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Amortization of Non-conforming Uses

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I. LEGAL CONSIDERATION

The power of a municipality to pass reasonable zoning ordinances was firmly established in *Village of Euclid v. Ambler Realty Co.*,[1] which settled the controversy over prospective regulation of undeveloped land but left unresolved the problem of how to deal with previously existing non-conforming uses, which were believed to be entitled to constitutional protection.[2]

[1] 272 U.S. 365 (1926). For an excellent discussion of this case see Reno, *Non-Euclidean Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963). See also Trager, *Contract Zoning*, 23 MD. L. REV. 121 (1963).

[2] Board of Zoning Appeals of Howard County v. Meyer, 207 Md. 389, 114 A. 2d 626 (1955); Higgins v. City of Baltimore, 206 Md. 89, 110 A. 2d 503 (1955).

Non-conforming uses are common to all zoning statutes or ordinances "and are those permitted by such statutes or ordinances to continue even though similar uses are not permitted in the area in which they are located."[3] To qualify as a non-conforming use, a use must be in existence at the time of the enactment of the zoning ordinances or at the date the ordinance becomes effective.[4]

Generally, prior non-conforming uses have been allowed to continue because it has been felt that zoning laws could not constitutionally be applied retroactively to deprive the owner of his non-conforming use. The Court of Appeals of Maryland accordingly has held that a lawful pre-existing use of property confers a vested right which cannot be destroyed by the subsequent enactment of zoning regulation.[5] The court has also held that the zoning of an area by a county as residential cannot apply to a previously established commercial use which is entitled under the circumstances to constitutional protection.[6]

"Non-conforming uses are usually continued with the expectation that they will eventually disappear" through abandonment, destruction and other normal changes.[7] Non-conforming uses, however, still abound, with the result that

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[3] Beyer v. City of Baltimore, 182 Md. 444, 446, 34 A. 2d 765 (1943).

[4] See Boulevard Scrap v. Baltimore, 213 Md. 6, 130 A. 2d 743 (1957); Daniels v. Board of Zoning Appeals, 205 Md. 36, 106 A. 2d 57 (1954).

[5] Amereihn v. Kotras, 194 Md. 591, 601, 71 A. 2d 865 (1950). At page 600 the court said:

> "It is well established law that if a person, prior to the time zoning regulations are effective, commences to build on his property a building for the purpose of conducting light manufacturing (as in this case) and expends money in the erection of such a building, or in partially erecting such a building, subsequent zoning regulations cannot prevent him from completing the building and conducting light manufacturing therein. If his property is within an area thereafter zoned as residential he, nevertheless, is regarded as having a non-conforming use for the purpose of conducting his business in that area. The effect of zoning regulations is in the future — their operation is prospective, to protect and preserve, not destroy."

Cf., Dal Maso v. Board of County Com'r, 182 Md. 200, 206, 34 A. 2d 464 (1943) and Kahl v. Consolidated Gas & Elec. Co., 191 Md. 249, 257, 60 A. 2d 754 (1948).

[6] Board of Zoning Appeals of Howard County v. Meyer, 207 Md. 389. *supra*, note 2, 294. The rule was enunciated by the Maryland Court of Appeals in the earlier case of Amereihn v. Kotras, 194 Md. 591, 601, 71 A. 2d 865 (1950):

> "If a property is used for a factory, and thereafter the neighborhood in which it is located is zoned residential, if such regulations applied to the factory it would cease to exist, and the zoning regulation would have the effect of confiscating such property and destroying a vested right therein of the owner. Manifestly this cannot be done, because it would amount to a confiscation of the property, and non-conforming use is a vested right and entitled to constitutional protection."

[7] See Schiff v. Board of Zoning Appeals, 207 Md. 365, 368, 114 A. 2d 644 (1955).

one of the primary zoning problems today is the elimination of non-conforming uses.

The only positive method of eliminating non-conforming uses yet devised is to amortize a non-conforming structure, that is, determine the normal useful remaining life of the building and prohibit the owner from maintaining it after the expiration of that time.[8]

Faced for the first time with a case involving amortization provisions in a municipal zoning ordinance, the Court of Appeals of Maryland held in *Grant v. Mayor and City Council of Baltimore* that the non-conforming use could be eliminated by the five-year amortization method provided for in the Baltimore City zoning ordinance and that such a provision was reasonable and constitutional.[9] *Grant* involved an action by several signboard companies and owners of property leased for billboard use to restrain the Mayor and City Council and the Baltimore City Building Inspection Engineer from enforcing a zoning ordinance which provided for removal of billboards from residential areas where such billboards constituted non-conforming uses after a five-year amortization period. The appellants argued that their rights to non-conforming uses were vested rights of property and that the enforcement of the ordinance would take these rights from them without compensation, contrary to Article 3, Section 40 of the Constitution of Maryland, and so would deprive them of property without due process of law.

In deciding against the landowners, the court stated:

> ". . . the earnest aim and ultimate purpose of zoning was and is to reduce non-conformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned."[10]

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[8] Crolly & Norton, *Termination of Non-Conforming Uses*, 62 ZONING BULL. 1 (1952).

[9] 212 Md. 301, 129 A. 2d 363 (1957). *Cf.* City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P. 2d 34, 44 (1954), where the court stated:

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

[10] *Id.* at 307. *Cf.* Harbison v. City of Buffalo, 4 N.Y. 2d 553, 152 N.E. 2d 42, 45, 176 N.Y.S. 2d 598 (1958), where the court said:

> ". . . our approach to the problem of permissible restriction on non-conforming uses has recognized that, while the benefit accruing to the public in terms of more complete and effective zoning *does not justify the immediate destruction* of substantial businesses or structures developed or built prior to the ordinance, the policy of zoning embraces the concept of the ultimate elimination of non-conforming uses, and thus the courts favor reasonable restriction of them." (Emphasis added.)

After finding that the use of eminent domain and the law of nuisances were unsatisfactory methods for eliminating non-conforming uses,[11] the court suggested:

> "It has become apparent that if non-conforming uses are to be dealt with effectively it must be under the law of zoning, a law not limited in its controls to harmful and noxious uses in the common law sense. Many legislative bodies have come to the technique of statutes or ordinances that call for the cessation of the extraneous use after a tolerance or amortization period, varying in length with the nature of the use and of the structure devoted to the use, from one year to sixty years. . . . It has been said that the only positive method yet devised of eliminating non-conforming uses is to determine the normal useful remaining ecomonic life of the structure devoted to the use and prohibit the owner from using it for the offending use after the expiration of that time."[12]

Thus the Maryland court appears to have approved the amortization technique for elimination of non-conforming uses, and, at the same time, to have disapproved the use of eminent domain and the law of nuisances in accomplishing this end.

The court did not say, however, that every amortization technique used will be found constitutional:

> "The distinction between an ordinance that restricts future uses and one that requires existing uses to stop after a reasonable time, is not a difference in kind but one of degree and, in each case, constitutionality depends on overall reasonableness, on the importance of the public gain in relation to the private loss."[13]

On the basis of this statement, it seems the court would uphold the elimination of non-conforming uses by amortization but only if the statute is reasonable and the benefit

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[11] *Id.* at 308, 129 A. 2d at 365:

"The effectiveness of eminent domain is restricted by the necessity that the purchase must be for a public use, by the complexities of administrative procedures and by the high cost of reimbursing the property owners. The law of nuisances has limits that many times make its use fall short of the objective. Some courts will restrain only common law nuisances and even where the lawmakers have expanded the nuisance category, judicial enforcement seems often to have been restricted to uses that cause a material and tangible interference with the property or personal well-being of others, uses that are equivalent to or are likely to become common law traditional nuisances."

[12] *Id.* at 308, 309.

[13] *Id.* at 315.

to the public outweighs the loss to the individual property owners.

In the *Grant* case, the Court of Appeals was guided by two fairly recent California decisions. The first of these was *Livingston Rock and Gravel Company v. County of Los Angeles.*[14] There the zoning board for the County of Los Angeles denied the right of a cement company to continue a non-conforming use after a twenty-year amortization period. The company was established in a zone of unlimited uses. The area was rezoned to include only light manufacturing and the cement mixing company became a non-conforming use. The court upheld the Zoning Board's action against constitutional attack:

> "[Z]oning legislation looks to the future in regulating district development and the eventual liquidation of non-conforming uses within a prescribed period commensurate with the investment involved."[15]

The more recent California case, frequently quoted with approval by the Maryland Court of Appeals in *Grant,* is *City of Los Angeles v. Gage.*[16] In 1930, Gage acquired two adjoining lots. He constructed a two-family residential building on one lot and rented the upper half solely for residential purposes. The lower half of the building was used for his plumbing supply business. In 1946, the City Council of Los Angeles passed an ordinance, applicable to the defendant's lot, providing that:

> "The non-conforming use of a conforming building or structure may be continued, except that in the 'R' Zones [residential zones] any non-conforming commercial or industrial use of a residential building or residential accessory building shall be discontinued within five (5) years from June 1, 1946, or five (5) years from the date the use becomes non-conforming, whichever date is later."[17]

In 1946 the City Council also changed the zoning classification on the defendant's lots from commercial to residential. The City then sought to enjoin the defendant from conducting his plumbing supply business on this property. The defendant contended that the ordinance was arbitrary and unreasonable, that it had no substantial relation to the public's health, safety, morals or general welfare, and that it was an unconstitutional impairment of his property

[14] 43 Cal. 2d 121, 272 P. 2d 4 (1954).
[15] *Id.* at 127.
[16] 127 Cal. App. 2d 442, 274 P. 2d 34 (1954).
[17] *Id.* at 448.

rights. Gage estimated that he would suffer a loss of between $125,000 and $350,000 annually, based on past gross income, if the injunction were to be granted. In upholding the ordinance as applied to the defendant, the court stated that the neighborhood change was sufficient reason for passing the ordinance[18] and added that the City Council had the undoubted power to pass such legislation as is necessary to effectuate its zoning.[19] In discussing amortization as a method of eliminating non-conforming uses, the court considered the reasonableness of amortization:

> "It would seem to be the logical and reasonable method of approach to place a time limit upon the continuance of existing non-conforming uses, commensurate with the investment involved and based on the nature of the use, and in cases of non-conforming structures, on their character, age, and other relevant factors."[20]

A more recent case is *Harbison v. City of Buffalo*,[21] where for the first time the highest court of a state discussed the factors which should be used in determining the reasonableness of an amortization statute. Since 1924, the petitioners in *Harbison* had operated a cooperage business (the reconditioning of steel barrels and drums) in an unzoned area of Buffalo. In 1926, the area was zoned for residential use. From 1936 through 1956 petitioners applied for and obtained a license to carry on their business under an ordinance which included their operations under the definitions of junk dealers. Effective July 30, 1953, the ordinances of the City of Buffalo were amended to provide, in effect, that premises within certain classifications, including the petitioners' premises, must liquidate their use within a three-year period. Accordingly, in 1956, petitioners were notified to cease the operation of their business immediately. After their license application was denied, petitioners brought a mandamus proceeding and the trial court granted an order directing that a wholesale junk license be issued to the petitioners. The Appellate Division affirmed. The New York Court of Appeals, with three judges dissenting, reversed and remanded the case for a final determination of the issues, holding that the constitution does not forbid termination of a prior non-conforming use after a period long enough to allow the owner a fair

[18] *Id.* at 453.

[19] *Id.* at 459.

[20] *Ibid.*

[21] 4 N.Y. 2d 553, 152 N.E. 2d 42, 176 N.Y.S. 2d 598 (1958).

opportunity to amortize his investments and make future plans.

Although a distinction exists between a non-conforming use and a non-conforming structure, the rules of amortization applying to each are analogous; the New York Court of Appeals recognized that:

> "If, therefore, a zoning ordinance provides a sufficient period of permitted non-conformity, it may further provide that at the end of such period the use must cease. This rule is analogous to that with respect to non-conforming structures."[22]

Unlike the decisions in *Grant* and *Gage,* however, the New York court mentioned five factors to be considered in determining the reasonableness of the statutory amortization period:

(1) the nature of the surrounding neighborhood;

(2) the value and condition of the improvements on the premises;

(3) the nearest area to which the owner may relocate;

(4) the cost of such relocation; and

(5) other reasonable factors and costs.

The Maryland Court of Appeals in *Grant* did not undertake to create any specific standards or guidelines to determine reasonableness; in *Gage,* the California court took into consideration the investment involved and the nature of the use in discussing the reasonableness of the amortization ordinance before it.

Harbison "left to the municipal legislatures the difficult problem of estimating amortization periods which would survive judicial scrutiny when applied to specific non-conforming uses."[23] Three years after *Harbison,* however, the Intermediate Appellate Court of New York held constitutional an amortization ordinance providing that non-conforming signs existing at the time of the adoption of the ordinance should be removed fifteen months after its effective date,[24] stating that the loss suffered by the user was insubstantial when compared with the benefit derived by the public. Also the Supreme Court of Kansas has upheld legislation requiring removal of auto wrecking yards and

[22] *Id.* at 562.

[23] See 14 SYRACUSE L. REV. 62, 63 (1962).

[24] Village of Larchmont v. Thomas B. Sutton, 30 Misc. 2d 245, 217 N.Y.S. 2d 929 (1961).

trailer storage yards in residential districts within two years after the effective date of the resolution.[25]

The federal courts also have recognized the constitutionality of the amortization device. In *Standard Oil Co. v. City of Tallahassee*,[26] a divided Fifth Circuit upheld a local zoning ordinance requiring the Standard Oil Company to remove within ten years a non-conforming gas station situated near the Florida state capitol. The zoning ordinance's intent was to redevelop an unsightly area around the Florida capitol; discontinuance of the filling station was required even though the area as a whole had not yet been redeveloped and many of the residences in the area were far below standard.

II. LEGISLATIVE TECHNIQUES

Assuming that the Court of Appeals would uphold as constitutional amortization provisions for the elimination of non-conforming uses, if such provisions were fair and reasonable and created no undue hardship on the user, it is suggested that the Maryland legislature pass a statute authorizing such amortization provisions as an amendment to Maryland's present zoning statutes.[27]

It is also submitted, however, that determination of periods for cessation of the non-conforming uses be left to local governing bodies, and that no attempt be made to set up a uniform code for the entire state, since each local governing body will have its own peculiar problems. Such enabling acts exist in at least four States, and follow the same pattern in each of those states. The broadest word-

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[25] Spurgeon v. Board of Comrs. of Shawnee County, 181 Kans. 1008, 317 P. 2d 798 (1957). See also City of Seattle v. Martin, 54 Wash. 2d 541, 342 P. 2d 602 (1959), where the Court of Appeals of Washington held constitutional Seattle Ordinance No. 45382 which provided: "In the First or Second Residence Districts, any non-conforming use of premises which is not in a building shall be discontinued within a period of one year from the date this Ordinance shall become effective." The court stated that the benefit the public would derive far outweighed the hardship the tenant would suffer from termination of the non-conforming use and held that this ordinance was not discriminatory.

[26] 183 F. 2d 410 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950).

[27] Maryland's present zoning enabling act, 6 MD. CODE ART. 66B, § 1 (1957), reads as follows:

> "For the purpose of promoting the health, security, general welfare and morals of the community, the mayor and city council of Baltimore City and the legislative bodies of cities and incorporated towns of the State containing more than 10,000 inhabitants are hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, and percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes."

ing is found in a Virginia enabling act, providing that "reasonable regulations may be adopted by councils of cities and towns of the Commonwealth for the gradual elimination of uses of land and buildings that do not conform to such (subsequently enacted zoning) regulations and restrictions."[28] In Pennsylvania,[29] Oklahoma[30] and Utah,[31] the legislatures empowered the local authorities to provide for the termination of non-conforming uses either by specifying the period or periods within which they shall be required to cease, or by providing a formula or formulae whereby the compulsory termination of non-conforming use shall be so fixed as to allow a reasonable period for the recovery of amortization of the investment in the non-conformance.

A few examples of how some localities solved their particular problems can be best illustrated by reference to several municipal statutes. A Los Angeles[32] zoning ordinance provides for the liquidation of non-conforming uses in residential districts in periods of forty, thirty or twenty years, according to the type of structure involved, the law not to take effect for twenty years from date of passage. Similarly, a proposed Minneapolis zoning ordinance provides a thirty year period for amortization of wood frame buildings, forty years for wood and masonry and fifty years for buildings, of other construction, the time period to be figured from the date of erection of the building.[33] In the alternative, a statute can be drafted which is aimed only at zoning out the most undesirable non-conforming uses. For example, a zoning ordinance may provide that builders'

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[28] 3 VA. CODE § 15-843 (1950).

[29] 16 PURDON'S PENNA. STAT. ANNO. § 2033(a) (1954).

[30] 19 OKLA. STAT. § 863.16 (1954).

[31] UTAH STAT. § 17-27-18 (1953).

[32] Zoning Ordinance of Los Angeles, California § 12.23 (1951). See also Zoning Ordinance of Portland, Oregon, § 6-2201(6) (1950), which provides for liquidation of non-conforming uses in 60, 40, or 30 year periods according to the type of structure involved, the law not to take effect until 15 years after the ordinance was passed, and see Chicago, Illinois, Zoning Ordinance §§ 6.1, 6.4-8, 6.5-4, 6.6-4 (1957), which contains elaborate amortization provisions, granting grace periods of from 5 years for buildings of less than $2,000 assessed valuation to 40 years for major buildings of "fire resistant" construction.

[33] Note, 6 WESTERN RESERVE L. REV. 183 (1955). This note also contains the Proposed Zoning Ordinance of New York City, New York, § 870-73, which provides that non-conforming use of land in residential or residential retail districts must liquidate within 3 years. In residential districts signs and buildings under $500 valuation must liquidate within 3 years. Other buildings are given 30 years to liquidate from the time of their establishment, with minimum periods of 10, 15, or 20 years before the enacted ordinance will take effect (the periods vary according to the classifications of the buildings).

supply yards, contractors' yards or lumber yards in residential districts must be liquidated, removed or discontinued in a three year period.[34]

III. CONCLUSION

Non-conforming uses can and must be eliminated. It is suggested that the amortization scheme, by balancing the benefit gained by the public against the loss sustained by the individual user, is the fairest method of achieving this goal.

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[34] Zoning Ordinance of Cortlandt, New York, § 9 (1951). See also Zoning Ordinance of Kansas City, Missouri, § 58-18 (1946), which provides that signs and billboards must be liquidated within 5 years, and Ordinance No. 711 (1953), Shawnee County Zoning Plan (Kansas), which provides that auto wrecking yards and the storing or locating of trailers are non-conforming uses in residential districts and are to be removed within 2 years from the effective date of the resolution.