Florida Law Review

Volume 12 | Issue 3 Article 6

September 1959

Termination of Nonconforming Uses by Amortizaiton

Edward B. Davis Jr.

Robert J. Carr

Follow this and additional works at: https://scholarship.law.ufl.edu/flr

 Part of the Law Commons

Recommended Citation

Edward B. Davis Jr. and Robert J. Carr, *Termination of Nonconforming Uses by Amortizaiton*, 12 Fla. L. Rev. 322 (1959).
Available at: https://scholarship.law.ufl.edu/flr/vol12/iss3/6

This Note is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

of the infamy attached to the criminal act. In considering this disqualification one may well remember the words of Professor Wigmore:[41]

> "The legislatures of almost every jurisdiction have long ago either entirely abolished or narrowly restricted the disqualification by conviction of crime. The statutes in the United States when not providing for entire abolition, usually retain the common law rule for perjury only (including subornation); while a few retain it in its original scope as to kinds of crime, but apply it in criminal trials only; but neither of these limitations has any justification in logic or policy."

The disqualification is based on infirm foundations and has been repealed for over a century in England, the land of its origin.[42] The decision by the Florida Supreme Court that a perjurer convicted in another jurisdiction may be a witness in Florida makes clear the unreasonableness of applying the rule solely to those convicted in Florida.[43] In the case of a criminal defendant the rule appears to be unconstitutional.

The Florida Supreme Court has taken the first step by narrowing the scope of the rule, but the ends of justice would be better served if the legislature would reconsider the law. The statute should be repealed entirely, or it should be modified along the lines of the current New York law, that is, use the record of conviction of perjury only to affect the credibility of the witness.

RICHARD D. DEBOEST

TERMINATION OF NONCONFORMING USES BY AMORTIZATION

With the wildfire expansion of Florida municipalities, the need for efficient and effective comprehensive zoning has become a matter of major concern to municipal authorities. The most ingenious of

---

should escape because of the inability of the witness to relate what he saw?

[41]See WIGMORE, EVIDENCE §524 (3d ed. 1940).

[42]*Ibid.*

[43]Lefcourt v. Streit, 91 So.2d 852 (Fla. 1956).

comprehensive zoning plans will result in nonconforming uses[1] that must be eliminated if the plan is to be successful. Land utilization that does not conform to zoning ordinances is a major obstacle to effective zoning.[2] Municipal attorneys,[3] urban planners,[4] zoning authorities,[5] and law review commentators[6] agree that nonconforming uses reduce the effectiveness of zoning ordinances, impair property values, and contribute to the growth of urban blight.

The control and elimination of property uses through zoning have long been considered valid exercises of the police power; however, any deprivation of property or use thereof must of course be done within constitutional limitations. Generally, a property owner has a vested property right in a nonconforming use;[7] consequently zoning ordinances may not operate retroactively to deprive the owner of this right.[8] Any ordinance that takes away the right to a nonconforming use in an unreasonable manner, or that is not in the interest of the public welfare is invalid.[9] The immediate cessation of nonconforming uses through zoning ordinances has been held to be an unreasonable exercise of the police power.[10] This summary termination is unconstitutional unless the use constitutes a public nuisance or if denial of the right to continue it would preclude the only suitable utilization of the property.[11]

Zoning authorities originally assumed that property owners would eventually eliminate nonconforming uses or that these uses would eliminate themselves. Experience has proved this to be

---

[1]A nonconforming use "is created when an area is zoned and there is already within such area property being used in such a manner as not to conform to the zoning regulations." State *ex rel.* S. A. Lynch Corp. v. Danner, 33 So.2d 45, 47 (Fla. 1947).

[2]See WEBSTER, URBAN PLANNING AND MUNICIPAL PUBLIC POLICY 403 (1958).

[3]See MESSER, NONCONFORMING USES, MUNICIPALITIES AND THE LAW IN ACTION 374 (1951).

[4]See LEWIS, A NEW ZONING PLAN FOR THE DISTRICT OF COLUMBIA 112 (1956).

[5]See YOKLEY, ZONING LAW AND PRACTICE 362 (2d ed. 1953).

[6]See Notes: 9 U. CHI. L. REV. 477 (1942); 102 U. PA. L. REV. 91 (1953).

[7]Schneider v. Board of Appeals, 402 Ill. 536, 84 N.E.2d 428 (1949).

[8]See RHYNE, MUNICIPAL LAW 921 (1957).

[9]Schneider v. Board of Appeals, *supra* note 7; James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955); City of Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953).

[10]Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930); James v. City of Greenville, *supra* note 9.

[11]Standard Oil Co. v. City of Bowling Green, 244 Ky. 362, 50 S.W.2d 960 (1932) (gasoline station).

little more than wishful thinking, for property owners, particularly those operating businesses in contravention of zoning ordinances, were quick to discover that zoning was actually beneficial to nonconforming uses in that it enabled a monopoly to be effected. The authorities soon discovered that a comprehensive zoning plan alone is inadequate to accomplish effective control of land utilization. Indeed, positive action is essential to the elimination of nonconforming uses. This may be accomplished by three basic methods: (1) eminent domain proceedings, (2) utilization of nuisance law, and (3) amortization. The first two methods are effective, though limited, tools for termination of nonconforming uses of property and will be dealt with summarily.

Broadly defined, eminent domain is the sovereign power vested in the state to take private property for a public use.[12] This power is absolute except as restrained by constitutional limitations,[13] which require that the taking be for a public purpose[14] and with just compensation.[15] These requirements greatly limit the use of eminent domain in terminating nonconforming uses, and at present only one state grants specific statutory authority for this purpose.[16]

There is no statutory authority in Florida permitting eminent domain proceedings to be used to terminate nonconforming uses; and to date the Florida Supreme Court has narrowly construed the public purpose requirement when invalidating certain urban redevelopment plans.[17] In view of this strict construction it is extremely doubtful that eminent domain could be effectively utilized in this state to end many existing nonconforming uses. Moreover, the administrative difficulties involved in the valuation procedure[18] and the costly reimbursement of property owners contribute to make any extensive use of the device unlikely. However, in limited situations, when the

[12]State *ex rel.* Lamar v. Jacksonville Terminal Co., 27 So. 221, 41 Fla. 363 (1899).

[13]Demeter Land Co. v. Florida Pub. Serv. Co., 99 Fla. 954, 128 So. 402 (1930); Spafford v. Brevard County, 92 Fla. 617, 110 So. 451 (1926).

[14]*E.g.*, Osceola County v. Triple E Development Co., 90 So.2d 600 (Fla. 1956); Gate City Garage, Inc. v. City of Jacksonville, 66 So.2d 653 (Fla. 1953); State v. Town of North Miami, 59 So.2d 779 (Fla. 1952); Demeter Land Co. v. Florida Pub. Serv. Co., *supra* note 13.

[15]Board of Pub. Instr'n v. Town of Bay Harbor Islands, 81 So.2d 637 (Fla. 1955); Abell v. Town of Boynton, 95 Fla. 984, 117 So. 507 (1928).

[16]MINN. STAT. ANN. §462.13 (1947).

[17]State v. Cotney, 104 So.2d 346 (Fla. 1958); Adams v. Housing Authority, 60 So.2d 663 (Fla. 1952); State v. Town of North Miami, 59 So.2d 779 (Fla. 1952).

[18]See BASSETT, ZONING 27 (1936).

circumstances are such as to satisfy the constitutional requirements and justify the expense, the power of eminent domain may be used as a valuable adjunct to comprehensive zoning.

If a nonconforming use within a specific locale is particularly obnoxious to the community and other property owners, it may be classified as a nuisance and forced out of existence immediately.[19] The use of nuisance principles to terminate nonconforming uses is somewhat limited, however, because a nonconforming use will not necessarily be sufficiently onerous to be classified as a nuisance. Nuisance law is nevertheless important in this area; it has been relied upon to uphold general ordinances, enacted under the police power, requiring the immediate discontinuance of nonconforming uses that verge on nuisance. The United States Supreme Court has upheld ordinances directed toward the termination of stables[20] and brickyards[21] that were particularly obnoxious to the residential areas in which they were located.

The termination of nonconforming uses by utilization of nuisance law or by municipal ordinances that are upheld because the use involved verges on a nuisance sometimes works a financial hardship on the individual property owner who is required to discontinue a certain use of his property. This has not, however, prevented the utilization of these methods. In *Hadacheck v. Sebastian*[22] the property owner operated a brickyard; this was a lawful use[23] of the property until the area in which it was located was annexed by the City of Los Angeles. The brickyard was valued at $800,000 when operating, but the land was worth only $60,000 for residential or other legitimate uses. The United States Supreme Court, in upholding an ordinance requiring immediate discontinuation of the brickyard, stated in regard to the financial hardship it worked upon the property owner:[24]

> "[W]e are dealing with one of the most essential [police] powers of government, one that is the least limitable. It may, in-

---

[19]Perkins v. City of Coral Gables, 57 So.2d 663 (Fla. 1952).

[20]Reinman v. City of Little Rock, 237 U.S. 171 (1915).

[21]Hadacheck v. Sebastian, 239 U.S. 394 (1915).

[22]*Ibid.*

[23]It is important to note the nuisance factor in this case, *i.e.*, soot, smoke, gas, odors, etc., coming from the brickyard. Without their presence it is extremely doubtful that the Court would have allowed immediate termination of the use.

[24]239 U.S. 394, 410 (1915).

> deed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. . . . There must be progress, and if in its march private interests are in the way, they must yield to the good of the community."

The third, and relatively new, method of terminating nonconforming uses is by amortizing the use over a reasonable period of time. This method does not run afoul of the general rule that a zoning ordinance that operates retroactively is unconstitutional,[25] because the use is not terminated immediately. The somewhat specious reasoning of most courts on this point is that the owner of the nonconforming use is given a monopolistic position for his business over the amortization period, and this is deemed to compensate him for the ultimate removal of the business.[26] Regardless of the reason, state and federal courts have upheld the elimination of nonconforming uses within periods of one,[27] two,[28] five,[29] and ten[30] years as a reasonable exercise of police power that does not deprive the owner of his property without due process of law.

In order for amortization to be valid, it must be *reasonable.* The amortization ordinance must be part of a comprehensive zoning plan that is reasonable in relation to the area zoned. In addition, the amortization period must be reasonable in relation to the loss of use of the property incurred by the owner. Finally, the loss incurred by the owner must be reasonable in relation to the gain realized by the community. The importance of this requirement is illustrated in the following line of amortization cases.

---

[25]See RHYNE, MUNICIPAL LAW 921 (1957).

[26]For an excellent discussion of the monopoly argument see City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954). See also Note, 35 VA. L. REV. 348 (1949).

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

[28]Spurgeon v. Board of Comm'rs, 181 Kan. 1008, 317 P.2d 798 (1957) (auto wrecking business).

[29]City of Los Angeles v. Gage, *supra* note 26 (plumbing establishment); Grant v. Mayor & City Council, 212 Md. 301, 129 A.2d 363 (1957) (billboards).

[30]Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir.), *cert. denied,* 340 U.S. 892 (1950) (gasoline station).

The first two decisions were the *Dema Cases*,[31] in which the Louisiana Supreme Court upheld a New Orleans zoning ordinance that required the discontinuance of all nonconforming uses in a newly zoned residential district within a one-year period. The ordinance was peculiar in that it made all nonconforming uses statutory nuisances; and the holding that one year was not an unreasonable time in relation to the size and nature of the two small businesses affected has been criticized as exhibiting confusion between zoning and nuisance regulation.[32] This criticism is undoubtedly correct from the theoretician's point of view; however, both businesses could have been relocated at a relatively small loss. Hence as a practical result the ordinance still fell within the conditions of reasonableness.

The validity of a zoning ordinance, or its application, as it affected a particular nonconforming use was involved in *Livingston Rock and Gravel Co. v. Los Angeles*.[33] A cement-mixing company sought to enjoin the county from enforcing certain provisions of a zoning ordinance that had been enacted subsequent to the establishment of the business. The area in question had been rezoned for light industry, and the petitioner had been given twenty years to discontinue operation. The zoning commission had the power to revoke the period of amortization for cause, and one year later it declared the cement plant to be a nuisance and demanded immediate termination of operations. The California Supreme Court upheld the commission and denied the petitioner equitable relief. This court also upheld another Los Angeles ordinance that required the discontinuance of a plumbing business within five years.[34] The court found that the owner could move the business at a cost of $5,000 and that this expense amortized over a five-year period would not work an unreasonable hardship on the owner.[35]

State courts in Kansas,[36] Maryland,[37] and New York[38] have also

---

[31]See cases cited note 27 *supra*.

[32]Matter of Franmor Realty Corp. v. Le Boeuf, 201 Misc. 220, 226, 104 N.Y.S.2d 247, 253 (Sup. Ct. 1951); Comment, 39 YALE L.J. 735 (1930).

[33]43 Cal. 2d 121, 272 P.2d 4 (1954).

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

[35]However, the California Supreme Court has adamantly refused to uphold ordinances that require the overnight discontinuance of a property use without just compensation when there is no question of public health, safety, or welfare. See Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930).

[36]Spurgeon v. Board of Comm'rs, 181 Kan. 1008, 317 P.2d 798 (1957).

[37]Grant v. Mayor & City Council, 212 Md. 301, 129 A.2d 363 (1957).

[38]Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42 (1958).

upheld amortization ordinances; in each instance the underlying test of reasonableness was met.

Not all amortization ordinances have been upheld. In most instances, however, it was because the amortization period was unreasonable in relation to the loss incurred by the property owner. In *Corpus Christi v. Allen*[39] an ordinance requiring the discontinuance of junk yards within nineteen months in an area that had been rezoned for light industry was held invalid because the benefit to the community was small in relation to the hardship caused the junk dealer. In *Town of Somers v. Camarco*[40] a zoning ordinance permitted continuance of the operation of a gravel pit, although it was a nonconforming use. The ordinance was later amended to require removal of all of the structures at the gravel pit over an approved period. The amendment was held invalid on the basis that the destruction of substantial buildings or structures was inequitable.

Amortization has been flatly rejected in at least one jurisdiction. In *City of Akron v. Chapman*[41] a municipal ordinance was enacted that gave the city council discretionary power to discontinue any nonconforming use that had been permitted to exist for a reasonable time. Under this authority the council enacted another ordinance describing the property in question by metes and bounds and naming the owner, and stated that use of the property as a junk yard had existed for a reasonable time and must be discontinued within one year. The Ohio Supreme Court refused to uphold the ordinance on the theory that a property right can be divested only under eminent domain proceedings or by an exercise of the police power in the abatement of a nuisance.

The ordinance in the *Akron* case was clearly discriminatory in that it named the property owner and specifically outlined the property involved. Furthermore, it was an example of spot zoning, which, in the absence of a real nuisance, will generally be looked upon with disfavor by the courts.[42] Either of these reasons was sufficient to invalidate the ordinance; consequently the court's disapproval of amortization has been severely criticized.[43]

To date there have been no reported cases in Florida dealing

---

[39]152 Tex. 137, 254 S.W.2d 759 (1953).

[40]126 N.Y.S.2d 154 (Sup. Ct. 1953).

[41]160 Ohio St. 382, 116 N.E.2d 697 (1953).

[42]RATHKOP, THE LAW OF ZONING AND PLANNING §7A (2d ed. 1949). See also Annot., 128 A.L.R. 740 (1940); 165 A.L.R. 823 (1946).

[43]67 HARV. L. REV. 1283, 184 (1954).

specifically with amortization. However, in *Standard Oil Co. v. City of Tallahassee*[44] a federal court upheld a zoning ordinance that amortized a gasoline station in the state capital over a ten-year period. The Florida Supreme Court viewed this decision with approval in *Adams v. Housing Authority*,[45] thereby implying that a zoning ordinance that provides for discontinuance of a nonconforming use after a reasonable period of time will be upheld in Florida.

CONCLUSION

The problem of eliminating nonconforming uses is a vexatious one for municipal zoning authorities. Eminent domain is usually expensive, and its application is severely restricted by constitutional limitations. The nuisance theory is also limited in application to few factual patterns; in addition, the immediate termination of use that results often works a financial hardship on the property owner. Amortization is the most far reaching of the three available methods and, it is submitted, is the most equitable for both property owner and the community.

Amortization is certainly no panacea for all zoning problems. Since the projection of sound zoning plans beyond a few years is extremely difficult, amortization will be of slight value when dealing with large capital investment property that would reasonably require long periods of time for their termination. The success of amortization that extends beyond a few years is often speculative. However, amortization is a very useful device when applied to nonconforming uses that can be fairly eliminated within a short period of time. The use of property for parking lots, junk yards, gasoline stations, and neighborhood groceries or drugstores can usually be discontinued within a few years without offending the rules of reasonableness.

Amortization offers a flexible method of terminating nonconforming uses—a method that can fairly balance the equities between municipality and property owner. It is submitted that with the urgent need for zoning controls in a rapidly developing state such as this one, it would be desirable for Florida municipalities to utilize amortization as the fairest and most valuable device for discontinuing nonconforming uses.

ROBERT J. CARR
EDWARD B. DAVIS, JR.

[44] 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950).
[45] 60 So.2d 663, 665 (Fla. 1952) (dictum).