adams v. Kalamazoo Ice and Fuel Co., 245 Mich. 261, 222 N.W. 86 (1928); Pelham View Apartments, Inc. v. Switzer, 130 Misc. 545, 224 N.Y. Supp. 56 (1927). WILLIAMS, LAW OF CITY PLANNING AND ZONING, § 201 (1922); METZENBAUM, LAW OF ZONING, § 287 (1930).

[21] Keenly v. McCarty, 137 Misc. 524, 244 N.Y. Supp. 63 (1930); Webb v. Alexander, 202 Ga. 436, 43 S.E. (2d) 668 (1947). 8 McQUILLIN, MUNICIPAL CORPORATIONS, § 25.11 (1950).

so by legislative fiat, it cannot be abated or treated as one upon the sole ground that it does not comply with the zoning regulaitons.[22]

This immediately presents our second and more difficult question. The authorities seem to indicate that the legislature may within constitutional bounds declare certain uses to be nuisances even though they were not such at common law.[23] This, however, is not unlimited; the legislative directive that a certain use is a nuisance must not be arbitrary nor can it be used without thought to protecting the health, safety or morals of the community.[24] The statutory enlargement of the common law nuisance will generally be sustained only upon the showing that the user is causing some physical harm to the property of others.[25] Thus, unless some of the elements of the common law nuisance are present, the legislature has no right to declare any particular use to be a nuisance. This requirement, surely justifiable, emphasizes the problem of eliminating the non-conforming use which is not a nuisance. The state of the law seems to be that if someting is a nuisance, either at common law or within the constitutional bounds of statutory declaration, it can be abated immediately without any invasion of constitutional rights.

Our attention must now be drawn to the ordinance which attempts the elimination of certain land use which by hypothesis is not a nuisance, either under traditional common law doctrines or by statutory declaration. Assume a particular user of land is legitimate and legal; subsequently, a zoning ordinance is passed which makes such user invalid in that area and attempts to eliminate this particular use of land. Should this type of provision be upheld by the courts as a reasonable exercise of the police power?

In the enabling acts of most jurisdictions there is no provision concerning the treatment of the non-conforming use.[26] In these states the rights of the owners of the non-conforming use are governed purely by judicial application of constitutional restraints. In examining these constitutional restraints, we must determine how effectively they have preserved the property rights of owners who

[22] But compare State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929) and State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), where the court held a use may be a nuisance because it does not comply with the zoning ordinance. For a more detailed discussion of these cases see infra.

[23] Leigh v. City of Wichita, 148 Kan. 607, 83 P. (2d) P. 644 (1938); York Harbor Village Corporation v. Libby, 126 Me. 537, 140 Atl. 382 (1928). JOYCE, NUISANCES, § 81 (1906); 8 McQUILLIN, MUNICIPAL CORPORATIONS, § 25.11 (1950). See 119 A.L.R. 1503 (1939) for a helpful annotation.

[24] In Lawton v. Steele, 119 N.Y. 226 at p. 233, 23 N.E. 878 (1890) the court said ". . . . the legislature cannot use it (statutory declaration of a nuisance) as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see the statute is a mere invasion, or was framed for the purpose of individual oppression, it will set it aside as unconstitutional *but not otherwise.*" (Emphasis supplied).

[25] Lawton v. Steele, 119 N.Y. 226, 23 N.E. 878 (1890); State v. Noyes, 30 N.H. 279 (1855); Commonwealth v. Howe, 13 Gray (79 Mass.) 26 (1859). See cases cited in notes 13, 14, 15 supra.

[26] Ala. Code Ann. (1940), tit. 37, §§ 772-785; Ark. Stat. Ann. (1947), tit. 19, §§ 2801 et seq.; Cal. Gen. Laws (1944) act. 994; Colo. Stat. Ann. (1935), c. 26; Conn. Rev. Gen. Stat. (1949), c. 43; Del. Rev. Code (1935), c. 179; Iowa Code (1950), c. 358 A; Okla. State (1941), tit. 11, §§ 401-410. But see Ill. Rev. Stat. (Cahill, 1927) c. 24, par. 521; Mass. Gen. Laws, (1921) c. 40, § 29; N.J. Rev. Stat. (1937), tit. 40 § 55.48, for statutes expressly providing that the non-conforming use should not be eliminated.

by ordinance find themselves maintaining non-conforming uses.

The courts traditionally hold that the elimination of prior-existing uses is an unreasonable and unjustifiable exercise of the police power.[27] Thus, upon the theory that the application of such a zoning ordinance would impair the owner's vested right, the attempted elimination of non-conforming uses has been denied.[28]

Some courts have nevertheless gone a long way in giving effect to the ordinance which requires the elimination of the non-conforming use. These courts have generally accomplished this by classifying the non-conforming use as a nuisance, and then relying upon traditional common law methods to immediately abate such nuisance. This type of treatment has been utilized in numerous cases by the Louisiana Court. Although the opinion was not clear, the court seemed to uphold the almost immediate elimination of a small grocery store on the theory that it was a nuisance.[29] When a

[27] Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930); Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 N.W. 86 (1928); Pierritti v. Johnson, 132 N.J.L. 576, 41 A. (2d) 896 (1945). See WILLIAMS. LAW OF CITY PLANNING & ZONING, § 201 (1922); METZENBAUM, LAW OF ZONING, § 287 (1930). See also, 39 YALE L.J. 735 (1930); Young, "City Planning & Restrictions on the Use of Property," 9 MINN. L. REV. 593 (1925). For cases which base their prime rejection of these ordinances on the theory that it deprives a property owner of his vested property rights see, Cassel Realty Co. v. City of Omaha et al., 144 Neb. 753, 14 N.W. (2d) 600 (1944); Building Height Cases, 181 Wis. 519, 195 N.W. 544 (1923), discussed in 1951 WIS. L. REV. 685. Perhaps it would be wise at this point to mention the distinction between the attempted elimination of non-conforming uses by means of the police power, and of their elimination by use of eminent domain. In some instances zoning has been effectuated through condemnation, compensation being provided to owners for property "taken." See generally, METZENBAUM, THE LAW OF ZONING (1930). This is discussed in greater detail infra.

[28] See 102 PA. L. REV. 91 (1953).

[29] Civello v. New Orleans, 154 La. 271, 97 So. 440 (1923).

zoning ordinance provided for the elimination of dress shop, the Louisiana Supreme Court again upheld the ordinance on the theory that such use was noxious and offensive.[30] The court in this case seemed to assume the constitutionality of the ordinance, even though this was the very issue to be decided. Again, in the *Dema Realty Cases*[31] the Louisiana Court upheld the elimination of a drug store and a grocery store upon the theory that such user was a nuisance.[32] The reasoning in these cases should be and has been criticized.[33] Fortunately, the general rule still remains that the legislature cannot declare a user a nuisance merely because it violates the zoning statute—some other elements must be present.[34]

Perhaps a more cogent way to specifically point up the differences between the elimination of the non-conforming use which is a nuisance and the non-conforming use which is not a nuisance can be best demonstrated by a contrast between the *Jones v. City of Los Angeles* [35] and the *Hadacheck v. Sebastion*[36] cases.

In the *Hadacheck Case* the land owner had been using his property for the manufacture of bricks for a good number of years; he specifically purchased the property because of the rich deposits of clay under the land. The land was outside the limits of the city, distant from other habitations when he erected expensive machinery for the manufacture of these bricks. The City of Los Angeles subsequently passed a zoning ordinance which prohibited any person from *establishing or operating* a brickkiln within the area owned by the petitioner. The petitioner asserted that to apply this zoning ordinance to him would deprive him of his property without due process of law. In spite of the fact, as recognized by the court, that the petitioner would suffer great property loss, the court upheld the ordinance, specifically relying on the effect that such a business had upon the health and comofrt of the community. Thus the court allowed the immediate elimination of the non-conforming use, finding it somewhat akin to the common law nuisance.

However, when we turn to the *Jones Case*, we are faced with a similar problem, and yet the court arrives at a different result. Here an ordinance attempted to prohibit the *establishment and operation* of hospitals, asylums, and sanatoriums in certain designated areas. The court stated that the retroactive application was invalid as an unreasonable use of the police power.[37] The court said that, " . . . It would be manifestly unjust to deprive the owner of property of the use to which it was lawfully devoted when the ordinance became effective."[38] This language of the court was not

[30] In Liberty Dress Shop v. New Orleans, 157 La. 26 at p. 27, 101 So. 798 (1924) the court stated, "In such a neighborhood . . . any business establishment is a public nuisance, because, if for no other reason, it is an example of defiance of the municipal government. . . ."

[31] State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929); State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929).

[32] These ordinances did not demand immediate abatement, but provided a one year period in which the user must be eliminated or be made to to conform. The problem of amortization as a method to eliminate the non-conforming use will be discussed infra.

[33] O'Reilly, "The Non-Conforming Use and Due Process of Law," 23 GEO. L.J. 218 (1935); 39 YALE L.J. 735 (1930).

[34] See note 21 supra.

[35] 211 Cal. 304, 295 P. 14 (1930).

[36] 239 U.S. 394, 36 S.Ct. 143 (1915).

[37] See note 19 supra.

[38] Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930).

meant to be as inclusive as it might seem, for the court went on to say that if the use were a nuisance (it is not clear from the opinion whether they meant common law or statutory) the destruction and elimination of such use would be within the realm of "reasonableness" under the police power.

Thus these two decisions illustrate the difference in dealing with a non-conforming use which is a nuisance, and with a use which is non-conforming but not a nuisance. If the non-conforming use is a nuisance, it may be immediately and drastically eliminated. On the other hand, if the non-conforming use is not a nuisance, neither at common law nor under permissible statutory definition, it cannot be immediately eliminated; other methods must be utilized to free a particular district from the continuation of the non-conforming use.

Perhaps this distinction between the nuisance and the non-conforming use is an arbitrary one when determing "reasonableness" under the police power or attempting to come within the traditional concepts of due process. The writer, however, feels that to preserve the property rights of individuals some definitive device is desirable and in fact necessary. Although individual rights must on many occasions give way to the general welfare of the community, it is submitted that in the area of zoning: *unreasonable use of the police power is synonymous with immediate elimination of a prior use which is not a nuisance.*

This is not as revolutionary (or perhaps as reactionary) as it may seem at first glance. It does not prevent the legislature from utilizing other means of eliminating the non-conforming use-means which both protect the private property owner and still achieve the benefits of a well-planned community. Admittedly, the non-conforming use should be eliminated, but by means which do not "take property without just compensation," nor by unreasonable use of police power. Our discussion will now turn to the various methods which have attempted to free zoned areas from the non-conforming use, methods which recognize the rights of the property owner while continuing to aim at the ultimate goal of zoning.

## Eliminating the Non-Conforming Use

I. *Condemnation Through Eminent Domain—*

Although the power to zone has been generally upheld under the guise of the police power, in seeking to eliminate the non-conforming use we can utilize the power of eminent domain.[39] In our analysis of the power of eminent domain as a method to eliminate the non-conforming use we shall confine ourselves to two basic questions: (1) The legal question of whether the use of eminent domain is within the scope of the constitutional power, and (2) The policy question of whether in fact this is a feasible method, assuming its legality, to eliminate the non-conforming use.

[39] Mich. Comp Laws (1948), § 125.583 a, ". . . . In addition to the power granted in this section, cities and villages may acquire by purchase, condemnation or otherwise private property for the removal of non-conforming uses and structures. . . . The elimination of such non-conforming uses and structures in a zone district as herein provided is hereby declared to be for a public purpose and for a public use. . . ."

The right to condemn private property for public use is not questioned. The significant problem in determining the constitutionality of statutes condemning non-conforming uses seems to turn upon whether such taking is for the "public use." If we say that the public at large will benefit because of this elimination, and that the legislative intent, presumably for the public as a whole, will be more effectively manifested, we might well conclude that such condemnation is valid under the power of eminent domain. Heretofore, the use of the power of eminent domain for this purpose has been held valid.[40]

One might suggest, however, that such a taking is not for the public use as traditionally defined, but really for the benefit of the other landowners within the zone. If the court finds that this be the effect of the "taking," i.e., not for the public use but only for a group of private landowners, then this method will be eliminated on constitutional grounds.[41] It should be noted, however, that even though private landowners in the zone will be directly benefited, it may still be quite possible to say that the taking is really for the public use. The intention of the legislature in passing such a zoning statute, coupled with this enabling power to condemn the non-conforming use, is initially and fundamentally done for the public as a whole. Merely because a small segment of the community stands to benefit more directly than others should not induce a court to say that the taking is for private use and therefore unconstitutional.[42]

Recognizing this technical and difficult problem, without any hope of arriving at a definite solution, we will now turn to the question of whether condemnation is an effective and feasible method of eliminating the non-conforming use. As a policy mat-

[40] State ex rel. Twin City B & I Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920). This case has been cited with approval in Thomas v. Housing Authority of Duluth, 234 Minn. 221, 48 N.W. (2d) 175 (1951). See 8 A.L.R. 594 (1920). See also 10 NAT. MUNIC. REV. 519 (1921).

[41] See Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N.E. 244 (1917) where the court found that a statute which extinguished the right of a restrictive covenant was merely for the benefit of a private landowners and not for the public as a whole. The same reasoning might well be applied where a zoning ordinance attempts to do the same. See 101 U. OF PA. L. REV. 1246 (1953).

[42] In Kansas City v. Liebi, 298 Mo. 569, 593, 252 S.W. 404 (1923) the court said, "In order to constitute a public use it is not necessary that the whole community or any part of it should actually use or be benefited by a contemplated improvement; benefit to a considerable number is sufficient. Nor does the mere fact that the advantage of a public improvement also inures to a particular individual . . . deprive it of its public character."

ter, should a municipality use its power of eminent domain to rid a particular area of non-conforming uses?

The attempt to use the power of eminent domain for purposes of putting into operation a city plan has been severely criticized by the authorities.[43] The sharpest criticism of this method is that the expense of assessing the benefits and damages to every non-conforming use in a community makes eminent domain unworkable.[44] The inability of most municipalities to pay fair compensation to every use they wish eliminated would defeat this method in its inception. Even if a city were financially able to condemn and compensate for a percentage of the non-conforming uses in any particular area, this would not effectuate the purpose of the ordinance, i.e., complete elimination of all such uses. The excessive cost of purchasing the land or the buildings would not be worth the gain to the community. Although by this method all non-conforming uses would be immediately eliminated, it is quite impractical that this be used as the sole method of solving this problem.

The expense, however, is not the only hindrance to its successful operation. Extensive litigation would follow the use of such method; spurious claims would be an almost immediate result. The use of eminent domain would tend to fix a rigid mold on the city, for each change would result in further litigation and a multitude of problems. Thus for these reasons eminent domain, in the average situation, will not be a practical method to eliminate the non-forming use.

This power can, though, be used to advantage in particular situations to eliminate specific non-conforming uses which are exceedingly bothersome. Thus, where the gain to the community would be well worth the cost of such condemnation, something which could be determined by the zoning authorities, eminent domain could be exercised.[45] Perhaps if a particular area has but a few non-conforming uses, an immediate elimination by condemnation would be practicably wise and even possible. If this be the situation, but surely we must recognize that it would be most

[43] "No effective zoning plan could be accomplished by the exercise of eminent domain. . . ." BASSETT, ZONING, p. 27 (1936).

[44] BAKER, THE LEGAL ASPECTS OF ZONING, p. 113 (1927); Young, "City Planning and Restrictions on the Use of Property," 9 MINN. L. REV. 593, 595 (1925).

[45] See, 1951 WIS. L. REV. 685 where the writer suggests that this method of eliminating non-conforming uses may be used to great advantage in rural areas than in urban ones.

unusual if it were, then condemnation by means of eminent domain would serve our purpose.

Keeping in mind the power of eminent domain as a supplementary method of resolving this problem, we must look further to see if other solutions would afford a more practical and more effective method.

II. *Abandonment and Discontinuance, Both Voluntary and Involuntary—*

*A. Voluntary*

Another method used to extinguish a non-conforming use is to provide in the ordinance that if such use has been discontinued for a certain length of time the non-conforming use cannot be resumed.[46] Although the courts are bound by constitutional doctrines to respect the vest property rights of an individual, when he voluntarily abandons such use, and the community is free of the burden, he should not be allowed to resume the non-conforming use. Once a use is discontinued[47] any subsequent use of the premises must be conforming. Our problem now becomes one of determining when a court can say that a particular use has been voluntarily abandoned.

Whether something has been abandoned depends upon the intention to abandon and upon some overt act or failure to act which carries the implication of abandonment.[48] The necessary intent to show abandonment is indicated by a conversion from one use to another;[49] or if the owner razes his building he is under a legal duty to make any new building conform to the ordinance;[50] or where the owner removed his manufacturing equipment from the plant the court held that this was sufficient to manifest the neces-

[46] "No building or premises where a non-conforming use is discontinued for more than two years . . . shall be devoted to any use that is prohibited in such district." Dayton, Ohio, Zoning Ordinance § 210 cited in 102 PA. L. REV. 91, 100 (1953) and in 35 VA. L. REV. 348, 349 (1949). See also, Wis. Stat. (1951), § 59.97(5). For an ordinance requiring as little as six months to effectuate a discontinuance see Orlando, Fla. Zoning Ord., § 9.

[47] The ordinances generally use the word "discontinued," but the courts have interpreted this to mean "abandoned." See 35 VA. L. REV. 348, 351 (1949).

[48] People ex rel. Delgado v. Morris, 334 Ill. App. 557, 79 N.E. (2d) 839 (1948); Dorman v. Mayor and City Council of Baltimore, 187 Md. 678, 51 A.(2d) 658 (1947). See 86 A.L.R. 689 (1933). See also, 8 McQUILLIN, MUNICIPAL CORPORATIONS, § 25. 192 (1950).

[49] Knickerbocker Ice Co. v. Sprague, (S.D.N.Y. 1933), 4 F. Supp. 499; Montclair v. Bryan, 16 N.J. Super. 535, 85 A.(2d) 231 (1951).

[50] Sitgreaves v. Board of Adjustment of Nutley, 136 N.J.L. 26, 54 A(2d) 451 (1947). See 8 McQUILLIN, MUNICIPAL CORPORATIONS, § 25.194 (1950).

sary intention to abandon.[51] Hence, it may be noted that any act of circumstances from which the court can determine the necessary intention to abandon the use will suffice to preclude the owner from ever re-establishing a non-conforming use in this area. In view of the fact that the court will require some manifested intention to abandon, mere suspension without more will not suffice,[52] but as the period of non-use grows it becomes increasingly easier to demonstrate the intent to abandon.

It seems that for a municipality to solely rely on this method to free itself of the burdens of non-conforming uses would be unrealistic. Not only is this doctrine so evasive that we will not be able to say with any degree of certainty what is or is not an abandonment, but the situation will be rare when a property owner will allow his action to be classified as an abandonment; he will be constantly on the alert. Although helpful in rare instances, these statutory provisions fall decisively short of effective elimination of the non-conforming use. Since the non-conforming use seems to be one of the most serious deterrents to effective city planning, more affirmative and aggressive action must be taken than mere reliance upon a voluntary abandonment.[53]

B. *Involuntary*

An interesting question arises when the use has ceased because of some force beyond the control of the owner, i.e., some act of God destroys his premises. Since the general theory of abandonment requires the requisite intention, the owner in these cases is allowed to rebuild and continue his non-conforming use.[54] However, quite frequently zoning ordinances provide that if more than a certain percentage of the value of the non-conforming building is destroyed, the right to replace the non-conforming building is terminated.[55] Such provisions have been held to be within the constitutional exercise of the police power[56] These provisions are predicated upon the theory that once there has been such a complete and substantial destruction,[57] the community is free from such burden and should not again be subjected to its presence. Thus, by a quirk of fate, coupled with such a statutory provision, another method of eliminating the non-conforming use can be seen. However, the same criticism directed toward voluntary abandonment can be *a fortiori* be used here, for were this the only method of eliminating such use, the community would be burdened without any adequate relief. Again a plea for a more affirmative meth-

[51] Francisco v. City of Columbus, (Ohio 1937), 31 N.E.(2d) 236 (1937).

[52] State ex rel. Schaetz v. Manders, 206 Wis. 121, 238 N.W. 835 (1931); Longo v. Eilers, 196 Misc. 909, 93 N.Y. Supp. (2d) 517 (1949).

[53] Another vexatious problem which has confronted our courts is the zoning ordinance which fails to prescribe a definite period which will constitute the necessary time for an abandonment. Wis. Stat. (1951), §§ 59.97(7)(c), 60.74(6)(b) (1951). This type of statute has led to much litigation, and presents a difficult problem of construction. See State ex rel. Morehouse v. Hunt, 235 Wis. 358, 291 N.W. 745 (1940).

[54] Braus v. Town of Hempstead, 272 App. Div. 31, 69 N.Y. Supp. (2d) 248 (1947). 8 McQUILLIN, MUNICIPAL CORPORATIONS, § 25.195 (1950).

[55] Dayton, Ohio Zoning Ord., § 210 (75%).

[56] Jetter v. Hofheins, 190 Misc. 99, 70 N.Y. Supp. (2d) 808 (1947); Incorporated Village of North Hornell v. Rauber, 181 Misc. 546, 40 N.Y. Supp. (2d) 938 (1943).

[57] The average figure is somewhat around sixty-five per cent, but it is sometimes as high as 75%, see note 56 supra, or as low as 20%, Orlando, Fla. Zoning Ord., § 9.

od must be restated. Such passive methods to eliminate this problem will be useful only as a supplement to the affirmative actions which must yet be examined.

III. *Extension of Use and Repairs*—

Since the underlying purpose of zoning ordinances is to restrict and ultimately eliminate the non-comforming use, it seems natural that limitations upon repairs, structural changes and alteraoitns would be widely utilized.[58] The ordinance, however, cannot with impunity deny an owner the right to make *any* repairs on his property; the right to continue the non-conforming use, whether expressly granted by statue or under constitutional interpretations, necessarily includes the right to preserve the use by means of repair.[59] This right to repair is not synonymous with the right to enlarge the use or to structually alter the buildings.

It has been generally held by the courts that the non-conforming use in existence when a zoning ordinance is passed cannot be changed into another kind of non-conforming use—it must be the same use and none other.[60] The theory behind this limitation seems to be predicated upon the principle that this owner is using his premises in violation of the ordinance and this in opposition to the public welfare; however, because of constitutional limitations his use in violation cannot be immediately extinguished,, but it is only *this use, i.e.,* at the time of the passing of the ordinance, which is afforded protection. Should he choose no longer to use his premises in this manner, he waives his right to make use of his property in any manner inconsistent with the ordinance. This surely is a sensible result, keeping in mind that the purpose of zoning is the eventual elimination of these non-conforming uses. To hold otherwise would be to support the continuance of non-conforming uses when the reason for such continuance is no longer present. In other

[58] 1 YOKLEY, ZONING LAW AND PRACTICE, § 153 (1953); 8 McQUILLIN, MUNICIPAL CORPORATIONS, § 25.201, p. 388 (1950). "No building or premises containing a non-conforming use shall hereafter be extended unless such extension shall conform with the provisions of this ordinance for the district in which it is located except as otherwise provided in this ordinance." Dayton, Ohio Zoning Ord. § 210.

[59] 8 McQUILLIN, MUNICIPAL CORPORATIONS, § 25.201 (1950); 1 YOKLEY, ZONING LAW AND PRACTICE, § 156 (1953), citing Granger v. Board of Adjustment of City of Des Moines, 241 Ia. 1356, 44 N.W. (2d) 399 (1950). But concerning the validity of a provision which prohibits any repair where more than a certain percentage has been destroyed see supra.

[60] Burmore Co. v. Champion, 124 N.J.L. 548, 12 A.(2d) 713 (1940). 1 YOKLEY, ZONING LAW AND PRACTICE, § 152 (1953); 35 VA. L. REV. 348 (1949). For the type of changes that are allowed see, 8 McQUILLIN, MUNICIPAL CORPORATIONS, §§ 25.203, 25.204 (1950).

words, since we are forced to give constitutional protection to these non-conforming uses, we should not extend the scope of such protection any more than is absolutely required to satisfy due process requirements.

Also quite consistent with the foregoing and with the ultimate purpose of zoning is the provision found in many ordinances that structural alterations of non-conforming buildings are prohibited, unless of course the alterations would convert the non-conforming use into a conforming use.[61] Such provisions are constitutional and valid.[62] However, as seen when we examined the use of eminent domain as a method to combat this problem, merely because a particular approach is constitutional does not make it *ipso facto* desirable. Perhaps a short discussion of the practical effects of prohibiting alterations will help us to formulate an opinion as to the feasibility of this method.

To allow a non-conforming use to remain, but forbid the alteration of such use seems to effect adversely the public health and safety. Specifically, in *Austin v. Older*[63] the property owner was refused a building permit when he desired to remodel and modernize his gasoline station by filling in a lubrication pit and extending a bay window over the filled-in land. Thus, because of the restriction in the ordinance prohibiting alteration or change, the public was subjected to the discomfort and danger of an open lubrication pit. If such be an end product of this method to eliminate the non-conforming use, it may well be argued that the means do not justify the ends. Here it seems that we must weigh the advantages and the disadvantages of such a result, keeping in mind that the public welfare is our prime consideration.

Of important consideration in determining the desirability of this method is its effectiveness in eliminating the use. If such a method be vitally effective, perhaps we should be willing to suffer with its faults. Perhaps an owner put in the position of the owner in the *Older Case* would immediately see that it would be economically unwise to continue his use in an area where he is restricted from modernizing. He would undoubtedly desire to change and modernize his building in order to effectively meet competition, and this would motivate him to move elsewhere, to an area where he might conduct his business as he saw fit. Added to this factor is the weaker reason that a non-conforming use will disintegrate to the point of being unusable.[64] The objection because of the possible danger to the public is diminutive due to traditional tort remedies which would be available. Even in *Austin v. Older*, al-

[61] 1 YOKLEY, ZONING LAW AND PRACTICE, § 155 (1953); 35 VA. L. REV. 348 (1949). "A non-conforming building cannot be enlarged as a matter of right." BASSETT, ZONING, p. 109 (1940).

[62] Austin v. Older, 283 Mich. 667, 278 N.W. 727 (1938); Rehfeld v. City of San Francisco, 218 Cal. 83, 21 P. (2d) 419 (1933). See 8 McQUILLIN, MUNICIPAL CORPORATIONS, §§ 25.205, 25.206, 25.207 (1950) and 1 YOKLEY, ZONING LAW AND PRACTICE, §§ 153 et seq. (1953) for additional problems arising when an attempt is made to limit the alterations of pre-existing uses. For cases attempting to define "structural alterations" see, Goodrich v. Selligman, 298 Ky. 863, 183 S.W.(2d) 625 (1944); Cole v. City of Battle Creek, 298 Mich. 98, 298 N.W. 466 (1941).

[63] 283 Mich. 667, 278 N.W. 727 (1938).

[64] Generally one permitted to enjoy a non-conforming use will have the correlative right to make repairs of this use.

though denied the right to remodel his station, the owner will not with impunity maintain it in a negligent fashion; he will be forever conscious of his legal duty to society; hence, the public safety is preserved and protected. We can conclude that the public good would be well served were this method utilized to combat this problem, although again not alone, but as a supplement. We turn now to the one method by which the legislature can take direct, affirmative action to eliminate the non-conforming use. The methods previously discussed, with the exception of eminent domain, were left to chance or circumstance; they gave no assurance that there would be complete elimination of the non-conforming use.

IV. *Amortization*

Amortization is a plan whereby the owner of a non-conforming use is given a certain period of time to eliminate the use. This then is a direct affirmative method by which non-conforming uses will ultimately be abolished, and yet because of the mitigating elements the provision will be upheld by the courts. However, we must examine now the constitutional problems which confront a council when they wish to incorporate an amortization provision into an ordinance.

The constitutional objection is rather fundamental, being that there would be a deprivation of property without due process of law. Since the theory of amortization is relatively new, there are

but a few cases which help us predict how the courts will react to this method. The few cases that do exist give the impression that such regulations would be held unconstitutional,[65] although generally the courts which hold this way do so in the context of an ordinance which requires the "immediate" elimination of the use.[66] Granted that this latter ordinance should be invalid, it does not follow that the amortization plan is likewise invalid. Should not the mitigating factors of this plan allow a court to distinguish this type of required elimination from the ordinary ordinance which requires immediate elimination?[67] Where the owner of the non-conforming use has sufficient time to wind up his business affairs, seek a new location, enjoy a monopolistic advantage, the court should conclude that this is not arbitrary nor unreasonable.

A perplexing problem in connection with this method is the amount of time that must be given the landowner to eliminate his use. The most radical decision, and decisions which have borne much criticism, are the often cited *Dema Realty Cases.*[68] Here an ordinance was sustained which provided that certain non-conforming uses must be eliminated within one year. Because the amortization period must be equated with the use, in this context a longer period seemed desirable; but this is a question of degree and it must be assumed that most courts would carefully examine the ordinance and protect the rights of the individuals while at the same time lending their power to effectuate the purposes of the ordinance. A ten-year period was held a valid measure in *Standard Oil Co. v. Tallahassee,*[69] The court felt that the gasoline station owner in this case was not deprived of his constitutional rights. The most recent case found by the writer is one in which a five-year amortization period was upheld as a constitutional exercise of the police power.[70]

Traditionally, the method by which the time limitation has been determined is to equate it with the normal life of the build-

[65] Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925); Jones v. Los Angeles, 211 Cal. 304, 295 P. 14 (1930). See 9 U. OF CHI. L. REV. 477 (1942).
[66] People v. Stanton, 125 Misc. 215, 211 N.Y. Supp. 438 (1925); Jones v. Los Angeles, 211 Cal. 304, 295 P. 14 (1930).
[67] See generally 9 U. OF CHI. L. REV. 477 (1942); 102 U. OF PA. L. REV. 91 (1953); Opperman, "Non-conforming Use and the City Plan," 15 J. LAND & P. U. ECON. 94 (1939).
[68] 168 La. 752, 172, 123 So. 314, 613 (1952).
[69] (5th Cir. 1950), 183 P. (2d) 410.
[70] City of Los Angeles v. Gage, (Cal. App. 1954), 274 P. (2d) 34.

ing.[71] In this manner, just regard is given to the rights of the individual while at the same time achieving the purpose of zoning. The landowner will thus not only have sufficient time to eliminate the use, but during this period of grace he will also have a monopolistic position which, if properly exploited, will more than compensate him for the eventual property use.[72] A few of our larger cities have already recognized the merits of this method and have incorporated amortization plans in their zoning ordinances.[73]

Only through this method—amortization—can we rid our community of the non-conforming use and achieve our goal of a well-planned community, serving the interests of all the people.

## Conclusion

Although our initial consideration is the welfare of the community and the advantages which can be secured from a well-planned community, the rights of individual property owners must also be recognized.

So long as there are methods to achieve both of these, we should not disregard the rights of the individual by utilizing other methods to accomplish our ultimate goal. Our courts should exercise the most stringent control on any attempts by the legislatures to "take property without compensation." No superficial equation to the police power should be sustained where a disregard for the rights of the individual would follow.

The methods outlined heretofor are suggested because the writer feels that the benefits derived by the public from zoning are of the utmost importance, but the individual should not bear the burden of the entire community when the loss can be distributed among those who will reap the benefits.

[71] "Such non-conforming use shall be discontinued and the building shall be demolished, removed or remodeled and converted to conform to the use which is permitted in the district in which it is located upon expiration of the *normal useful life of such building*. . . ." (Emphasis supplied). Chicago, Ill., Zoning Ord. (1949), § 20. "The only positive method of getting rid of non-conforming uses yet devised is to amortize a non-conforming building. That is, to determine the normal useful remaining life of the building and prohibit the owner from maintaining it after the expiration of that time." Crolly & Norton, "Termination of Non-Conforming Uses," 62 ZONING BULLETIN 1 (1952). 72 9 U. OF CHI. L. REV. 477 (1942).

[72] 9 U. of CHI. L. REV. 477 (1942).

[73] Chicago, Ill. Zoning Ord. (1944), § 20; Cleveland, Ohio Zoning Ord. (1939), §§ 1281-9(e); New Orleans, La. Zoning Ord. (1929).