# A PROPOSAL TO AMEND THE MICHIGAN ZONING ENABLING ACT TO ALLOW AMORTIZATION OF NONCONFORMING USES

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## INTRODUCTION

A fundamental issue facing state and local government is the question of how extensively it may regulate private property in the course of executing its land use policies and exercising its police power. The issue involves an inherent tension between government and its desire to regulate for the health, safety and welfare of the community on one hand and the rights of private property owners to do with their land as they wish on the other.

The roots of the dilemma run deep. Many argue that private property rights form the very foundation of individual liberty, upon which government regulations should not be allowed to intrude. Under this viewpoint, individuals must be defended against state interference,[1] and government must

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1. *See, e.g.*, JOHN STUART MILL, ON LIBERTY (1859).

not be allowed to force individual property owners to bear a disproportionate portion of the costs of particular government policies.

In contrast, at a certain level, local government's primary purpose is to regulate. Most would agree that in a civilized society certain property rights must yield to the common good. As noted by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*,[2] "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change . . . . As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."[3]

One of the ways that local government often exercises this so-called police power[4] is by regulating private property and land use through the legislative technique of "zoning." First sanctioned explicitly by the U.S. Supreme Court in 1926 in *Village of Euclid v. Ambler Realty Co.*,[5] zoning typically sets out areas specifying what sorts of uses and structures will be allowed on specific properties. Since *Euclid*, courts at all levels have consistently upheld a wide variety of zoning ordinances despite the damage that they can do to the interests of individual property owners.[6]

With zoning comes the inevitable problem of what to do with so-called "nonconforming" uses and structures–those uses and structures that are not permitted in the new use districts in which they are located. On one hand, the interests of individual property owners can be affected significantly if such preexisting lawful uses and structures become nonconforming and then are required to be terminated; on the other hand, "[a] zoning ordinance cannot achieve its goal of separating incompatible uses in this situation unless it requires the elimination of nonconforming uses."[7] In the early days of zoning, most ordinances provided that lawful uses existing on the effective date of the law could continue, since it was thought "they would be few and likely to be

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2. 260 U.S. 393 (1922).

3. *Pennsylvania Coal Co.*, 260 U.S. at 413.

4. "Police power" refers to state government's power to protect public health, safety and welfare. The U.S. Supreme Court has defined the police power as "not confined . . . to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people." Bacon v. Walker, 204 U.S. 311, 318 (1907).

5. 272 U.S. 365 (1926). In *Euclid*, the Court upheld a local zoning ordinance that set zoning boundaries and in so doing decreased the fair market value of plaintiff's land by 75%, from approximately $10,000 per acre to $2,500 per acre. *Euclid*, 272 U.S. at 384. *See infra* note 16 and accompanying text for further discussion of *Euclid*.

6. Zoning ordinances often diminish the value - economic and non-economic - of the land regulated. *See, e.g., supra* note 5. Zoning can also *increase* the value of the land regulated, in which case the property owner likely does not complain about the regulation.

7. DANIEL R. MANDELKER, LAND USE LAW § 5.66 at 205 (3d ed. 1993).

eliminated by the passage of time and restrictions on their expansion."[8] Nonconforming uses have not disappeared, however, so new techniques were developed to accomplish the "earnest aim and ultimate purpose of zoning [which] was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned."[9]

One technique that local legislatures developed to eliminate nonconforming uses, while at the same time taking into account private property rights, is the technique of "amortization."[10] Within the last fifty years, courts in a majority of the states have upheld legislatively-enacted amortization provisions. Michigan is not among those states. Michigan has so far rejected amortization not so much because of any deeply-held philosophical reservations, but rather more by accident due to the fact that at the time the Michigan legislature set forth its proposed amortization language in 1947–only to have it rejected by a now-obsolete Attorney General Opinion[11]–the technique was in its infancy,[12] and had not yet become accepted by an overwhelming majority of courts[13] as it has today.

Section I of this article provides a brief history of zoning and nonconforming uses, and demonstrates that local government subunits[14] in Michigan do have the authority to legislate to limit and even eliminate nonconforming uses under certain circumstances, notwithstanding the Zoning Enabling Act's prohibition against amortization of nonconforming uses. This authority does not, however, give cities sufficient discretion to carry out adequately their police power responsibilities. Section II argues that to remedy this deficiency, the Michigan legislature should amend the state Zoning Enabling Act to allow the amortization of nonconforming uses when all other efforts to reconcile the private and public interests have failed. Such

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8. Grant v. Mayor and City Council of Baltimore, 129 A.2d 363, 365 (Md. Ct. App. 1957).

9. *Grant*, 129 A.2d at 365.

10. The term amortization refers to the gradual "phasing-out" or elimination of nonconforming uses and structures over a specified period of time. *See* 83 AM. JUR. 2D *Zoning and Planning* § 691 (1992).

11. *See infra* notes 94, 100-108 and accompanying text.

12. "While amortization was upheld as early as 1929 it did not enjoy substantial utilization until the 1950s and 1960s." DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 4.35 at 123 (2d ed. 1986) (footnote omitted).

13. DANIEL R. MANDELKER ET AL., PLANNING AND CONTROL OF LAND DEVELOPMENT 244 (4th ed. 1995).

14. Local government subunits include, among others, cities, villages, townships, counties, and districts. For purposes of consistency, this article will refer to these local government subunits as a whole by the generic term of "city".

an amendment would go a long way toward creating a Zoning Enabling Act that provides "clear and uniform laws adapted to modern needs"–a standard that the research arm of the Michigan House of Representatives has advocated.[15] Section III concludes by restating the Article's main points and emphasizing the importance, from a policy standpoint, of the Michigan legislature taking cognizance of the need for an amendment to allow amortization of nonconforming uses and structures.

## I. EXISTING MICHIGAN LAW ALLOWS THE REASONED EXCLUSION OR ELIMINATION OF NONCONFORMING USES UNDER CERTAIN SPECIFIC CIRCUMSTANCES

### A. History/Background

To put the issue of amortization in the proper context, it is useful to discuss briefly the history of zoning and nonconforming uses in the United States and Michigan. After the U.S. Supreme Court first upheld a city's right to zone in *Village of Euclid v. Ambler Realty Co.*,[16] zoning ordinances proliferated: between the years of 1930 and 1967 the number of cities that had zoning ordinances increased from 1,000 to over 9,000.[17] Zoning is essentially a police power exercise that resides in the state, which then delegates the power to local governments through the mechanism of the Standard State Zoning Enabling Act.[18] The validity of a particular Michigan zoning

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15. HOUSE LEGISLATIVE ANALYSIS SECTION, SECOND ANALYSIS, H.B.s 4591-4594 (Mich. 1979) at 3. *See also infra* note 112 and accompanying text. According to the Analysis, the Michigan Zoning Enabling Act as it now stands is "severely outdated and [is] in many places vague and confusing. Changing trends in the planning and use of land . . . have rendered these statutes unwieldy and inadequate tools." *Id.* at 1. *See infra* note 111.

16. 272 U.S. 365 (1926). In *Euclid,* the city's zoning plan separated the city into various use districts, height districts, and area districts, and in so doing diminished the value of the plaintiff's land by 75%, from $10,000 per acre to $2,500 per acre. The Court upheld the city's zoning ordinance, finding that it did not result in a taking violation under the Fifth or Fourteenth amendments of the United States Constitution. The court stated that zoning will be presumed valid, overturned only upon a showing by plaintiff that the zoning is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395.

17. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1003 (3d ed. 1993). In the words of one commentator, "Zoning reached puberty in company with the Stutz Bearcat and the speakeasy. F. Scott Fitzgerald and the Lindy Hop were products of the same generation. Of all these phenomena of the twenties, only local zoning has remained viable a generation later." RICHARD F. BABCOCK, THE ZONING GAME 3 (1966).

18. MANDELKER ET AL., *supra* note 13, at 197-201. Every state has adopted the Standard State Zoning Enabling Act in one form or another. DUKEMINIER & KRIER, *supra* note

ordinance is determined by whether it meets the legal test of "reasonableness": "It is firmly established that zoning ordinances, when related to the public health, morals, safety or general welfare, are a valid exercise of the police power, provided that such ordinances satisfy the legal test of reasonableness."[19]

Once a zoning ordinance is in place, it is highly likely that some preexisting uses and structures are not permitted in the newly zoned area in which they are located. Courts around the country have adopted different approaches in addressing the often-diametrically opposed interests at stake in the matter of such nonconforming uses and structures. It is generally agreed that a measure forcing the *immediate* cessation of a nonconforming use is not allowed, on the grounds that such an action would constitute a "taking" of property without just compensation[20] in violation of the Fifth Amendment to

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17, at 1005. Michigan's zoning enabling act for cities and villages is contained in MICH. COMP. LAWS ANN. §§ 125.581-.600 (West 1989). The enabling statutes for townships is contained in MICH. COMP. LAWS ANN. §§ 125.271-.310 (West 1989 & Supp. 1998) and for counties in MICH. COMP. LAWS ANN. §§ 125.200-.241 (West 1989 & Supp. 1998).

19. Detroit Edison Co. v. City of Wixom, 382 Mich. 673, 686, 172 N.W.2d 382, 387 (1969) (Kavanaugh, J. concurring) (citing, *e.g.*, Roll v. City of Troy, 370 Mich. 94, 120 N.W.2d 804 (1963); West Bloomfield Township v. Chapman, 351 Mich. 606, 88 N.W.2d 377 (1958)). One factor that Michigan courts have identified as important in determining "reasonableness" is whether the regulation allows for alternate uses of the property. *See, e.g.*, Recreational Vehicle v. Sterling Heights, 165 Mich. App. 130, 418 N.W.2d 702 (1987) (upholding ordinance limiting recreational vehicle parking on private property where regulation permitted reasonable alternate uses for the property); Fenton Gravel Co. v. Village of Fenton, 371 Mich. 358, 123 N.W.2d 763 (1963) (holding that a regulation will not on its face be considered a taking of property in violation of the State and Federal Constitutions so long as the regulation allows for alternate uses of the property.) Regarding the reasonableness test, "[i]t is equally well established that each case involving the reasonableness of a zoning ordinance and its consequent validity or invalidity must be determined on its own facts and surrounding circumstances." *Detroit Edison Co.*, 382 Mich. at 686-87, 172 N.W.2d at 387 (citing, *e.g.*, Korby v. Redford Township, 348 Mich. 193, 82 N.W.2d 441 (1957); Long v. City of Highland Park, 329 Mich. 146, 45 N.W.2d 10 (1950)).

20. MANDELKER, *supra* note 7 at 206 (citing Jones v. City of Los Angeles, 295 P. 14 (Cal. 1930); Missouri Rock, Inc. v. Winholtz, 614 S.W.2d 734 (Mo. Ct. App. 1981).

Historically, an important exception to this principle is the case where the nonconforming use or structure constitutes what the legislature says is a nuisance, in which case the nonconforming use can be terminated immediately without compensation to the owner. *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915). Within the last decade, however, the U.S. Supreme Court has placed a needed limitation on the extent to which cities may restrict property rights on "nuisance" grounds. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that a regulation denying *all* economically beneficial or productive use of land is to be presumed unconstitutional *per se*–a presumption rebuttable only upon a showing by the regulating authority that "background principles of nuisance and property law . . . prohibit the [owner's intended] uses") *Lucas*, 505

the U.S. Constitution.[21] Accordingly, from the beginning, almost every zoning ordinance required that nonconforming uses be allowed to continue.[22] In the words of one court:

> Originally [nonconforming uses] were not regarded as serious handicaps to [zoning's] effective operation; it was felt they would be few and likely to be eliminated by the passage of time and restrictions on their expansion. For these reasons and because it was thought that to require immediate cessation would be harsh and unreasonable, a deprivation of rights in property out of proportion to the public benefits to be obtained and, so, unconstitutional . . . at a time when strong opposition might have jeopardized the chance of any zoning, most, if not all, zoning ordinances provided that lawful uses existing on the effective date of the law could continue although such uses could not thereafter be begun.[23]

An alternative approach, favored now by an overwhelming majority of the courts,[24] allows amortization, the "gradual elimination of nonconforming uses to accomplish the zoning objective of compatible and homogenous land use environments."[25] Under the amortization approach, the city undertakes to

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U.S. at 1031. After *Lucas,* if a regulation intended to control a nuisance causes a total "wipeout" to the value of the property, the regulation will be presumed to be an unconstitutional "taking," prohibited under the Fifth Amendment. If the nuisance-control regulation causes *less* than a total wipeout, however, the principle espoused in *Hadacheck* and *Miller* still controls, whereby no taking occurs and the government may so regulate without paying just compensation.

21. The Fifth Amendment's "takings" clause states, "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. Correspondingly, the Michigan Constitution provides, "private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record." MICH. CONST. art 10, § 2.

22. HAGMAN & JUERGENSMEYER, *supra* note 12, § 4.27, at 114; MANDELKER, *supra* note 7.

23. Grant v. Mayor and City Council of Baltimore, 129 A.2d 363, 365 (Md. Ct. App. 1957). At the core of the reluctance to allow amortization is the concern that the property owner's "expectation" interests would be unlawfully abridged if amortization were allowed. When a person purchases real property, he or she expects to be able to use all the "sticks" in the bundle of rights that is the property in a way allowed under the zoning regulations in place at the time of purchase. If one of those sticks is altered after the purchase–say, the right to continue operating a scrapyard in a newly-zoned residential area–the scrapyard owner's *expectation* of running a scrapyard on the property for as long as he desires is compromised. Similarly, that person's expectation of being able to sell the property for a price reflecting the market value of a scrapyard would be altered (although not necessarily always to the property owner's detriment–it is entirely possible that property values would increase as a result of such a zoning change).

24. MANDELKER, ET AL., *supra* note 13; MANDELKER, *supra* note 7, § 5.72, at 213 (citing cases from many states).

25. MANDELKER, *supra* note 7. Most amortization statutes hold to the principle that

establish a reasonable period of time that is intended to allow the property owner to "recoup" at least a significant part of his investment–*i.e.*, to satisfy his expectation interest.[26] After the time elapses the nonconforming use will terminate.[27]

The jurisdictions upholding amortization as facially valid have developed a set of factors to be utilized in the determination of whether, as applied, the scheme is reasonable. Generally, local regulations providing for the eventual termination or substitution of non-conforming uses without compensation are

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the *immediate* termination of nonconforming uses is rarely allowed.

26. *See supra* note 23.

27. The length of this so-called "amortization" period can vary:

> Nonconforming uses of land are typically given the shortest period, since there is no investment in buildings and . . . the activities can assumedly locate elsewhere with a minimum of loss. Since the building could assumedly be used for conforming uses, relatively short periods of amortization also might be provided for nonconforming uses of conforming buildings. The periods are typically longest for nonconforming buildings, particularly those that are specialties, such as an oil refinery which would have a large capital investment and buildings that would be rather difficult to utilize for a conforming purpose. The period of amortization may also depend on the type of construction, so that the period would be longer for brick or concrete high-rise buildings and less for temporary, low-rise, inexpensively constructed warehouses.

HAGMAN & JUERGENSMEYER, *supra* note 12, § 4.35, at 122-23. A number of other commentators have offered various approaches for determining the proper amortization period in any given case. *See, e.g.*, Gilbert T. Graham, *Legislative Techniques for the Amortization of the Nonconforming Use: A Suggested Formula*, 12 WAYNE L. REV. 435 (1966); David R. Schwiesow, *A Suggested Means of Determining the Proper Amortization Period for Nonconforming Structures*, 27 STAN. L. REV. 1325 (1975). A useful statement of the reasonableness of amortization periods in different circumstances is contained in the following statement by the highest New York court:

> Whether an amortization period is reasonable is a question which must be answered in the light of the facts of each particular case. Certainly, a critical factor to be considered is the length of the amortization period in relation to the investment .... Similarly, another factor considered significant by some courts is the nature of the nonconforming activity prohibited. Generally a shorter amortization period may be provided for a nonconforming use as opposed to a nonconforming structure . . . . [T]he critical question [,however,] is whether the public gain achieved by the exercise of the police power outweighs the private loss suffered by the owners of nonconforming uses. While an owner need not be given that period of time necessary to permit him to recoup his investment entirely, the amortization period should not be so short as to result in a substantial loss of his investment . . . . In determining what constitutes a substantial loss, a court . . . should look to, for example, such factors as: initial capital investment, investment realization to date, life expectancy of the investment, [and] the existence or nonexistence of a lease obligation, as well as a contingency clause permitting termination of the lease.

Modjeska Sign Studios, Inc. v. Berle, 373 N.E.2d 255, 262 (N.Y. 1977), *appeal dismissed*, 439 U.S. 809 (1978) (citations omitted).

found reasonable–and hence constitutional[28]–where the court considers relevant facts and circumstances such as the nature of the property's current use, in its development prospects, as well as the length of the proposed period of amortization, and determines that the benefits to the community exceed the detriment to the private owner.[29]

An influential 1954 California state court case illustrates well the analysis undertaken by courts when considering the validity of a particular amortization provision. In *City of Los Angeles v. Gage,*[30] the California Court of Appeals upheld a local ordinance that imposed a five-year amortization period on a plumbing supply business conducted in a residential dwelling. In balancing the interests at stake, the court reasoned that the noise, disturbance and traffic caused by Gage's operation was high for a residential neighborhood;[31] that termination after normal useful remaining life is proper;[32] that the property could be used for a conforming use;[33] and that uses such as Gage's tend to impair the development and stability of the comprehensive plan.[34] The court concluded that the gradual elimination of nonconforming uses was a logical and reasonable method for assuring the character of residential areas, and opined that there was no distinction between amortization and other methods for eliminating nonconforming uses, such as abandonment or restoration provisions:

> The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss [and that the amortization provisions were no harsher than ordinances preventing extension, alteration and reuse after abandonment] . . . . Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements.[35]

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28. *See supra* note 19 and accompanying text.

29. *See, e.g.,* Major Media of Southeast, Inc. v. Raleigh, 792 F.2d 1269 (4th Cir. 1986), *cert. denied* 479 U.S. 1102 (1987); Ebel v. Corona, 767 F.2d 635 (9th Cir. 1985); Art Neon Co. v. Denver, 488 F.2d 118 (10th Cir. 1973), *cert. denied* 417 U.S. 932 (1974); SDJ, Inc. v. City of Houston, 636 F. Supp. 1359 (S.D. Tex. 1986). *See also generally* Jay M. Zitter, Annotation, *Validity of Provisions for Amortization of Nonconforming Uses,* 8 A.L.R. 5th 391, § 3 (1993).

30. 274 P.2d 34 (Cal. App. 1954).

31. *Gage,* 274 P.2d at 37.

32. *See id.* at 44.

33. *See id.*

34. *See id.*

35. *Id. See also, e.g., Art Neon Co.,* 488 F.2d 118; Donrey Communications Co. v. City of Fayetteville, 660 S.W.2d 900 (Ark. 1983), *cert. denied,* 466 U.S. 959 (1984); Metromedia, Inc. v. City of San Diego, 610 P.2d 407 (Cal. 1980), *rev'd on other grounds,* 453 U.S. 490 (1981); Mayor & Council v. Rollings Outdoor Adver., Inc., 475 A.2d 355 (Del. 1984); Lamar Adver. Assoc. of E. Fla. v. City of Daytona Beach, 450 So. 2d 1145 (Fla. Dist. Ct. App. 1984);

Despite the momentum created by *Gage* and these other cases,[36] however, a minority of state legislatures and courts (including Michigan's) continue to forbid the scheduled termination of nonconforming uses or structures under *any* circumstances. Under this minority approach, "primary emphasis [is placed] on protecting the 'vested' rights[[37]] of property owners in nonconforming uses. Courts adopting this philosophy tend to strike down zoning requirements that eliminate nonconforming uses," period–even if the elimination takes place only after an extended period of time.[38]

## B. The Statute

As noted, Michigan's Zoning Enabling Act explicitly limits a city's ability to terminate nonconforming uses and structures. In its entirety, section 125.583a of the Zoning Enabling Act states:

> Sec. 3a. (1) The lawful use of land or a structure exactly as the land or structure existed at the time of the enactment of the ordinance affecting that land or structure, may be continued, except as otherwise provided in this act, although that use or structure does not conform with the ordinance.
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> (2) The legislative body may provide by ordinance for the resumption, restoration, reconstruction, extension, or substitution of nonconforming uses or structures upon terms and conditions provided in the ordinance. In establishing terms for the resumption, restoration, reconstruction, extension, or substitution of

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Village of Glenview v. Velasquez, 463 N.E.2d 873 (Ill. App. Ct. 1984); Spurgeon v. Board of Comm'r of Shawnee Co., 317 P.2d 798 (Kan. 1957); Naegele Outdoor Adver. Co. v. Village of Minnetonka, 162 N.W.2d 206 (Minn. 1968); University City v. Diveley Auto Body Co., 417 S.W.2d 107 (Mo. 1967); Temple Baptist Church, Inc. v. City of Albuquerque, 646 P.2d 565 (N.M. 1982); *Modjeska Sign Studios, Inc.*, 373 N.E.2d 255; Goodman Toyota, Inc. v. City of Raleigh, 306 S.E.2d 192 (N.C. App. 1983); Sullivan v. Zoning Bd. of Adjustment, 478 A.2d 912 (Pa. Comm. 1984); Fairway Food, Inc. v. Timmer, 314 S.E.2d 322 (S.C. 1984); Rives v. City of Clarksville, 618 S.W.2d 502 (Tenn. App. 1981); City of Seattle v. Martin, 342 P.2d 602 (Wash. 1959); 22 A.L.R.3d 1134 (1969).

36. *See supra* note 35.

37. In order to be protected, nonconforming uses "must be lawfully established at the time the ordinance making them nonconforming takes effect . . . . A lawful use is not usually established by [mere] intent or plans, even if the intent has been perfected by purchasing land, arranging for finance, entering into contracts, clearing the land and so forth. The use must be more substantial." HAGMAN & JUERGENSMEYER, *supra* note 12, § 4.28, at 116 (citing Fredal v. Forster, 9 Mich. App. 215, 156 N.W.2d 606 (1967) (removal of 50,000 cubic yards of stone held to be substantial enough to establish quarry use (footnotes omitted))). If a landowner has been granted a permit to put the property to a specified use which then becomes nonconforming due to a zoning change, courts will usually allow the city to revoke the permit "unless [good faith] expenditures have been made in reliance on the permit." HAGMAN & JUERGENSMEYER, *supra* note 12, § 5.11 at 155.

38. MANDELKER, *supra* note 7, § 5.66, at 206.

> nonconforming uses or structures, different classes of nonconforming use may be established in the ordinance with different regulations applicable to each class.
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> (3) In addition to the power granted in this section, a city or village may acquire by purchase, condemnation, or otherwise private property or an interest in private property for the removal of nonconforming uses and structures, except that the property shall not be used for public housing.[39]

According to Section 3a(3),[40] the only way a city may eliminate a nonconforming use or structure is by acquiring the property or an interest in the property by purchase or condemnation. This limitation is qualified by a major caveat, however: under section 3a(2), the city may specify by ordinance the terms and conditions under which a nonconforming use or structure may be "resumed," "restored," "reconstructed," "extended," or "substituted."[41] In interpreting this provision, it is important to note that each of these five terms involve some sort of *change* to the nonconforming use. By its terms, the statute does *not* allow the city to set terms and conditions for a nonconforming use where there is no change contemplated.

As far as it goes, though, the city's power to set terms and conditions under Section 3a(2) is broad. In requiring that legislative provisions must be liberally and broadly construed in favor of cities, the Michigan Constitution states, "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution."[42] Accordingly, the Michigan Supreme Court recently confirmed that "[t]he enactment and enforcement of ordinances related to municipal concerns is a valid exercise of municipal police powers as long as the ordinance does not conflict with the constitution or general laws."[43] In *Square Lake Hills*

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39. *See* MICH. COMP. LAWS ANN. 125.583a (West 1997). This statute governs cities and villages. A parallel, virtually identical statute governs counties and townships. This article's arguments apply equally to both statutes.

40. *See supra* text accompanying note 39.

41. *See* MICH. COMP. LAWS ANN. 125.583a § 3a(2) (West 1997). *See supra* note 39 and accompanying text. Section 3a(2) further provides that the city may establish different classes of nonconforming uses and structures with different regulations applicable to each class. *See id.*

42. MICH. CONST. art. 7, § 34.

43. Rental Property Owners Ass'n of Kent County v. City of Grand Rapids, 455 Mich. 246, 253, 566 N.W.2d 514, 517 (1997) (citing Austin v. Older, 283 Mich. 667, 674, 278 N.W. 727, 730 (1938); Fass v. Highland Park, *on reh'g*, 321 Mich. 156, 161, 32 N.W.2d 375, 377 (1948); Cady v. Detroit, 289 Mich. 499, 286 N.W. 805 (1939)). The court also commented in another recent case that "the police power 'belongs to subordinate governmental divisions when and as conferred by the State either through its Constitution or constitutionally authorized legislation.'" Adams Outdoor Adver. v. East Lansing, 439 Mich. 209, 225, 483 N.W.2d 38, 45

*Condominium Ass'n. v. Bloomfield Township*,[44] for example, the Michigan Supreme Court noted that any judicial analysis of powers expressly and explicitly conferred upon municipalities will be conducted in such a manner as to give broad deference to the municipality.[45]

How is a municipality to know, then, how to interpret the terms of Section 125.583a(2)? Taking Section 3a(2) one term at a time, "resumption" of a nonconforming use refers to the case where the use has been abandoned or otherwise discontinued. Under general common law principles, when the nonconforming use or structure has been abandoned, the nonconforming use lapses, and the owner is not allowed to resume the use.[46] Michigan courts have held that the necessary elements of abandonment in this context are intent and some act or omission on the part of the owner or holder which clearly manifests his or her voluntary decision to abandon.[47]

"Reconstruction" and "restoration" refer to the case where the nonconforming use or structure has been somehow damaged or destroyed. Under common law principles, once the use or structure is damaged or destroyed, by fire for example, most courts will typically permit repairs to be

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(1992) (Levin, J., concurring in disposition, dissenting in part) (qouting Clements v. McCabe, 210 Mich. 207, 215, 177 N.W. 722, 725 (1920). *See also* City of Livonia v. D.S.S., 423 Mich. 466, 492-94, 378 N.W.2d 402, 415-16 (1985) (discussing continued vitality of *Clements*); Detroit Osteopathic Hosp. v. Southfield, 377 Mich. 128, 132, 139 N.W.2d 728, 729-30 (1966); Krajenke Buick Sales v. Hamtramck City Engineer, 322 Mich. 250, 254, 33 N.W.2d 781, 782 (1948); Kalamazoo v. Titus, 208 Mich. 252, 265, 175 N.W. 480, 483 (1919)).

44. 437 Mich. 310, 471 N.W.2d 321, *reh'g denied*, 472 N.W.2d 287 (1991).

45. *Square Lake*, 437 Mich. at 317, 471 N.W.2d at 324. The Michigan Court of Appeals put it well in Horton v. Kalamazoo, 81 Mich. App. 78, 81, 264 N.W.2d 128, 129 (1978):

> The actions of a municipal legislative body enjoy a presumption of validity. The courts are especially deferential toward legislative determinations of public purpose, "[f]or determination of what constitutes a public purpose involves considerations of economic and social philosophies and principles of political science and government. Such determinations should be made by the elected representatives of the people."

*Id.* (citations omitted).

*See also* Inch Memorials v. City of Pontiac, 93 Mich. App. 532, 535, 286 N.W.2d 903, 904 (1979) (stating that "the powers that cities possess fall into three categories: those granted in express words; those necessarily or fairly implied in or incident to the powers expressly granted; and those essential to the accomplishment of the declared objects and purposes of the municipal corporation") (citations omitted); 1426 Woodward Ave. Corp. v. Wolff, 312 Mich. 353, 369; 20 N.W.2d 217, 223 (1945); Law Enforcement Union v. Highland Park, 138 Mich. App. 342, 346; 360 N.W.2d 611, 613, *rev'd*, 422 Mich. 945, 374 N.W.2d 698 (1984); Youngblood v. Jackson County, 28 Mich. App. 361, 365; 184 N.W.2d 290, 291 (1970).

46. *See, e.g.*, MANDELKER, *supra* note 7, § 5.69, at 209-10; HAGMAN & JUERGENSMEYER, *supra* note 12, § 4.33 at 120-21.

47. Norton Shores v. Carr, 81 Mich. App. 715, 265 N.W.2d 802 (1978).

made.[48] Alterations, however, are usually precluded,[49] so the issue becomes one of where the distinction between "repair" and "alteration" lies.

"Substitution" refers to the act of replacing one structure with another structure, as in *Cole v. City of Battle Creek,*[50] or the actual substitution of one use for another. In *Kopietz v. Zoning Board of Appeals for the City of the Village of Clarkston,*[51] for example, the Michigan Court of Appeals overturned a local zoning board's refusal to permit a change in the nonconforming use of a property from a funeral home to a bed-and-breakfast–a significant change indeed. The court held that "[a]n ordinance requiring an immediate cessation of a nonconforming use may be held to be unconstitutional because it brings about a deprivation of property rights out of proportion to the public benefit obtained."[52] The court explained that "not every change in a nonconforming use constitutes an extension of a prior nonconforming use" and commented that "when the proposed use does not expand or extend the nonconformity, the property owner [may] continue the nonconforming use."[53]

The term "extension" is more ambiguous–and potentially more broad–than the other four terms.[54] In the zoning context, "extension" normally refers to the physical alteration of the nonconforming use to allow a larger structure or an additional piece of property.[55] Under common law principles,

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48. *See* HAGMAN & JUERGENSMEYER, *supra* note 12, § 4.30, at 118. "Such permission makes sense, because there is a general policy, particularly as represented by housing codes, to have buildings in a good state of repair." *Id.* It should be emphasized that the local ordinances may specify the terms for reconstruction and restoration, as allowed by Section 3a(2), and the courts have upheld such restrictions against constitutional attacks. *See* MANDELKER, *supra* note 7, § 5.68, at 208. This principle was explained in an early *Michigan Law Review* article emphasizing that a zoning ordinance may prohibit the repair of nonconforming existing structures. William F. Fratcher, Comment, *Constitutional Law–Zoning Ordinances Prohibiting Repair of Existing Structure*, 35 MICH. L. REV. 642 (1937).

49. *See* HAGMAN & JUERGENSMEYER, *supra* note 12, § 4.30, at 119.

50. 298 Mich. 98, 298 N.W. 466 (1941) (upholding city's refusal to allow substitution of nonconforming structure with newer altered structure, even though newer structure would actually decrease the amount of square feet used for the nonconforming use).

51. 211 Mich. App. 666, 535 N.W.2d 910 (1995).

52. *Kopietz*, 211 Mich. App. at 694 (quoting *Austin*, 283 Mich. at 676).

53. *Id.* at 696.

54. Black's Law Dictionary notes that the term "extend" "lends itself to great variety of meanings, which must in each case be gathered from context. It may mean to expand, enlarge, prolong, lengthen, widen, carry or draw out further than the original limit." BLACK'S LAW DICTIONARY 583 (6th ed. 1990).

55. An alternative interpretation of "extension" might mean, however, the actual "passing of the right" to continue the nonconforming use from the owner to subsequent owners. This would be the "prolong, lengthen, . . . carry or draw out further than the original limit" part of the Black's description described *supra*, note 54. BLACK'S LAW DICTIONARY 583 (6th ed. 1990).

a nonconforming use cannot be changed or expanded. In *Township of White Lake v. Lustig,*[56] the Michigan Court of Appeals carefully examined Michigan precedent and concluded that

> it is the law of Michigan that the continuation of a nonconforming use must be substantially of the same size and same essential nature as the use existing at the time of passage of a valid zoning ordinance and that the use must be within the same spatial confines that the prior use occupied.[57]

In giving a city the power to enact legislation to set terms and conditions for the "resumption," "restoration," "reconstruction," "extension," or "substitution" of nonconforming uses and structures, MCLA § 125.583a more pointedly gives a city the power to determine when *not* to allow these activities. This latter "negative" power is the "exclusion" or "elimination" of nonconforming uses of which the Michigan Supreme Court spoke when it stated that a

> provision of a zoning ordinance permitting the continuation of a nonconforming use is designed to avoid the imposition of hardship upon the owner of property, but the limitation upon such use *contemplates the gradual elimination of the nonconforming use* and does not permit the erection of new nonconforming buildings or additions to existing nonconforming buildings[58]

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Such an interpretation would be used, for example, as follows: "The nonconforming use was extended from Mr. A to Ms. B upon the sale of the property from A to B." The viability of this alternative interpretation is uncertain–no Michigan court has addressed the matter, and the legislative history does not provide details on how the term should be interpreted.

56. 10 Mich. App. 665, 160 N.W.2d 353 (1968).

57. *White Lake,* 10 Mich. App. at 673-74, 160 N.W.2d at 357. *See also Austin*, 283 Mich. at 678, 278 N.W. at 731 (stating that "[l]imiting the further extension of a nonconforming use by prohibiting alterations and additions to existing buildings is a valid exercise of governmental power"); Norton Shores v. Carr, 81 Mich. App. 715, 720, 265 N.W.2d 802, 805 (1978); (commenting that "[t]he policy of the law is against the extension or enlargement of nonconforming uses, and zoning regulations should be strictly construed with respect to expansion"); Township of Commerce v. Rayberg, 5 Mich. App. 554, 557, 147 N.W.2d 453, 455 (1967) (holding that a "nonconforming use is restricted to the area that was nonconforming at the time the ordinance was enacted").

58. South Central Imp. Ass'n v. City of St. Clair Shores, 348 Mich. 153, 158, 82 N.W.2d 453, 456 (1957) (emphasis added). *See also Cole*, 298 Mich. at 104, 298 N.W. at 468 (holding, in a pre-§ 125.583a case, that "limitations upon [nonconforming uses] contemplate the gradual elimination of the nonconforming use"); Redford Moving & Storage Co. v. City of Detroit, 336 Mich.702, 711, 58 N.W.2d 812, 815 (1953) ("continuation of a nonconforming use under the zoning ordinance is for purpose of avoiding imposition of hardship upon the owner of the property with a view to the gradual elimination of such nonconforming use"). *See also infra* note 124 and accompanying text.

or when it has commented that "[t]he improvement of residential districts by the *exclusion* of nonconforming businesses has a reasonable relationship to the public health, welfare and safety."[59]

C. The Current Michigan Zoning Enabling Act Hampers City Efforts to Create Compatible Land Use Environments

Despite the breadth of discretion given cities in MCLA § 125.583a(2) to set terms and conditions for the resumption, restoration, reconstruction, extension, and substitution of nonconforming uses,[60] and despite strong language from the courts that cities may "exclude" nonconforming uses under terms allowed in section 3a(2),[61] Michigan cities remain seriously hampered in their efforts to carry out adequately their police power responsibilities due to their lack of authority to amortize nonconforming uses. The non-amortization statute, MCLA § 125.583a, unquestionably has the effect of protecting the interests of individual property owners, and hence is presumptively a good statute. Government at all levels is all too apt to chip away at individual rights, so any legislation that provides greater protection to the individual property owner is to be applauded, and should be altered only after very careful consideration. The Michigan non-amortization statute goes too far, however, in failing to allow amortization under *any* circumstances, and to place an outright prohibition on amortization. As a result, the statute fails to account for the *community's* interest in planning for the maximum benefit of the greatest number of people. It is axiomatic in a modern, complex society that the interests of the individual must be balanced in some way with the interests of the community,[62] a balancing which by its terms requires that the interests of both sides must be compromised to some degree. As pointed out by the California court in *Gage*, nonconforming uses "tend to impair the development and stability of the [comprehensive plan] . . . . Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements."[63]

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59. Northwood Properties Co. v. Perkins, 325 Mich. 419, 422, 39 N.W.2d 25, 26 (1949) (emphasis added) (quoting *Austin*, 283 Mich. at 678). It is relevant that the *Northwood Properties, South Central Imp. Ass'n,* and *Redford Moving* decisions, *see supra* note 58, occurred *after* the 1947 enactment of MCLA § 125.583a, indicating that the Michigan Supreme Court considered the terms "resumption, restoration, reconstruction, extension [and] substitution" in the statute to be consistent with the reasoned "exclusion" or "elimination" of nonconforming uses.

60. *See supra* notes 45-47 and accompanying text.

61. *See supra* notes 58-59 and accompanying text.

62. *See supra*, notes 2-3 and accompanying text.

63. City of Los Angeles v. Gage, 274 P.2d 34, 43-44 (Cal. App. 2d 1954). *See supra*

To illustrate how a Michigan city has inadequate means under the current statute to carry out its police power responsibilities, and how the current statute adds a large measure of uncertainty to city planning efforts, imagine the following facts. A Michigan Home Rule City,[64] the home of a large university, has a zoning ordinance that divides the residential areas of the city into three districts.[65] The ordinance allows for the rental of single-family dwellings (in any of the three districts) to up to four unrelated individuals upon the granting of a rental license. Over a period of years, owners of a large percentage of the single-family homes in certain neighborhoods near the university acquire rental licenses and now regularly rent the homes to four unrelated persons. These neighborhoods become noisier, the homes become less-well maintained, families move out, school enrollments in the city drop, and the city loses a significant part of its tax base. Seeking to stem the conversion of single-family homes to rental units, the city passes an ordinance that reduces the number of unrelated tenants allowed in single-family homes in any of the three districts from four to two.[66] Thereafter, seeking to cause an eventual reduction of the number of single-family homes already licensed

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notes 30-35 and accompanying text. Any amortization provision enacted by the Michigan legislature would need to satisfy the legal test of reasonableness, including the requirement that there exist reasonable "alternate uses" of the property. *See supra* note 19.

64. The Home Rule Cities Act, Public Act 1909, No. 279 (1909) (codified as amended at MICH. COMP. LAWS ANN. §§ 117.1-.38 (West 1991)), "is intended to give cities a large measure of home rule. It grants general rights and powers subject to enumerated restrictions." Rental Property Owners Ass'n of Kent County v. City of Grand Rapids, 455 Mich. 246, 254, 566 N.W.2d 514, 518 (1997) (citing Detroit v. Walker, 445 Mich. 682, 690, 520 N.W.2d 135 (1994); Conroy v. Battle Creek, 314 Mich. 210, 221, 22 N.W.2d 275, 298 (1946)). Under Article 7, Section 22 of the 1963 Michigan Constitution, home rule cities have broad powers to enact ordinances for the welfare of the community:

> Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

MICH. CONST. art. 7, §22.

65. The "R-1" district allows single-family dwellings only, with a minimum lot size of 10,000 square feet; the "R-2 " district allows single-family dwellings only, with a minimum lot size of 5,000 square feet; the "R-3" district allows single-family or multifamily dwellings.

66. The point of reducing the number of tenants allowed from four to two is at least twofold: one, there will be less economic incentive for the owner to rent the property, thus creating an environment more favorable to owner-occupied housing; and two, the lessened density itself will improve conditions in the neighborhood.

for rental to four unrelated persons,[67] the city amends its zoning code to add the following provision:

> Any owner (Owner One) of a single-family dwelling licensed for rental to a maximum of four unrelated individuals on the effective date of the ordinance may continue to maintain that license (assuming all fees are paid and other requirements continue to be met) for so long as there is no change in ownership. Upon the first change of ownership after the effective date of the ordinance, the new owner (Owner Two) may continue to rent the dwelling to a maximum of four unrelated individuals for so long as Owner Two continues to own the property. Upon any subsequent change of ownership after the effective date of the ordinance, the new owner (Owner Three) may rent the dwelling to a maximum of two unrelated individuals, in accordance with the provisions of the effective date of the ordinance.[68]

In essence, then, the city's amended zoning code allows the current owner, and any person to whom the current owner sells the property, to rent to four unrelated persons for an unlimited number of years; but any owner thereafter could rent to only two unrelated individuals.

This fact pattern raises two major issues: One, is the ordinance that reduces the maximum number of tenants from four to two unconstitutionally discriminatory or exclusionary? Two, may the preexisting (now nonconforming) rental units legitimately be phased-out in the manner contemplated by the city?

The second major issue raises the more difficult questions; it is therefore addressed first. The city can credibly argue that the amendment eliminating the nonconforming use upon the second transfer of ownership satisfies the legal test of reasonableness, and would thus be upheld by Michigan courts.[69] The city has a clear incentive under its police power to attempt to protect its housing stock and to create safe, attractive neighborhoods. The relative hardship to the property owner is low, for the following reasons. First, it is worth remembering what the city is in fact doing when it is eliminating these nonconforming uses. The city is *not* prohibiting the rental of these dwellings–it is merely *reducing* the number of tenants allowed in any one single-family dwelling. The property clearly can continue to be put to a productive use either as a rental or owner-occupied dwelling, thus satisfying the "alternate use" element of the reasonableness test. Second, Owner One is able to continue the nonconforming use as long as he desires–there is no set time period for elimination of the sort struck down by the Michigan Supreme

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67. After passage of the ordinance, those homes licensed for rental to four unrelated individuals have become, by definition, nonconforming uses.

68. *See supra* notes 62-63.

69. *See supra* note 19 and accompanying text.

Court in *DeMull v. City of Lowell*.[70] Indeed, the amendment not only allows Owner One to continue the nonconforming use as long as he desires, but allows him to convey the nonconforming use to Owner Two, who may then continue to use the nonconforming use as long as *she* desires. The nonconforming use is only eliminated when Owner Two–who received the property *with notice* of the amendment that reduced the maximum number of tenants to two–conveys the property to Owner Three. All of these facts combined lead to the conclusion that this approach is eminently reasonable, taking into account and balancing the needs of both the city and the private property owner.

The city can argue that it takes this gradual approach–rather than requiring Owner Two to comply immediately with the new ordinance[71]–out of recognition that Owner One of such a nonconforming uses has developed an "expectation" interest, or a "vested right" of sorts, to be able to rent the dwelling to four unrelated people.[72] On this reasoning, Owner One should be allowed to continue that use as long as he desires, and should also be able to realize his expectation of being able to enjoy any economic or other advantage of conveying the property to the new owner with all of its attendant uses intact, including the right to rent to four unrelated people.[73]

On the other hand, there is no getting around the fact that by its action the city is attempting to force the eventual discontinuance of a nonconforming use, even though there has been no "change" to the use of the sort embodied by the language of section 3a(2) of the statute.[74] The statute is explicit in stating that "[t]he lawful use of land or a structure exactly as the land or structure existed at the time of the enactment . . . may be continued."[75] Under these facts, because the owners of such nonconforming uses are seeking merely to continue the use "exactly as [it] existed at the time of the

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70. 368 Mich. 242, 118 N.W.2d 232 (1962). *See infra* note 91 and accompanying text.

71. The city might attempt to argue that it could technically refuse to "extend" the nonconforming use to Owner Two under Section 125.583a(2) of the Zoning Enabling Act, *see supra* notes 54-55 and accompanying text, but in light of the adverse effect of such a provision on the rights of Owner One, it is unlikely that the provision would withstand the legal test of reasonableness. *See supra* note 19 and accompanying text. Accordingly, the city would be wise to adopt the more gradual approach.

72. *See supra* notes 23, 37 and accompanying text.

73. Clearly, the fact that Owner Two will not be able to convey the property to Owner Three with the right to rent to a maximum of four unrelated people creates a new dynamic in the negotiations between Owner One and Owner Two, but that effect is certainly more remote and attenuated than if Owner Two were not allowed to continue to rent to a maximum of four unrelated people herself.

74. *See supra* note 41 and accompanying text.

75. MICH. COMP. LAWS ANN. § 125.583a(1) (West 1997).

enactment" by continuing to rent to four unrelated individuals–and to be able to sell their property with that use and expectation intact–the city's proposed plan is of questionable validity under the current statute.[76] This uncertainty raises the real threat of legal challenges to the plan, and hampers the city's plan to improve its neighborhoods.[77]

The first major issue–*i.e.*, whether the original ordinance reducing the maximum number of tenants from four to two is constitutional–is more settled, and is fully supported under both the U.S. and Michigan Constitutions. The U.S. Supreme Court addressed this issue in its landmark *Village of Belle Terre v. Boraas*[78] decision in 1974, holding that it is within a city's police power to limit the number of unrelated individuals who may live together in single-family dwellings. The court upheld such an ordinance promulgated by the city of Stony Brook, New York,[79] reasoning that "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is . . . permissible . . . . [The community may] lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[80]

Regarding the *state* Constitution, it is true that in 1984 the Michigan Supreme Court struck down as unconstitutional a Delta Township ordinance that limited to two the number of unrelated persons who could occupy a single-family dwelling.[81] The key point in that case, however, was *not* the mere limitation, but rather that the ordinance did not allow for a so-called "functional family" of unrelated individuals to live together under *any* circumstances. That was why the Delta Township ordinance was struck down, not simply because it limited the number of unrelated persons from living together. Indeed, the court in *Dinolfo* stated affirmatively that communities *may* "regulate the behavior it finds inimical to its concept of a residential neighborhood, including a rational limitation on the numbers of persons that may occupy a dwelling."[82] Moreover, communities "need not open its residential borders to transients and others whose lifestyle is not the functional equivalent of 'family' life."[83]

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76. *Id.*
77. *See infra* notes 112 and accompanying text.
78. 416 U.S. 1 (1974).
79. Stony Brook is the home to the State University of New York at Stony Brook.
80. *Village of Belle Terre*, 416 U.S. at 9.
81. Charter Township of Delta v. Dinolfo, 419 Mich. 253, 295, 351 N.W.2d 831, 842 (1984).
82. *Dinolfo*, 419 Mich. at 277, 351 N.W.2d at 843.
83. *Id.*

A recent Michigan Court of Appeals decision bolsters the conclusion that such ordinances are valid under the Michigan Constitution. In *Stegeman v. City of Ann Arbor*,[84] the court upheld an Ann Arbor ordinance that sought to limit the number of unrelated persons from living together, finding that since the Ann Arbor zoning code provided for "functional families" (that is, unrelated persons living together as a permanent, single housekeeping unit), the ordinance was not discriminatory. The court noted that this ordinance protected the interests of such "functional families",[85] while at the same time "acknowledging the right of the municipality to restrict transients and others whose lifestyle is not the functional equivalent of a family."[86]

So it is with the ordinance in our hypothetical fact pattern. The ordinance is precisely the sort of lawmaking at the local level that the U.S. Supreme Court envisions when it speaks of "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people,"[87] and that the Michigan Supreme Court envisions when it speaks of a community's right to preserve "its concept of a residential neighborhood, including a rational limitation on the numbers of persons that may occupy a dwelling."[88] The important point to be made is that courts at all levels agree that municipalities have every right to protect their neighborhoods in the way envisioned by this ordinance.

## II. THE MICHIGAN LEGISLATURE SHOULD AMEND THE ZONING ENABLING ACT TO ALLOW THE AMORTIZATION OF NONCONFORMING USES

### A. The Michigan Approach

As noted previously, amortization, the technique allowed in a majority of the states to terminate nonconforming uses,[89] is *not* allowed under the Zoning Enabling Act in Michigan. Under the statute, a nonconforming use or structure "may be continued . . . although that use or structure does not conform with the ordinance."[90]

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84. 213 Mich. App. 487, 489, 540 N.W.2d 724, 725-26 (1995).

85. The Ann Arbor provision for "functional families" was what distinguished the case from *Dinolfo*, *see supra* notes 81-83 and accompanying text, the case in which the court struck down the Delta Township ordinance.

86. *Stegeman*, 213 Mich. App. at 490, 540 N.W.2d at 726.

87. *Belle Terre*, 416 U.S. at 9.

88. *Dinolfo*, 419 Mich. at 256, 351 N.W.2d at 832.

89. *See supra* notes 10, 27-29 and accompanying text.

90. MICH. COMP. LAWS ANN. § 125.583a(1) (West 1997). *See supra* note 39 and accompanying text.

The benchmark case on the topic of amortization in Michigan is the 1962 case of *DeMull v. City of Lowell,*[91] in which the Michigan Supreme Court held that cities may not amortize nonconforming uses under existing Michigan law. The local ordinance at issue in *DeMull* involved a zoning provision under which the plaintiff's preexisting lawfully-operated junkyard would be required to be discontinued within three years of the effective date of the ordinance.[92] The court concluded that it is beyond a city's authority to sentence nonconforming uses to abolition at expiration of a set time period from the effective date of ordinance.[93]

In striking down the City of Lowell amortization scheme, the *DeMull* court looked to the legislative history of MCLA § 125.583a and observed that the statute, as originally proposed by the State Senate, actually included explicit language *allowing* amortization, but that the pertinent language was ultimately excluded on the basis of a now-obsolete Opinion of the Attorney General. The State Senate's proposed amortization language stated:

> "The legislative body in cities and villages *may provide for the removal of such nonconforming uses or structures by specifying a reasonable period* or periods in which such removal shall be required. In determining such periods consideration shall be given to the type of use and the type, age and other characteristics of the structures."[94]

The AG Opinion recommended against the inclusion of such language, however, concluding that:

> "It is our opinion that Senate Bill No. 74, in delegating to cities and villages the power to provide for removal of nonconforming uses by specifying a reasonable period based on type of use and the type, age and other characteristics of structures, would be held invalid, since it contemplates ordinances which would set definite periods of time."[95]

As a result of this AG Opinion, the Zoning Enabling Act as ultimately enacted did *not* contain the proposed amortization language.[96]

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91. 368 Mich. 242, 118 N.W.2d 232 (1962).

92. *See DeMull,* 368 Mich. at 247, 118 N.W.2d at 235.

93. *See id.* at 250, 118 N.W.2d at 236.

94. *Id.* at 252, 118 N.W.2d at 237 (quoting 1947 Op. Att'y Gen. 146 (1947) (emphasis added).

95. *Id.* (quoting 1947 Op. Att'y Gen. 146 (1947). *See infra* notes 100-09 and accompanying text for full discussion of how this Attorney General Opinion has become obsolete.

96. As enacted in 1947, MCLA §125.583a provided:

> The lawful use of land or a structure exactly as such existed at the time of the enactment of the ordinance affecting them, may be continued, except as [otherwise] provided in this act, although such use or structure does not conform with the . . . ordinance . . . . The legislative body may in its discretion provide by ordinance for the

In interpreting this legislative history, the *DeMull* court observed that the legislature "has withheld permission to destroy [nonconforming uses], by time limitation or otherwise" and accordingly held the city's attempt to amortize plaintiff's junkyard under the ordinance "invalid for want of legislative warrant."[97]

It is time for the Michigan legislature to provide such a "legislative warrant"–and to create a clear and uniform Zoning Enabling Act that is well-adapted to modern needs. The legislature can do so by amending the Act to allow the amortization of nonconforming uses. In order to assure that the future development and use of its land and resources proceeds in a manner that optimizes the needs of both private and community interests, communities need the freedom that amortization provides. At the same time, to assure that the individual property rights are adequately balanced, any amortization scheme undertaken by a city must meet the legal test of reasonableness, including the requirement that the property can be put to a reasonable "alternate use."[98]

The Michigan Supreme Court almost certainly would let stand such an amendment.[99] First, the court's 1962 *DeMull* decision (striking down a city's amortization ordinance due to lack of legislative authority) was based largely upon the legislature's response to a 1947 Attorney General Opinion, the substance of which has become clearly obsolete in the intervening fifty years,

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> resumption, restoration, reconstruction, extension or substitution of non-conforming uses or structures upon such terms and conditions as may be provided in the ordinance. In addition to the power granted by this section, cities and villages may acquire by purchase, condemnation or otherwise private property for the removal of non-conforming uses and structures . . . .

Act of June 27, 1947, Public Act of Mich. 1947, No. 272.

97. *DeMull*, 368 Mich. at 252, 118 N.W.2d at 237. Accordingly, Michigan courts subsequently have consistently struck down local ordinances that have sought to impose time limitations upon the continuation of nonconforming uses. *See, e.g.*, Central Adver. Co. v. City of Ann Arbor, 42 Mich. App. 59,74, 201 N.W.2d 365, 373 (1972) *remanded*, 391 Mich. 533, 218 N.W.2d 27 (1974) (holding that "a city cannot destroy by time limitation 'nonconforming uses,' whatever their nature").

98. *See supra* note 19.

99. Michigan courts have long recognized that a legislature may impose any limitation upon the use of property which it deems may be necessary to promote and protect the safety, morals, health, comfort and welfare of the people, provided that the limitation has a reasonable connection to legislative goals. *See, e.g.*, Square Lake Condominium Ass'n v. Bloomfield Township, 437 Mich. 310, 471 N.W.2d 321 (1991); People v. Qualles, 434 Mich. 340, 454 N.W.2d 374 (1990); Vance v. Ananick, 145 Mich. App. 833, 378 N.W.2d 616 (1985); Horton v. Kalamazoo, 81 Mich. App. 78, 264 N.W.2d 128 (1978); Tally v. Detroit, 54 Mich. App. 328, 220 N.W.2d 778 (1974); 1426 Woodward Ave. Corp. v. Wolff, 312 Mich. 352, 20 N.W.2d 217 (1945). Michigan courts will defer to the legislative judgment on such matters. *See infra* note 123 and accompanying text.

and should no longer be considered as persuasive. It is now well-settled that amortization of nonconforming uses is within the local police power and is hence constitutional under the U.S. Constitution and the constitutions of a majority of the states. Second, the Michigan Supreme Court has already upheld amortization as a land use technique promulgated under the Home Rule Act, and has strongly implied that it would uphold the constitutionality of amortization under the Zoning Enabling Act as long as the proper legislative authority exists.

B. The Michigan Legislature's Original Basis for Prohibiting Amortization No Longer Applies

On the first point, the Michigan legislature's decision not to include amortization language[100] in the 1947 amendments to the Zoning Enabling Act–a decision which formed the basis for the Michigan Supreme Court's refusal to uphold a city's amortization ordinances in *DeMull* and subsequent cases–was based upon a 1947 Attorney General Opinion which has since become obsolete. The AG Opinion acknowledged that earlier Michigan cases had established that "the power to zone is not limited to the protection of the status quo, but that it may contemplate planning for the future" and that "[t]he gradual elimination of non-conforming [sic] uses is within the police power,"[101] but that "[s]uch elimination appears to be limited to change in the structures, destruction by fire, abandonment and the like."[102] The AG Opinion goes on to note that it had found only one state court in the entire nation[103] that had upheld an ordinance providing for the amortization of nonconforming uses and finding that solitary court's theory itself untenable,[104] issued the

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100. As noted *supra* note 94 and accompanying text, Senate Bill No. 74 included the following proposed language:

> The legislative body in cities and villages may provide for the removal of such non-conforming uses or structures by specifying a reasonable period or periods in which removal shall be required. In determining such periods consideration shall be give to the type of use and the type, age and other characteristics of the structures.

*DeMull*, 368 Mich. at 252, 118 N.W.2d at 237 (quoting 1947 Op. Att'y Gen. 146 (1947)).

101. 1947-1948 MICH. ATT'Y GEN. BIENNIAL REP. at 218 (Mar. 7, 1947) (citing Austin v. Older, 283 Mich.667, 675, 278 N.W. 727, 730 (1938)).

102. 1947-1948 MICH. ATT'Y GEN. BIENNIAL REP. (Mar. 7, 1947) (citing Adams v. Kalamazoo Ice & Fuel Co., 222 N.W. 86, 245 Mich. 261 (1928); Cole v. City of Battle Creek, 298 Mich. 98 298, N.W. 466 (1941)).

103. The Supreme Court of Louisiana was the only court found by the AG Opinion to have upheld an amortization provision. 1947-1948 MICH. ATT'Y GEN. BIENNIAL REP. (Mar. 7, 1947) (citing State *ex rel.* Duma Realty Co. v. McDonald, 121 So. 613 (1929); State v. Jacoby, 123 So. 314 (1929)).

104. "[The Louisiana case] was largely based on the theory that after a zoning ordinance

opinion that amortization provisions that delegates "to cities and villages the power to provide for removal of non-conforming [sic] uses by specifying a reasonable period [for elimination] . . . would be . . . invalid, since it contemplates ordinances which would set definite periods of time."[105]

Was the 1947 AG Opinion warranted in its conclusion? The benefit of fifty years time allows us to answer the question with an emphatic "No."

First, the AG's objection to the proffered legislation was based largely upon the fact that in 1947 there were no cases in other states (save Louisiana, with whose theory the AG Opinion disagreed) upholding similar amortization schemes. That clearly is no longer the case–indeed, in the last fifty years courts in a majority of the states have *upheld* amortization provisions of the sort at issue in the 1947 Michigan AG Opinion.[106] The natural conclusion to be drawn is that had the amortization approach been as widely accepted in 1947 as it is today, the Opinion of the Attorney General would have been different, and the proposed language allowing amortization probably would have remained in the statute.

Second, the AG Opinion itself suggests that its objection to amortization in 1947 was quite thin to begin with. Specifically, the 1947 AG Opinion qualified its negative opinion with the following statement: "If a period were provided based on the normal life of uses or structures; for example, one based on the length of time in which the value of a structure would, in good accounting practice, be written off, *our opinion would be otherwise.*"[107] In other words, the AG Opinion was willing to go beyond what it determined was the prevailing practice of the day by allowing the reasoned elimination of nonconforming uses.

Based on these comments, it is clear that the Attorney General's Opinion was based *not* on any particular philosophical objections to the concept of

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is effective, a non-conforming use becomes a nuisance and can be abated." 1947-1948 MICH. ATT'Y GEN. BIENNIAL REP. (Mar. 7, 1947). The AG Opinion also noted that "Massachusetts enacted in 1941 a special act for Boston providing for the liquidation of non-conforming uses by 1961," but that the AG could find no Massachusetts decisions on that special act. *Id.*

105. 1947-1948 MICH. ATT'Y GEN. BIENNIAL REP. (Mar. 7, 1947). The exact language of the AG Opinion reads as follows:

> It is our opinion that Senate Bill No. 74, in delegating to cities and villages the power to provide for removal of non-conforming uses by specifying a reasonable period based on type of use and the type, age and other characteristics of structures, would be held invalid, since it contemplates ordinances which would set definite periods of time.

*Id.* To better understand the Attorney General's position, *see supra* note 23 and accompanying text for description of how nonconforming uses were viewed in the early days of zoning.

106. *See supra* notes 24, 35 and accompanying text.

107. 1947-1948 MICH. ATT'Y GEN. BIENNIAL REP. (Mar. 7, 1947) (emphasis added).

amortizing nonconforming uses or structures; rather, the Opinion's "normal life write-off" phrase[108] suggests that the AG's objection is simply with the *means* by which the city would determine the length of time before termination of the nonconforming use or structure would occur. If that detail were to be reconciled by the legislature, the Opinion suggests, the AG would *favor* the scheduled removal of nonconforming uses and structures–even in 1947, without the benefit of knowing that courts in a majority of states would later explicitly uphold even broader amortization provisions.[109]

Third, a subsequent 1978 amendment to MCLA § 125.583a further suggests that the Michigan legislature is ready to revisit the matter of amortization. The statute was amended in 1978 to split section 3a into three subparts, and in so doing the Michigan legislature added the following second sentence to what became section 3a(2): "[i]n establishing terms for the resumption, restoration, reconstruction, extension, or substitution of nonconforming uses or structures, different classes of nonconforming use may be established in the ordinance with different regulations applicable to each class."[110] In the words of the House Legislative Analysis Section, the amendment was intended to update the Zoning Enabling Act by permitting cities "to establish different classes of nonconforming uses, with different regulations for each."[111] This and other amendments to the Zoning Enabling Act were intended to permit better land management and "to ensure that uses

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108. *See supra* note 107 and accompanying text.

109. This qualification in the AG Opinion is interesting from the standpoint that the legislature did not then redraft the offending phrase to comply with the AG Opinion; rather, the legislature simply dropped the phrase altogether. It would have been a simple revision for the legislature to replace the offending phrase, *see supra* text accompanying notes 94, 95, with language that complied with the AG Opinion's suggestion. One can only speculate as to the reason for the legislature's failure to adopt such a reworked phrase–the legislative history is unrevealing on this point. Perhaps the legislature believed that a requirement specifying that removal be tied to "normal life" would be in some way unworkable for cities to implement.

110. MICH. COMP. LAWS ANN. 125.583a § 3a(2) (West 1997). After the 1978 amendments, the statute assumed its current language. *See supra* note 39 and accompanying text.

111. HOUSE LEGISLATIVE ANALYSIS SECTION, SECOND ANALYSIS, H.B.s 4591-4594 at 1 (Mich. 1971). According to the analysis, "Michigan's zoning enabling acts are severely outdated and are, in many places, vague or confusing. Changing trends in the planning and use of land, new types of building developments, and a greater concern for the environment have rendered these statutes unwieldy and inadequate tools." *Id.*

These legislative proposals were the outcome of a ten-month study of Michigan's zoning enabling acts undertaken by an advisory committee under the sponsorship of the Michigan Department of Natural Resources. *See id.* at 2.

of land take place in appropriate locations and relationships, and to encourage the use of land in a socially and economically desirable manner."[112]

With these 1978 changes, the legislature sent the explicit message that it recognizes its responsibility "to take the initiative and provide local units with clear and uniform laws adapted to modern needs,"[113] and that it intended to delegate to cities even broader police power authority to promulgate and enforce its zoning rules, including nonconforming uses, since local government is best positioned to know what is appropriate for the area:

> The general effect of these bills will be to give local units of government greater control of land management. This is both reasonable, in that local units should be best informed about environmental and commercial conditions in the area, and fair, in that it is the local officials and their immediate constituencies who will have to live with the decisions that are made.[114]

The legislature's 1978 amendments were an important and necessary first step to providing local government with "laws adapted to modern needs," but for the same reasons elucidated in the House Legislative Analysis Section Report[115] the legislature now needs to go one step further to amend the Zoning Enabling Act to explicitly allow amortization of nonconforming uses–as it had desired to do from the beginning, only to be dissuaded by the now-obsolete 1947 Opinion of the Attorney General. Cities naturally are in the best position to know about local conditions in the area, and cities need to have the added flexibility of being able to amortize nonconforming uses. As demonstrated herein, the majority of states already allow cities this flexibility; it is now time for the Michigan legislature to provide an explicit statement, by means of an amendment to MCLA 125.583a, that adapts the Zoning Enabling Act to modern needs by granting cities the power to pass ordinances providing for the amortization of nonconforming uses and structures.[116]

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112. *Id.* at 1.

113. *Id.* at 3. The analysis came to this conclusion based upon the "enormous volume of litigation" that had ensued from the Zoning Enabling Act. "Zoning law has lately been made more in the courts that in the legislature. This unsystematic process has resulted in a hodgepodge of decisions that has increased the over-all confusion." *Id.*

114. *Id.* at 3.

115. *See supra* notes 111-14 and accompanying text.

116. For specific language of the proposed amendment, this article recommends that the legislature adopt the exact language proposed in, and then redacted from, the original 1947 act. After amendment, MCLA 125.583a § 3a(1) would read as follows (language to be added in italics):

> The lawful use of land or a structure exactly as the land or structure existed at the time of the enactment of the ordinance affecting that land or structure, may be continued, except as otherwise provided in this act, although that use or structure does not conform with the ordinance. *The legislative body in cities and villages may provide*

C. The Michigan Supreme Court Has Upheld the Principle of Amortization in Other Contexts

A second reason suggesting that the Michigan Supreme Court would almost certainly let stand such an amendment is the court itself made clear in a 1992 case that it *is* willing in principle to allow amortization of nonconforming uses and structures, so long as proper legislative authority exists. In *Adams Outdoor Advertising v. East Lansing*[117] the court drew a distinction between the Home Rule Act,[118] which does not contain any explicit limitations against amortization, and the Zoning Enabling Act, which, as we have seen, does not allow amortization. Determining that East Lansing's regulation allowing the amortization of nonconforming signs was promulgated pursuant to the Home Rule Act instead of the Zoning Enabling Act, the court upheld the city's ordinance.[119]

*Adams Outdoor Advertising* is important because it demonstrates for the first time that the Michigan Supreme Court *is* willing to allow amortization when there exists the proper legislative authority. In so holding the court sends the message that it considers local amortization schemes, in principal, to be constitutional exercises of the city's police power.

Moreover, the Michigan Supreme Court has strongly *implied* that it would approve of the use of amortization under the Zoning Enabling Act. In *DeMull,* despite striking down the amortization ordinance "for want of legislative warrant,"[120] the Michigan Supreme Court as much as invited the legislature to adopt language allowing amortization under the Zoning Enabling Act: "[T]he cities of Michigan have not *as yet* been authorized, by requisite legislative act, to terminate nonconforming uses by ordinance of time limitation."[121] Further, "*[s]o far* the legislature has permitted ordinances providing for the resumption, restoration, reconstruction, extension or substitution of nonconforming uses."[122]

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*for the removal of such nonconforming uses or structures by specifying a reasonable period or periods in which such removal shall be required. In determining such periods consideration shall be given to the type of use and the type, age and other characteristics of the structures.*

117. 439 Mich. 209, 483 N.W.2d 38 (1992).

118. *See* MICH. COMP. LAWS ANN. § 117.4i(5) (West 1991). *See supra* note 64 for description of the Home Rule Act.

119. *See Adams Outdoor Adver.*, 439 Mich. at 218, 483 N.W.2d at 42.

120. DeMull v. City of Lowell, 368 Mich. 242, 252, 118 N.W.2d 232, 237 (1962). *See supra* note 97 and accompanying text.

121. *DeMull*, 368 Mich. at 250, 118 N.W.2d at 237 (emphasis added).

122. *Id.* (emphasis added).

Implied in the Michigan Supreme Court's comments in *DeMull* is the notion that the only thing preventing cities from being allowed to amortize nonconforming uses and structures is the legislature's decision not to allow it, and that if the legislature were at some point to decide affirmatively to allow amortization under the Zoning Enabling Act, the court would defer to that judgment as well.[123] To uphold legislatively-enacted amortization schemes would be in keeping with other pronouncements from the Michigan Supreme Court suggesting that while "[a]n ordinance requiring an *immediate* cessation of a nonconforming use may be held to be unconstitutional because it brings about a deprivation of property rights out of proportion to the public benefit obtained," the *gradual elimination* of nonconforming business in existence at the time of passage of a zoning ordinance is within a city's police power.[124]

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123. Such deference is required under the Michigan and U.S. Constitutions. Under the constitutional doctrine of separation of powers, it is not up to the court to make legislative policy–such decisions are properly left to the legislature. Michigan's Constitution provides:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

MICH. CONST. Art. 3, §2. In the context of the judiciary's review of legislation, this provision is applied such that Michigan courts hold as a cardinal rule of statutory construction the need to determine and effectuate the intent of the legislature. *See, e.g.*, Melia v. Employment Sec. Comm'n, 346 Mich. 544, 562, 78 N.W.2d 273, 282 (1956).

As articulated by the Michigan Supreme Court, "[o]ur laws have wisely committed to the people of a community themselves the determination of their municipal destiny .... The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life." Brae Burn, Inc. v. Bloomfield Hills, 350 Mich. 425, 431, 86 N.W.2d 166, 169 (1957). The court added,

> With the wisdom or lack of wisdom of the [legislature's] determination we are not concerned .... Let us state the proposition as clearly as may be: It is not our function to approve [legislation] ... as to wisdom or desirability. For alleged abuses involving such factors, the remedy is the ballot box, not the courts. We do not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises.

*Brae Burn*, 350 Mich. at 431, 86 N.W.2d at 169.

The U.S. Supreme Court laid out its position on the matter of judicial deference to legislative zoning action in *Euclid*, stating that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926). A court may strike down the legislature's action as unconstitutional only when such action is shown to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. *See also* Queenside Hills Realty v. Saxl, 328 U.S. 80 (1946) (suggesting that choices involving social policy are best left to the legislature–choices that should not be lightly discarded by the courts).

124. Austin v. Older, 283 Mich. 667, 676, 278 N.W. 727, 730 (1938) (emphasis added).

In sum, in light of the Michigan Court's comments regarding amortization,[125] its interpretations of the state and federal Constitutions,[126] and its pronouncements regarding judicial deference,[127] it is highly likely that the Michigan Supreme Court would uphold an amendment to the Zoning Enabling Act to allow amortization of nonconforming uses. This would be a positive development in Michigan law, for to hold otherwise would unnecessarily and improperly restrict the broad police power conferred on local governments by the state legislature, by preventing the enactment and operation of a reasonable and flexible means of eliminating nonconforming uses in the public interest.

## CONCLUSION

The Michigan legislature should amend the Zoning Enabling Act to allow amortization of nonconforming uses. This Article has argued that while Michigan cities already have broad discretion under existing law to eliminate or exclude nonconforming uses under certain circumstances, cities need to have the technique of amortization at their disposal in order to be able to effectively carry out their comprehensive plans for growth and development. At the same time, the thoughtful consideration of private property rights must always be included in the mix, so any local amortization plan must satisfy the legal test of reasonableness and allow for reasonable alternate uses of the affected property. By amending the Zoning Enabling Act to allow amortization of nonconforming uses, the Michigan Legislature will provide local government with laws adapted to modern needs, and in so doing it will join the majority of states and the great weight of authority that now recognize amortization as a viable and effective land-use planning technique.

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*See also* Gackler v. Yankee Springs Township, 427 Mich 562, 398 N.W.2d 393 (1986) (commenting that in the interest of public safety and aesthetics, a local community may under its police power properly provide for the limitation and eventual elimination of a nonconforming use); Norton Shores v. Carr, 265 Mich. App. 715; 265 N.W.2d 802 (1978); South Central Imp. Ass'n v. City of St. Clair Shores, 348 Mich. 153; 82 N.W.2d 453 (1957) (noting that zoning ordinance's limitation of nonconforming uses contemplates the elimination of the nonconforming use); Redford Moving & Storage Co. v. City of Detroit, 362 Mich. 163; 58 N.W.2d 812 (1953) (stating that continuation of nonconforming use under zoning ordinance is for the purpose of avoiding imposition of hardship upon the owner of property with a view to gradual elimination of the nonconforming use); Cole v. City of Battle Creek, 298 Mich. 98; 298 N.W. 466 (1949) (same). *See also supra* notes 57, 58 and accompanying text.

125. *See supra* notes 117-122 and accompanying text.

126. *See supra* note 123-24.

127. *See id.*