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David M. Roberts

ZONING—ABATEMENT OF PRIOR NONCONFORMING USES: NUISANCE REGULATIONS AND AMORTIZATION PROVISIONS

I. Introduction

"Property" traditionally is defined to include not only the right to hold title to a piece of land, but also the right to *use* that land.[1] Since realty came to hold a prominent place in English law at a time when society was largely agricultural, the shift in population to the cities, accompanied by the need for legal restraints upon the use of urban land, severely taxed traditional concepts of property rights.

The law of nuisance was employed to meet the challenge. Embodied in the maxim *sic utere tuo ut alienum non laedas* is the legal principle that the holder of property rights in land should not use that land so as to injure the rights of another. The prohibited use of land is the *unreasonable* use.

It is obvious, however, that the law of nuisance is not sufficient to meet the requirements of a highly urbanized society. More positive measures are needed to deal with the problems of over-crowding, fire hazards, health and police protection, to mention only a few. To accomplish these ends, a much higher degree of affirmative governmental regulation over the use of land came into existence. These regulations are well-recognized incidents of the police power inherent in every sovereign state.

In America, statutory restrictions upon the unfettered use of realty are found as early as 1692, when, for the purpose of establishing "fire zones," limitations were enacted upon the types of structures which could be built in Boston.[2] Later, when it became apparent that the rising problem of over-crowding was helping to breed unsanitary conditions, disease and crime, so-called "tenement house codes" were enacted.[3] Another attack on the increasingly serious urban problem was to restrict to specified localities certain injurious occupations, not nuisances at the common law, or to ban them altogether from the municipality.[4]

By the beginning of the twentieth century, it was apparent that the foregoing helter-skelter methods were not sufficient. Taking the lead, the City of New York in 1916 enacted the first comprehensive zoning code,[5] which specified in detail what uses of land were permissible within the various areas of the city. Thought by many to be an unconstitutional taking of property for public use without just compensation, the ordinance nevertheless was upheld by the New

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Editor's Note: For an important Missouri case see Hoffman v. Kinealy, 389 S.W.2d 745 (Mo. En Banc 1965), discussed at note 93 *infra.*

1. See, *e.g.*, Terrace v. Thompson, 263 U.S. 197, 215 (1923).
2. Cited in 1 Metzenbaum, Zoning 4 (2d ed. 1955). See also, Metzenbaum, *The History of Zoning—"A Thumbnail Sketch,"* 9 W. Res. L. Rev. 36 (1957).
3. 1 Metzenbaum, *op. cit. supra* note 2, at 5-6.
4. *Id.* at 6-7.
5. Enacted pursuant to New York, N.Y., Charter § 242 (a), (b)(1914), as amended, N.Y. Sess. Laws 1916, ch. 497.

York Court of Appeals as being consistent with the requirements of due process.[6] Other cities and states soon followed New York's pioneering example by enacting similar laws. The courts of some other states did not follow the New York court, however, and there was soon a wide divergence in the decisions as to whether such zoning ordinances were constitutional.[7]

The landmark case of *Village of Euclid v. Ambler Realty Co.*,[8] decided by the United States Supreme Court in 1926, put to rest all doubts as to whether a comprehensive zoning ordinance met the due process test by holding that such an ordinance, like any other exercise of the police power, is constitutional if reasonably applied.[9] The *Euclid* Court, recognizing that the line separating a legitimate zoning plan from an illegitimate one is imprecise, turned to the law of nuisance for a "helpful clew."[10] Though zoning and nuisance are two separate aspects of the police power, they have much in common. In both, the question of whether a particular use can be prohibited or suppressed cannot be governed by an abstract consideration of the *use alone;* the use must be considered in the context of the circumstances and locality in which it is found.

The primary concern of this comment is the examination of the present state of the law concerning prior nonconforming uses; that is, those uses of land which were actually in existence at the time of the enactment of the zoning ordinance, and which are not in harmony with the plan's permitted uses.[11] What measure of constitutional protection is afforded these nonconforming uses, and how may they constitutionally be abated?[12]

II. Restrictions on Nonconforming Uses

At the time the *Euclid* decision was handed down, it seems to have been generally assumed that nonconforming uses would disappear rapidly and thus

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6. Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920).

7. That the need for comprehensive zoning codes was widely recognized at this time is shown by the fact that within the approximately ten years between the enactment of the New York code and Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), some sixteen states had already *ruled* on the constitutionality of similar ordinances. The large majority of these courts had upheld the ordinances. *Id.* at 369.

8. 272 U.S. 365 (1926).

9. Said the Court, per Mr. Justice Sutherland, "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are coming within the field of their operation. In a changing world, it is impossible that it should be otherwise." *Id.* at 387.

10. *Ibid.*

11. A nonconforming use is a "use of a building or land which does not agree with the zoning regulations of the use district in which it is situated. . . ." 2 Rathkopf, Zoning and Planning § 58-1 n.1 (3d ed. 1960).

12. Among the numerous law review commentaries on termination of non-

would not long impair the effectiveness of zoning plans.[13] In the desire to protect economic investments which were frequently very substantial, it was quite natural for the courts to restrict the power of the municipality to zone established businesses out of existence. Zoning was felt to be *prospective* in nature, intended only to regulate the future use of land.[14] Following this view, the majority of courts held that zoning ordinances which made no provision for the continuance of a prior nonconforming use were an arbitrary and unreasonable deprivation of property.[15]

The early optimism about the rapid disappearance of nonconforming uses was unwarranted.[16] Quite contrary to original expectations, nonconforming users often capitalize on their favored and unique position and because of their virtual monopoly become more securely entrenched than they otherwise would be. A good example is the small grocery store located in a residential use district. The economics of present day marketing being what they are, such small stores often can exist only as nonconforming uses, protected by the very laws designed to exclude them.

Even before the tenacity of the nonconforming use was recognized as a serious threat to zoning, it was well settled that such uses were not to be favored in the eyes of the law, since they are by their very nature inharmonious with the zoning plan.[17] Therefore, almost from the very beginning, the courts upheld reasonable regulations designed to restrict the nonconforming use. These restrictions fall into two broad categories:

(1) *Requirement of actual use.* The rationale of this type of regulation is that unless the land actually is being used in a nonconforming way, the prop-

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conforming uses, the following are especially helpful: Anderson, *Amortization of Nonconforming Uses—A Preliminary Appraisal of Harbison v. City of Buffalo,* 10 SYRACUSE L. REV. 44 (1959); Anderson, *The Nonconforming Use—A Product of Euclidian Zoning,* 10 SYRACUSE L. REV. 215 (1959); Katarincic, *Elimination of Nonconforming Uses, Buildings and Structures by Amortization—Concept v. Law,* 2 DUQUESNE L. REV. 1 (1963); Moore, *The Termination of Nonconforming Uses,* 6 WILLIAM & MARY L. REV. 1 (1965); Noel, *Retroactive Zoning and Nuisances,* 41 COLUM. L. REV. 457 (1941); Young, *The Regulation and Removal of Nonconforming Uses,* 12 W. RES. L. REV. 681 (1961); Comment, 24 MD. L. REV. 323 (1964); Comment, 57 NW. U.L. REV. 323 (1962); Comment, 1951 WIS. L. REV. 687; Note, 44 CORNELL L.Q. 453 (1959); Note, 67 HARV. L. REV. 1283 (1954); Note, 9 U. CHI. L. REV. 477 (1942); Note, 1965 U. ILL. L.F. 604; Note, 103 U. PA. L. REV. 1102 (1955); Note, 102 U. PA. L. REV. 91 (1953); Note, 35 VA. L. REV. 348 (1949).

13. See, *e.g.,* Noel, *supra* note 12.

14. Harbison v. City of Buffalo, 4 N.Y.2d 553, 570, 176 N.Y.S.2d 598, 611, 152 N.E.2d 42, 51 (1958) (dissent).

15. *E.g.,* City of Los Angeles v. Gage, 127 Cal. App.2d 442, 454, 274 P.2d 34, 40 (1954); Grant v. Mayor & City Council of Baltimore, 212 Md. 301, 307, 129 A.2d 363, 365 (1957); Molnar v. George B. Henne & Co., 377 Pa. 571, 105 A.2d 325 (1954).

16. *E.g.,* Grant v. Mayor & City Council of Baltimore, *supra* note 15, at 307, 129 A.2d at 365; Hoffman v. Kinealy, 389 S.W.2d 745, 750 (Mo. En Banc 1965). It has been stated that "the fundamental problem facing zoning is the inability to eliminate the nonconforming use." City of Los Angeles v. Gage, *supra* note 15, at 454, 274 P.2d at 40.

17. 2 RATHKOPF, *op. cit. supra* note 11, § 62-1.

erty owner will suffer no material hardship by prohibition of such use.[18] Though the question of when a lawful nonconforming use arises may be difficult in a given set of circumstances, conceptually it comes into being when the property owner has made a substantial use of the property in a nonconforming manner. If the property owner has abandoned or discontinued his nonconforming use,[19] it is within the power of the municipality to forbid a resumption of that use, again on the theory that no financial hardship will be caused beyond that which he already has inflicted on himself. It also has been held that the change from one nonconforming use to another evidences an intent to abandon the former, which thereafter may not again be resumed.[20]

(2) *Prohibiting or limiting repairs and extensions.* If zoning ordinances are ever to be effective, nonconformities must not be allowed to enlarge or expand. All that is taken away by these regulations is the landowner's ability to make his noncompliance with the zoning laws more flagrant than it already is. On the theory that the property owner already has lost the value of his investment if his nonconforming structure has been destroyed, as by fire, his right to rebuild and repair can validly be denied.[21] Similarly, substantial structural alterations may be prohibited.[22] However, the property owner may make such repairs as are necessary to continue the nonconforming use, as long as they do not tend to enlarge it.[23]

The great shortcoming of the restrictions discussed thus far is that they assume the validity of the existence of nonconformities and attempt to deal with them "after the fact." The practical effectiveness of these restrictions is questionable in most cases. Recognizing that it is necessary to devise principles which cut to the heart of the problem instead of merely chipping away at the periph-

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18. Young, *supra* note 12, at 686-88.

19. Strictly speaking, the terms "abandonment" and "discontinuance" are not synonymous. The former is held to require an intent specifically to abandon the use, while no such intent is a condition precedent to the operation of an ordinance terminating the nonconforming use after non-use for a specified period of time. Auditorium, Inc. v. Wilmington, 47 Del. (8 Terry) 373, 386, 91 A.2d 528, 534-35 (1952). See 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 7.07 (1956). But a few courts require intent to abandon as an element of even the discontinuation ordinances. 2 RATHKOPF, *op. cit. supra* note 11, §§ 61-14, 61-15.

20. 1 ANTIEAU, *op. cit. supra* note 19, § 7.07; 2 RATHKOPF, *op. cit. supra* note 11, § 61-13. Most zoning ordinances are "cumulative," and the landowner is given the power to change to a *lesser* nonconforming use. This is a very practical provision, since it tends to bring the nonconformity more into harmony with its surroundings. See Reno, *Non-Euclidian Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963).

21. D'Agostino v. Jaguar Realty Co., 22 N.J. Super. 74, 91 A.2d 500 (1952). The complexity of the problem increases when the nonconforming structure is not totally destroyed. Commonly, the applicable ordinance specifies a percentage of destruction, above which repair will not be permitted. 2 RATHKOPF, *op. cit. supra* note 11, §§ 61-14, 61-15.

22. 1 ANTIEAU, *op. cit. supra* note 19, § 7.07.

23. *Ibid.*

ery, zoning experts have begun to use other legal tools to eliminate the nonconforming use.[24]

III. NUISANCE

Under the law of nuisance, certain uses of property are considered illegitimate: *uses which unreasonably injure or annoy another in the enjoyment of his legal rights.*[25] Such uses are subject to immediate abatement, regardless of the financial hardship resulting thereby to the person so using his land. Traditionally, the law of nuisance has been employed only where

> the objectionable use constituted a clear hazard to the plaintiff's (or the public's) health, safety, or morals or caused a substantial interference with this peace or comfort. This standard normally restricted injunctive relief to those instances where the use has produced effects of a tangible, crude, and exceedingly distasteful nature.[26]

It is clear that municipal corporations possess the authority not only to suppress nuisances, but also to provide legislatively what shall be deemed a nuisance.[27] Even though a particular use was not a nuisance at common law, the legislative body may declare it to be such,[28] so long as its determination is not arbitrary and capricious.[29] There are restrictions on this power: though the municipality can add to the common law list of nuisances, it cannot under the guise of the police power abate that which is not in fact a nuisance.[30]

In view of the municipality's power to define and abate nuisances under the police power, it was quite natural for city planners to turn to the law of

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24. Condemnation is a positive method, not discussed in this comment, which is sometimes employed to terminate nonconforming uses. It is now generally held that the elimination of nonconformities is a sufficient "public use" to enable the municipality to exercise the power of eminent domain for the purpose of effecting its zoning plan. However, the usefulness of this device is greatly limited by its inherent expense. See generally, Anderson, *The Nonconforming Use—A Product of Euclidian Zoning, supra* note 12; Moore, *supra* note 12.

25. 39 AM. JUR. *Nuisances* § 2 (1942).

26. Moore, *supra* note 12, at 9-11.

27. Kays v. City of Versailles, 224 Mo. App. 178, 22 S.W.2d 182 (K.C. Ct. App. 1929); 1 ANTIEAU, *op. cit. supra* note 19, § 6.01; 39 AM. JUR. *Nuisances* § 12 (1942).

28. State v. Tower, 185 Mo. 79, 84 S.W. 10, 402 (1904).

29. Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801 (1927).

30. If the use complained of is a nuisance *per se,* then without doubt it may be abated summarily. If, however, the use is merely one in fact (*per accidens*), the city must show more than mere violation of the ordinance before abatement is proper: it must show that the use is in fact an unreasonable interference with the rights of others. First Ave. Coal & Lumber Co. v. Johnson, 171 Ala. 470, 54 So. 598 (1911); Wilkins v. City of Harrison, 218 Ark. 316, 236 S.W.2d 82 (1951). See 1 ANTIEAU, *op. cit. supra* note 19, § 6.01. A nuisance *per se* is generally considered to be a use of property "which is a nuisance at all times and under any circumstances, regardless of location or surroundings." 39 AM. JUR. *Nuisances* § 11 (1942). A nuisance *per accidens,* on the other hand, is a use "which is not a nuisance per se, but which may become a nuisance by reason of circumstances, location, or surroundings." *Ibid.*

nuisance for other methods to combat nonconforming uses.[31] Indeed, it would seem that an expanded concept of nuisance was judicially recognized and approved before zoning itself. In *Hadacheck v. Sebastian*[32] the property owner was convicted for violation of an ordinance forbidding the manufacture of clay bricks within certain districts of the city. This prohibition, which had the effect of reducing the value of the land from some 800,000 dollars to 60,000 dollars, was not grounded in the putative power of the city to establish zoning districts as we know them today; rather, it declared that the specified use was a nuisance. The United States Supreme Court approved this use of the police power, saying

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, 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. . . . To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community.[33]

Implicit in the *Hadacheck* opinion is the recognition that the central problem in abating harmful uses of land is a balancing of the relative interests of the public and the individual landowner. In determining whether a particular use is so out of harmony with its surroundings as to be justifiably labelled a "nuisance," the Court accorded great deference to the decision of the legislative body: in the absence of a showing of bad faith and dishonest exercise of judgment, such decision will stand.[34] Since the classification of certain uses of land as unreasonable is a fact question, and, in the large number of cases, subject to honest differences of opinion, this judicial deference is of great significance.[35]

Hadacheck's effect was to allow the municipality the power to accomplish some of the primary purposes of zoning. That is, the city might be divided into what now would be called "use districts," excluding from certain of those districts uses of property considered concretely harmful. Until quite recently, however, the laws of nuisance and zoning have existed side by side as merely similar exercises of the police power. There have been few attempts to combine the two in an effort to rid the community of nonconforming uses. True, if the nonconformity was considered a nuisance it could be abated; but the fact that it was a nuisance did not proceed ipso facto from its being a nonconformity.

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31. Moore, *supra* note 12, at 10.
32. 239 U.S. 394 (1915).
33. *Id.* at 410.
34. *Id.* at 413-14. This is a quite normal application of one of the cardinal rules of constitutional law: that there is a strong presumption of constitutionality of legislation. Village of Euclid v. Ambler Realty Co., *supra* note 8, at 388. See generally, 16 AM. JUR. 2d *Constitutional Law* §§ 137-39 (1964).
35. 1 ANTIEAU, *op. cit. supra* note 19, § 6.01; 37 AM. JUR. *Municipal Corporations* § 293 (1941); 39 AM. JUR. *Nuisances* § 13 (1942).

Livingston Rock & Gravel Co. v. County of Los Angeles[36] is a widely noted case which displays a municipality's attempt to unite the laws of zoning and nuisance. This was a suit to enjoin enforcement of a regional planning commission's finding that plaintiff's cement mixing plant constituted a nuisance and order that it cease operations within fourteen months. The ordinance in question permitted nonconforming uses such as plaintiff's twenty years of continued legal use, subject to immediate abatement if the planning commission found that it could revoke the exception "without impairing the constitutional rights of any person"[37] or if "the use for which approval was granted is so exercised as to be detrimental to the public health or safety, or so as to be a nuisance."[38] The California court recognized that it had generally been accepted that zoning ordinances which required termination of nonconforming uses were of "doubtful constitutionality."[39] The ordinance was upheld, however, the court saying that

> revocation of the right to continue a previously existing lawful business because of [the finding by the commission that it was so exercised as to be detrimental to the public health or safety, or so as to be a nuisance] would be a lawful exercise of the police power.[40]

The opinion places great emphasis on the provision of the ordinance which allowed plaintiff's nonconforming use to continue for twenty years and notes that

> zoning legislation looks to the future in regulating district development and the eventual liquidation of nonconforming uses within a prescribed period commensurate with the investment involved.[41]

The *Livingston* opinion is unsatisfactory in many ways.[42] In accord with the general principles of nuisance regulation, the court held that hardship to the property owner is not controlling. It also accepted the thesis that an administrative agency has the power to determine whether a particular use constitutes a nuisance and order termination thereof.[43] These principles could

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36. 43 Cal.2d 121, 272 P.2d 4 (1954).
37. *Id.* at 124, 272 P.2d at 7.
38. *Ibid.*
39. *Id.* at 127, 272 P.2d at 8.
40. *Id.* at 128, 272 P.2d at 9.
41. *Id.* at 127, 272 P.2d at 8-9.
42. The question before the court was whether the decision of the commission was reasonable as applied to the plaintiff. This question was properly reviewable at law by way of certiorari or mandamus; hence, plaintiff was not entitled to the injunctive relief he sought. There was thus no decision on the question of the reasonableness of the commission's ruling that the nonconforming use constituted a nuisance. *Livingston* is further confused by the possibility that the nonconforming use was an actionable nuisance even absent the ordinance in question. On this latter point, see 103 U. PA. L. REV. 1102, 1105, n.17 (1955).
43. *Livingston* raises a problem not discussed in this comment, which potentially is present whenever a prior nonconforming use is ordered to be terminated: equal protection of the laws. Just as a zoning ordinance is discriminatory if directed solely against a particular nonconforming use and is not in its terms equally applicable to all similar nonconforming uses within the use district, so an ordinance requiring termination of a nonconformity must be equally applicable

greatly effect the purposes of zoning. Nevertheless, the central problem in the abatement of any nonconforming use is a question of *degree:* how substantial must the injury be to surrounding property and to the public before the municipality may validly abate it as a nuisance?[44] Another question left unanswered is what relation does the statutory grace period bear to the problem of nuisance? Is the court saying, in effect, that a use which is not a nuisance, as that term is normally construed, may be treated as one if it is not suppressed *immediately*? Since the determination of whether a nuisance may be abated depends on a balancing test in which hardship on the user is one consideration, it may be that courts will be more willing to treat the use as an actionable nuisance if the user's hardship is reduced by giving him a grace period of continued legal use.[45] *Livingston* does not adequately discuss these problems, and its force is limited to certain very vague principles.[46]

There are two early Louisiana cases which, if followed, would remove all limits on the power of the municipality to declare all nonconforming uses nuisances and order immediate termination thereof. The *Dema Realty* cases[47] involved suits brought to enjoin the continued operation of a drug store and a grocery store in violation of a New Orleans ordinance which "prohibited the establishment or maintenance of all businesses of every kind and character" within residential use districts and which required liquidation of such businesses within one year. In both cases, the Louisiana Supreme Court affirmed the granting of the injunctions. The court treated the businesses as nuisances, saying

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to all such nonconformities within the use district. In City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953), the Ohio Supreme Court invalidated an ordinance which provided that a nonconforming use was to be discontinued when, in the opinion of the city council, such use had been permitted to exist for a reasonable time. The city council had determined in January, 1950, that January 1, 1951, was a "reasonable time" in the case of the nonconforming user's junk yard. The opinion unfortunately mixes up due process and equal protection, and it is difficult to know on just which ground (or whether on both) the ordinance was invalid. See the good discussion of the case in 67 HARV. L. REV. 1283 (1954). *Livingston* may have avoided this problem by assigning the task of determining whether a particular nonconforming use was to be abated to an administrative, and not a legislative, body.

44. The nonconforming user invested approximately $18,000 in the construction of the plant and $80,000 in the purchase of mixer trucks.

45. It is just this sort of granting of a "grace" or "tolerance" period for the nonconforming use which is at the heart of so-called "amortization provisions," discussed *infra*. *Livingston* makes clear that the line of demarcation between nuisance regulations and amortization ordinances can be an extremely thin one.

46. Compare Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930), where the court invalidated an ordinance which would have required *immediate* abatement of a prior nonconforming sanitorium located in a residential use district. *Livingston* distinguished *Jones* primarily on the ground that the ordinance in *Jones* made no provision for the automatic continuance of nonconforming uses, whereas the ordinance in *Livingston* did. See text accompanying note 69 *infra*.

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

> [W]e take it to be well settled that any business operated or maintained in violation or in defiance of a zoning ordinance is to be regarded as a public or common nuisance.[48]

The *Dema* cases are manifestly incorrect.[49] While it is true that a municipality may enjoin continuing violations of a zoning ordinance on the ground it is a nuisance,[50] this does not avoid the necessity of determining whether the ordinance itself is constitutional. It is a bootstrap argument simply to say that violations of a zoning ordinance may be enjoined, and look no further. The court in the *Dema* cases held the ordinance itself constitutional, but failed to examine carefully the problems involved. The theory of the opinions is that since in *Euclid v. Ambler Realty Co.* the municipality "had the authority *to create and maintain* a purely residential district," it had similar authority "*to remove* any business or trade from the district."[51] This simple conclusion leaves something to be desired.[52]

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48. State *ex rel.* Dema Realty Co. v. McDonald, *supra* note 47, at 175, 121 So. at 614-15.

49. One writer has said of these cases, "The Louisiana decisions in this field . . . sound more like Cosack interpretations of Muscovite ukases than utterances of a court operating under the benign provisions of the Magna Carta." Fratcher, *Constitutional Law—Zoning Ordinances Prohibiting Repair of Existing Structures*, 35 MICH. L. REV. 642, 644 (1937).

50. 3 RATHKOPF, *op. cit. supra* note 11, §§ 66-1, 66-9 (cases collected). Some states accord a similar right to private citizens injured by the violations. However, it appears to be the rule in most jurisdictions that the nonconforming use must in fact possess the characteristics of a nuisance before it can be suppressed as such. See, *e.g.*, Mason v. Deitering, 132 Mo. App. 26, 111 S.W. 862 (St. L. Ct. App. 1908); Rice v. Jefferson, 50 Mo. App. 464 (K.C. Ct. App. 1892); Warren v. Cavanaugh, 33 Mo. App. 102 (St. L. Ct. App. 1888); Stegner v. Bahr & Ledoyen, Inc., 126 Cal. App.2d 220, 272 P.2d 106 (1954). In Louisiana and North Carolina, however, it has been held that any repeated violation of a municipal ordinance is a nuisance *per se*, and hence can be abated without a showing of actual injurious use. City of New Orleans v. Liberty Shop, 157 La. 26, 101 So. 798 (1924); Knight v. Foster, 163 N.C. 329, 79 S.E. 614 (1913). *But see* Hutson v. Continental Oil Co., 136 So.2d 714 (La. App. 1961).

51. State *ex rel.* Dema Realty Co. v. McDonald, *supra* note 47, at 182, 121 So. at 616 (emphasis supplied).

52. A recent Washington case, City of Seattle v. Martin, 54 Wash.2d 541, 342 P.2d 602 (1959), has recognized that the traditional "balancing of hardships" of nuisance law is an appropriate test of the validity of an ordinance requiring the termination of a nonconforming use. In *Martin*, the court affirmed a conviction arising out of the violation of an ordinance which provided for the mandatory discontinuance within one year of the use of vacant land in a residential use district for the storage and repair of construction equipment. "It appears, then, that the test in the instant case is whether the significance of the hardship as to appellant is more compelling, or whether it reasonably overbalances the benefit which the public would derive from the termination of the use of the vacant lot as a place for the repair of construction equipment. We are convinced that the answer should be in the negative." *Id.* at 544, 342 P.2d at 604.

The *Martin* case is instructive not only because of the holding that the ordinance was constitutional as applied to the defendant, but also because of the particular facts of the case. There was evidence that some of the defendant's work was carried on at night and was very noisy. On the other hand, he had erected no

There are, however, very definite limitations on the usefulness of nuisance regulations as a means of terminating prior non-conforming uses. Most courts probably are not willing to attach the nuisance label to a nonconforming use unless its deleterious effects are fairly clear and substantial. Nuisance has always been associated with uses which cause relatively concrete harm to the enjoyment of surrounding property.[53] In the cases applying an expanded concept of nuisance the damage which the offending uses threatened was much more serious than most zoning regulations are intended to cure. Thus in *Livingston*[54] the operation of a nonconforming cement plant might well create substantial noise from its operations and from the constant coming-and-going of its mixer trucks.[55] In *Hadacheck*,[56] the existence of a brick manufacturing establishment in a residential neighborhood might well cause severe discomfort to surrounding residence owners.[57] It is doubtful that most nonconforming uses, whose injuries to surrounding property may not be so obvious and concrete, can be reached and abated through any concept of the law of nuisance which the courts are likely to accept.

Nevertheless, these cases do show that much of the traditional law of nuisance is peculiarly appropriate to the problem of abating prior nonconforming uses. Nonconforming uses are analogous to nuisances because they do have a harmful effect on the effectiveness of the zoning plan. In the "gray areas," where it connot with any certainty be said that a particular nonconforming use is obnoxious enough to be a nuisance, the courts may be willing to hold such a use to be terminable on nuisance principles where the use is permitted a reasonable grace period of continued existence.

IV. Amortization

In order to supress prior nonconforming uses not causing injury which is material and tangible enough to be labeled a nuisance, zoning officials have found hope in so-called "amortization ordinances." Such an ordinance normally calls for the termination of the nonconforming use within a certain time, the "tolerance" or "grace" period, during which the owner has the opportunity to amortize his investment and make future plans. The term of this period varies in length according to the nature of the use and of the structure (if any) devoted to the use.[58] Commonly, the ordinance distinguishes between different types of

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buildings on the lot and was leasing the land on a month-to-month basis. It is apparent that this latter fact greatly influenced the court in favor of the one-year grace period which the ordinance provided.

53. Moore, *supra* note 12, at 9-11.

54. Livingston Rock & Gravel Co. v. County of Los Angeles, *supra* note 36.

55. This conclusion is somewhat weakened, however, by the fact that the nonconforming plant was located in a district zoned "light industrial" and not in a residential use zone.

56. Hadacheck v. Sebastian, *supra* note 32.

57. See City of Seattle v. Martin, *supra* note 52.

58. Katarincic, *supra* note 12, collects and interprets a number of amortization provisions now in force in the larger cities in the United States.

nonconforming uses, and provides different grace periods according to whether the nonconformity is a nonconforming use of land, a nonconformig use of a conforming structure, or a nonconforming use of a nonconforming structure.[59] Frequently, in the case of nonconforming buildings, the ordinance may set up different grace periods depending on the value or projected useful life of the building or structure.[60] As in the case of usual zoning laws, the ordinance may single out certain nonconforming uses or structures as especially noxious in the use district in which they are located.[61]

The *Dema Realty* cases[62] contain the earliest example of what might be called amortization ordinances. The ordinance there required cessation within one year of all commercial activities operating in residential zones. This crude provision was upheld by the Louisiana court as a reasonable exercise of the police power.[63] Though these cases have been much criticized as hopelessly confusing the laws of nuisance and zoning,[64] the court simply enjoined as a *nuisance* the violation of a *zoning* ordinance. It has been said that these cases

> must be read carefully inasmuch as the language in the opinions indicate that the uses did, in fact, constitute actionable nuisances which, of course, could always be summarily terminated without compensation.[65]

Nevertheless, it is unlikely that all drug stores or grocery stores located in a residential neighborhood would cause tangible enough injury to be subject to immediate abatement as nuisances. The *Dema* court did, in fact, lay some emphasis on the fact that the property owner had not shown "any substantial reason why such a business could not be liquidated and closed out within a year."[66] In view of the sophistication with which courts now approach zoning problems, these two cases are unsatisfactory, not because of their confusion of nuisance and zoning, but rather because of their failure to examine sufficiently the reasonableness of the zoning ordinance itself.

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59. *E.g.*, KANSAS CITY, MO., ZONING ORDINANCE § 65.230 (1956), set out in Katarincic, *supra* note 12, at 13-14.

60. *E.g.*, CHICAGO, ILL., ZONING ORDINANCE art. 6 (1939), set out in Katarincic, *supra* note 12, at 15-16.

61. See, *e.g.*, the ordinances involved in the following cases: Stoner McCray Sys. v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956) (billboards); Spurgeon v. Board of Comm'rs, 181 Kan. 1008, 317 P.2d 798 (1957) (auto wrecking yards); Grant v. Mayor & City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957) (billboards); Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958) (junk yards); City of Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953) (auto wrecking yards).

62. State *ex rel.* Dema Realty Co. v. Jacoby, State *ex rel.* Dema Realty Co. v. McDonald, *supra* note 47.

63. A very similar ordinance, requiring discontinuance within one year of all nonconforming uses, was invalidated in James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955). This case points up extremely well the hardships which may be entailed by suppressing a pre-existing nonconforming use.

64. Note, 44 CORNELL L.Q. 450, 454-55 (1959).

65. Katarincic, *supra* note 12, at 21.

66. State *ex rel.* Dema Realty Co. v. McDonald, *supra* note 47, at 179, 121 So. at 616.

Following the *Dema* cases little was heard of amortization until 1942, when an article advocating its wider use appeared in the *University of Chicago Law Review*.[67] Then in the early 1950's began a series of cases involving various types of ordinances calling for termination of nonconforming uses within specified times. Though the United States Supreme Court has not yet ruled on the question, it would seem to be only a matter of time until it grants certiorari in such a case. The state court decisions have not been uniform in their holdings, perhaps judicially reflecting the uncertainty of zoning officials who themselves cannot agree on what grace periods are reasonable. Of the cases which have directly ruled on the question, probably the majority has held the amortization ordinance constitutional in its general provisions.[68]

The cases in which amortization provisions were brought into question appear to divide into two main groups. One group of cases emphasizes the concept that one of the primary attributes of property is the owner's right to *use* his land. This approach naturally tends to underscore the "taking" of the right by the ordinance, with the result that the ordinance may be declared invalid. It is usually expressed in the "vested right" theory: the landowner has a vested right in his prior nonconforming use which cannot be taken without just compensation. The cases which follow this view tend to consider the right as an abstract principle of constitutional law, without reference to the circumstantial facts surrounding any given nonconforming use.

The other group of cases tends to view an amortization provision as a normal exercise of the police power. The primary question then becomes whether, considering the particular facts of any given nonconforming use, the ordinance is reasonable in its application to that use. Here much the same approach is followed as in nuisance law: on balancing the social benefit resulting from abatement of the nonconformity against the hardship to the land-owner forced to terminate it, does it appear that the amortization period provided for is reasonable?

These two approaches will be examined in the following sections. It should be noted, however, that the *nominal* approach which both groups of cases take is to determine whether the particular ordinance is a reasonable exercise of the police power. The real difference between the two is that the second does not begin with an underlying feeling that any ordinance is per se suspicious if it tends to encroach on property rights.

A. *The "Vested Rights" Theory*

The 1930 case of *Jones v. City of Los Angeles*[69] is sometimes cited as one of those which denies the constitutionality of amortization provisions. The ordinance in that case required *immediate* suppression of the prior nonconforming use, a mental hospital located in a residential use district. Clearly, the ordinance

67. Note, 9 U. CHI. L. REV. 477 (1942).
68. Though, like any other exercise of the police power, it may be unconstitutional in its particular application.
69. 211 Cal. 304, 295 Pac. 14 (1930).

would not be termed an "amortization" ordinance today because the landowner is not allowed a reasonable grace period before termination is required. Nevertheless, the case has acquired a certain significance because of its very broad language protecting prior nonconforming uses. The opinion dwells at some length on the theory that zoning measures are only *prospective* in nature—their only purpose is to regulate the future use of land—and cannot be applied *retroactively* to abate existing uses. The court asks

> does the broad view of the police power which justifies the taking away of the *right to engage in such businesses* in certain territory, also justify the *destruction of existing businesses?* We do not think that it does.[70]

The so-called "vested rights" theory of prior nonconforming uses is based on this assumption that zoning is prospective only. At some point in the development of the use of his land, prior to the enactment of a zoning ordinance, the developing landowner is considered to have obtained a "vested right" in that use. The conclusion that *any* statutory attempt to suppress or prohibit the continuation of that use is an unconstitutional deprivation of property without just compensation follows from the fact that the right to use one's land is a property right and from the assumption that one's right in any pre-existing nonconforming use is vested.[71]

In the *Jones* case, this theory (though not labelled a "vested rights" theory) is expressed in these terms:

> But we think that there is a decided difference between an ordinance which operates to limit the future use of property, no matter how great the impairment of its value, and one which requires the discontinuance of an existing use. In the first situation, we see merely the familiar example of an intangible and speculative future value being reduced as a necessity of city planning; and in the second we see the destruction of a going business. This latter action, if sustained by law, may have a serious and damaging effect on private enterprise generally, in addition to its manifest injury to the persons whose businesses are prohibited.[72]

In 1954, however, the Second District Court of Appeal of California handed down a decision which rejected the vested rights doctrine where a true amortization ordinance was in issue. *City of Los Angeles v. Gage*[73] was a suit brought to enforce an ordinance which required discontinuance within five years of de-

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70. *Id.* at 309-10, 295 Pac. at 17 (emphasis in original).

71. The vested rights theory had its genesis in cases coming up long before amortization provisions were in vogue. The ordinances attempting abatement in most of these cases clearly were unreasonable and showed no intent to balance the conflicting interests of nonconforming user and public. See, *e.g.*, O'Conner v. City of Moscow, 69 Idaho 37, 202 P.2d 401 (1949) (invalidating an ordinance which provided for immediate termination of nonconforming uses upon change of ownership thereof).

72. Jones v. City of Los Angeles, *supra* note 69, at 319, 295 Pac. at 21.

73. 127 Cal. App.2d 442, 274 P.2d 34 (1954).

fendants' nonconforming plumbing supply concern.[74] On the authority of the *Jones* case, the trial court held that the ordinance was void as applied to Gage since it operated to deprive him of a vested property right without due process of law. In reversing this decision, the court of appeal distinguished *Jones*.[75] The primary distinction between the two cases is that in *Gage* the building itself was conforming and only the use nonconforming, whereas in *Jones* the building was nonconforming and represented a substantial investment. Taken as a whole, the court said, the injury to Gage did not appear so substantial when it was recognized that the ordinance gave him five years in which to amortize his investment and move to a new location.

Gage points out that the legislative body has the undoubted power to enact zoning regulations, and that it naturally would seem to follow that it has the power to pass such reasonable regulations as are necessary to secure effectively the benefits of zoning.[76] The vested rights theory is logically defective because

> In essence there is no distinction between requiring the discontinuance of a nonconforming use within a reasonable period and provisions which deny the right to add to or extend buildings devoted to an existing nonconforming use, which deny the right to resume a nonconforming use after a period of nonuse, which deny the right to extend or enlarge an existing nonconforming use, which deny the right to substitute new buildings for those devoted to an existing nonconforming use—all of which have been held to be valid exercises of the police power.[77]

The court emphasizes that the distinction between the ordinance restricting future use and the one requiring termination of already existing uses is only one of degree:

> Zoning as it affects every piece of property is to some extent retroactive in that it applies to property already owned at the time of the effective date of the ordinance.[78]

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74. The applicable ordinance contained similar provisions with regard to the nonconforming use of land (1) where no buildings were employed in connection with such use, (2) where any buildings so employed were only incidental or accessory to such use, and (3) where the use was maintained in connection with a conforming building.

Defendants' business was located in a residential use district, and the principal structure concerned was a building which was completely conforming except for one room which was used as an office for the business. A garage was also used for the storage of plumbing supplies and materials; and on an adjoining lot, racks, bins and stalls were constructed and used for the storage of supplies. The business grossed between $125,000 and $350,000 per year, and the cost of relocating the business was approximately $5,000 plus the cost necessary to advertise a new location and the risk of loss of customers while moving.

75. In distinguishing *Jones,* the court relied heavily on dictum in *Livingston Rock & Gravel Co. v. County of Los Angeles,* discussed in text accompanying note 36 *supra.*

76. City of Los Angeles v. Gage, *supra* note 73, at 459, 274 P.2d at 43.

77. *Id.* at 459, 274 P.2d at 44.

78. *Id.* at 460, 274 P.2d at 44.

A shadow was cast on the *Gage* decision in a 1956 case in the Fourth District Court of Appeal in California, *City of La Mesa v. Tweed & Gambrell Planing Mill.*[79] The amortization provision in that case permitted continued use of defendants' nonconforming planing mill for a maximum of twenty years from the date of its construction. In no case, however, was the nonconforming use to be lawful more than five years after notification by the city council. Though the court held that the amortization provisions were unconstitutional as applied to these defendants, it should be noted that this decision does not rest on any vested rights theory. The decision was that as applied to the facts of *this case* the ordinance was unreasonable. This holding proceeds from a number of factors: (1) the nonconforming building has a remaining useful life of twenty-one years, while the order of the city council gave it only five; (2) the area in which the mill was located was bordered on the east by a railroad track and surrounded on the other three sides by industrial and commercial developments; and (3) the private loss was much greater than in *Gage,* while the public gain was much less.[80] It is clear, then, that *La Mesa* is not authority for the proposition that the amortization ordinance was invalid because it attempted to violate the nonconforming user's "vested rights."

B. *The Balancing Approach*

There is another approach to amortization ordinances followed by many counts which rejects the so-called vested rights theory. The primary question is framed in simple terms: is the ordinance a *reasonable* exercise of the police power? Since the use which the ordinance attempts to extinguish is an existing one and is not merely contemplated by the property owner, the situation is similar to the abatement of a nuisance. Though the nonconforming use does not cause injury which is concrete and noxious enough to be labelled a nuisance, it nevertheless harms the orderly development of the community. The premise of this approach is that there is no constitutionally protected right to continue such a harmful use indefinitely. It follows that the injurious use may be abated by the municipality, *provided always* that the means of abatement is reasonable.

The question comes down to the *means* the municipality employs to suppress the nonconforming use. Since the only variable in most amortization ordinances is the length of time the nonconforming use is allowed to continue, the court

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79. 146 Cal. App.2d 762, 304 P.2d 803 (1956).

80. It is this third factor, the balancing test, which is probably the most interesting aspect of *La Mesa.* For a further discussion of how other cases have applied this test, see the next section.

There is also a problem concerning possible violation of the equal protection clause of the fourteenth amendment. The municipal legislative body, the city council, singled out the defendants' nonconforming use and ordered abatement of it. Since the resolution applied solely to the defendants and not to other businesses similarly situated, it would appear to be unconstitutionally discriminatory. For a similar case, see City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953), and the excellent note in 67 HARV. L. REV. 1283 (1954). See also note 43 *supra.*

is forced to determine whether, in the facts of a particular case, the grace period provided for is reasonable. Under the normal rules of constitutional law a court is not justified in invalidating an ordinance grounded in the police power unless it is perfectly clear that the legislative body acted unreasonably and arbitrarily. As in the case of a statutory definition of nuisance, the determination of whether a particular nonconforming use is so detrimental to the public good as to require abatement within a specified number of years is often a fact question upon which reasonable men may differ. In such a case the legislative determination must stand. The usual net result of this approach is to uphold the constitutionality of the amortization provision.

City of Los Angeles v. Gage[81] is an example of this judicial deference to the balancing already done by the legislative body. It will be remembered that in *Gage* the amortization provision set up grace periods varying widely according to the type of noncorming use, the probable injury done to zoning, and the foreseeable hardship resulting from termination. A great deal of the opinion in *Gage* centers on the *reasonableness* of the legislature's balancing. Amortization provides "an equitable means of reconciliation of the conflicting interests"[82] of property owner and public, and it could not be shown that the well-defined and graduated termination periods did not bear some reasonable relation to the ends sought. The court concluded

> As a method of eliminating existing nonconforming uses [a reasonable amortization scheme] allows the owner of the conforming use, by affording an opportunity to make new plans, at least partially to offset any loss he might suffer. The loss he suffers, if any, is spread out over a period of years, and he enjoys a monopolistic position by virtue of the zoning ordinance as long as he remains. If the amortization period is reasonable the loss to the owner may be small when compared with the benefit to the public. Nonconforming uses will eventually be eliminated. A legislative body may well conclude that the beneficial effect on the community of the eventual elimination of all nonconforming uses by a reasonable amortization plan more than offsets individual losses.[83]

A rather extreme example of judicial deference to the legislative determination is seen in *Standard Oil Co. v. City of Tallahassee*.[84] This was a suit brought to enjoin the enforcement of a zoning ordinance which required termination of plaintiff's nonconforming use of its land as a gasoline service station. Shortly after the plaintiff bought the land in question and erected its station, the area was rezoned from residence "B" to business "A" and all service stations were required to cease operations within ten years. Though it appears from the lower court's opinion[85] that the purpose of the ordinance was the redevelopment of

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81. *Supra* note 73.
82. *Id.* at 460, 274 P.2d at 44.
83. *Ibid.*
84. 183 F.2d 410 (5th Cir. 1950), *affirming* 87 F. Supp. 145 (N.D. Fla. 1949), *cert. denied* 340 U.S. 892 (1950).
85. 87 F. Supp. 145 (N.D. Fla. 1949).

a rather rundown neighborhood in close proximity to the state capitol, the Court of Appeals for the Fifth Circuit upheld the ordinance. Undoubtedly, the ten-year amortization period influenced both the district court and the court of appeals, but neither of them referred to it. Practically the whole of their brief opinions is directed to the presumption of reasonableness which accompanies legislative action.[86] Since the injury to the surrounding neighborhood was evidently very slight the soundness of this decision seems questionable. However, the excess, if any, is only one of degree because the court makes it clear that a balancing of conflicting interests is an appropriate legislative determination.[87]

In *City of Corpus Christi v. Allen*[88] defendants operated four nonconforming junk yards in a "light industrial" use district, such yards being permitted only in "heavy industrial" districts. The city brought suit to enjoin their operations under the provisions of a 1948 amendment to the comprehensive zoning plan, which required the termination of nonconforming junk yards within two years. In holding the amortization provision an unconstitutional taking of property as applied to defendants, the Texas Supreme Court emphasized repeatedly that zoning ordinances must be *reasonable* exercises of the police power. In *Allen* the amortization provision was felt to be unreasonable because the economic hardship which the defendants would suffer by its operation far outweighed any possible benefit accruing to the city.[89]

Allen, it is true, pays scant attention to the usual presumption of reasonableness which accompanies legislative exercises of the police power. Nevertheless, on the peculiar facts of the case, the result is probably correct. The benefit to the city of forcing the operators of junk yards to move their businesses from a "light industrial" use district to a "heavy industrial" district would appear minimal.[90]

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86. "The power of a municipality to require by ordinance the discontinuance of an existing property use also appears to be well established law in Florida." 183 F.2d at 413. It is also interesting to note that one of the authorities heavily relied on by both courts in holding the presumption of reasonableness not rebutted was Hadacheck v. Los Angeles, *supra* note 32.

87. The dissent contains the widely quoted observation that "in sustaining this admittedly confiscatory ordinance, a good general principle, the public interest in zoning, has been run into the ground, the tail of legislative confiscation by caprice has been permitted to wag the dog of judicial constitutional protection." 183 F.2d at 414. Unfortunately, the dissenting judge does not examine the matter any more closely than does the majority. The almost inescapable conclusion which follows from reading the opinions is that the court did not comprehend fully the potential scope of its holding.

88. 152 Tex. 137, 254 S.W.2d 759 (1953), *affirming* 247 S.W.2d 130 (Tex. Civ. App. 1952).

89. In the area immediately surrounding defendants' nonconforming use were numerous businesses, including secondhand furniture stores and garages.

90. The court apparently did not intend its decision to foreclose the constitutionality of amortization provisions which would operate so as to bring greater benefits to the municipality and correspondingly less to the nonconforming user. At the very end of the opinion is found the following caveat: "Our conclusion is

A 1957 Maryland decision greatly clarified the problems found in amortization provisions. *Grant v. Mayor & City Council of Baltimore*[91] involved an amendment to the comprehensive zoning plan which required removal within five years of all billboards located in residential use districts. Plaintiffs (signboard companies and individual owners of property leased for the use of billboards) sued to enjoin city officials from enforcing the ordinance. The ordinance was upheld, the court recognizing that pre-existing nonconforming uses impaired the effectiveness of zoning and that they had not disappeared as fast as originally had been hoped. Concluding that amortization provisions thus were justified, the court discarded the vested rights and substantial use doctrines as being inconsistent with accepted applications of the police power.[92]

Standing in severe contrast to *Grant* is the latest decision to pass on the constitutionality of an amortization provision, *Hoffman v. Kinealy*.[93] Relators operated a lumber business and in connection therewith had for a number of years used the lots in question for the open storage of lumber, building materials and construction equipment. In 1950, the St. Louis zoning code was amended so as to require the termination within six years of the use of any land within any residential district for open storage. Despite the evident care with which the amortization provisions were drafted and the long grace period accorded a relatively minor nonconforming use, the Supreme Court of Missouri held the amendatory ordinance unconstitutional on the familiar ground that it deprived relators of their property without just compensation.

Though there are circumstances in *Hoffman* which indicate that the benefit which would accrue to the public from the abatement of the particular nonconforming use would not be very great,[94] the opinion is unsatisfactory because

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not to be construed as a holding that the ordinance in question may not, under other circumstances, be invoked to terminate a nonconforming use, not a nuisance nor injurious to the public health, safety or welfare." 254 S.W.2d at 761.

91. 212 Md. 301, 129 A.2d 363 (1957).

92. Undoubtedly the court was influenced by the fact that the city council of Baltimore did not enact the amortization provision at all precipitously, but only after extensive public hearings at which testimony was heard from expert witnesses as well as from residents of the neighborhoods concerned. It is evident that the council moved with great caution and regard for the conflicting interests involved.

Grant is undoubtedly one of the better analyses found in case law of the problems concerning amortization provisions. The opinion should be read in its entirety because no brief discussion could do it justice.

93. 389 S.W.2d 745 (Mo. En Banc 1965). This was an appeal from a review by certiorari by the Circuit Court of the City of St. Louis sustaining the decision of the board of adjustment which in turn had sustained the building commissioner's denial of relators' application for a certificate of occupancy for the lots in question as a pre-existing lawful nonconforming use.

94. There were a number of other nonconformities located in close proximity to that of relators, and indeed the very block in which the lots in question were located was divided into two use districts, the east half being two-family dwelling and the west half being industrial. Relators' planing mill was located in the west half and hence was not even nonconforming; their nonconforming storage lot in the east half was only used in conjunction with their other operations.

the court does not even purport to balance the conflicting interests of the relators and the public. The whole opinion is grounded on the theory that the nonconforming use was a vested property right which could not be suppressed pursuant to the police power. The decision seems to say that amortization provisions suffer under a very strong presumption of unconstitutionality since they operate in derogation of a property right "of the character to which the courts traditionally have referred as a 'vested right.'"[95]

C. *The "Substantial Use" Doctrine*

In the concluding paragraphs of the majority opinion in *Hoffman,* the court seems to indicate that an ordinance cannot operate to deprive the landowner of a "substantial" nonconforming use.[96] According to this thesis, the power to reach and abate nonconforming uses not amounting to nuisances is limited to those uses the loss of which will not cause the landowner material detriment. The origin of this doctrine is in a 1952 New York case, *People v. Miller.*[97] The nonconforming user in that case was prosecuted criminally for keeping pigeons as a hobby in violation of the zoning code which required the immediate termination of all such nonconforming uses in residential use districts.[98] On the ground that the loss of this use was "relatively slight and insubstantial,"[99] the court of appeals held this amortization provision of the ordinance to be a reasonable exercise of the police power.

The holding in *Miller* would seem to be grounded in the principle of *de minimis non curat lex,* something not seen too often in constitutional questions. The court explained the orthodox vested rights theory in this language:

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95. Hoffman v. Kinealy, *supra* note 93, at 753. Another recent case invalidating an amortization provision is Village of Oak Park v. Gordon, 32 Ill.2d 295, 205 N.E.2d 464 (1965). The amortization provision there gave the user approximately five years to convert to a conforming use his nonconforming rooming house located in a residential use district. Though the Illinois Supreme Court recognized that this provision was entitled to the same presumption of validity as have other zoning ordinances, it effectively ignored the presumption in applying its own balancing test. An unusual feature of the case was that there was testimony by a real-estate expert that "as a general rule the existence of a rooming house tends to lower the value of surrounding residential property, although he had no opinion as to whether defendant's rooming house had such an effect." *Id.* at 296, 205 N.E.2d at 466. Failing to see any public need for abatement, the court held the ordinance unconstitutional as applied to defendant. It noted, however, that it might uphold amortization provisions applied in different fact settings. See Note, 1965 U. ILL. L.F. 604.

96. *Supra* note 93, at 754-55.

97. 304 N.Y. 105, 106 N.E.2d 34 (1952).

98. Another section of the ordinance permitted continuance of nonconforming uses similar to defendant's for a maximum of two years, upon the issuance of a permit by the board of appeals. Though this is not the normal sort of amortization provision, it is treated by the court as though it were, and a later case, Harbison v. City of Buffalo, *supra* note 61, also so treats it.

99. People v. Miller, *supra* note 97, at 108, 106 N.E.2d at 35.

> The decisions [holding prior nonconformities to be constitutionally protected] are sometimes put on the ground that the owner has secured a "vested right" in the particular use—which is but another way of saying that the property interest is too substantial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision. . . . Every zoning regulation, because it affects property already owned by individuals at the time of its enactment, effects some curtailment of "vested" rights, either by restricting prospective uses or by prohibiting the continuation of existing uses.[100]

Because, however, ordinances which prohibit already existing uses of land are likely to be more injurious to the landowner than are purely prospective ordinances, the *Miller* court holds that only *insubstantial* nonconforming uses may be abated. It is clear that the adjective "insubstantial" is meant to qualify the *financial* loss the landowner will suffer.[101]

Miller uses the term "vested right" merely as a shorthand method of expressing when the landowner's financial investment in the development of his nonconforming use is so substantial that it cannot constitutionally be suppressed.[102] In dictum, it is said that ordinances requiring the destruction of substantial businesses or structures would be unconstitutional. Nevertheless, when the validity of an amortization provision was again questioned in 1958 in *Harbison v. City of Buffalo*[103] the nonconforming user's financial investment (in a junk yard) was obviously not "insubstantial," "inconsequential," "slight" or "purely incidental" under any conceivable stretch of the principles laid down in *Miller*. In *Harbison* the ordinance provided for cessation within three years of junk yards in areas zoned for residential use.[104] The amortization amendment to the zoning ordinance was enacted in 1953; in 1956, the landowners were notified to discontinue their operations, and their subsequent applications for licenses to carry on business were denied by the director of licenses.[105] The New York Court of Appeals reversed the holding of the trial court and of the appellate division that "ordinances in relation to the termination of nonconforming

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100. *Ibid.*

101. *Id.* at 108, 106 N.E.2d at 36.

102. This is shown by the fact that the court cites Fox Lane Corp. v. Mann, 243 N.Y. 550, 154 N.E. 600 (1926), *affirming* 216 App. Div. 813, 215 N.Y. Supp. 334 (1926), which holds that the issuance of a building permit did not give the landowner a vested right to finish erection of his building, on the ground that his prior expenditures were insufficient.

103. 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958).

104. The ordinance required cessation within three years of nonconforming uses located in residential use districts which involved:
(1) land only and not accessory to buildings;
(2) buildings whose assessed tax value does not exceed $500;
(3) use of signs;
(4) junk yards.

105. Although the nonconformity was classified by the city as a "junk yard," it was actually a cooperage business for the reconditioning of steel drums. No issue of that difference was made, however. The suit was an action in the nature of mandamus to compel the issuance of a wholesale junk license.

uses may not be employed to deprive the petitioners of . . . the nonconforming use of their premises."[106] The majority opinion in *Harbison* is grounded on the principle that the test of any exercise of the police power is its reasonableness; and as applied to the ordinance in question, it could not be said as a matter of law that it was unreasonable. In so holding, the court purported to follow the *Miller* rule that a property owner had a "vested right" in his nonconforming use unless the nonconformity was "insubstantial." However, the opinion explicitly states that *financial loss* is not the only factor to be considered in determining whether the loss of his property interest in the nonconforming use is substantial:

> When the termination provisions are reasonable in the light of [1] *the nature of the business of the property owner,* [2] *the improvements erected on the land,* [3] *the character of the neighborhood,* and [4] *the detriment caused the property owner,* we may not hold them constitutionally invalid.[107]

Harbison thus expands, and radically changes, the rule in *Miller,* by holding that it is only on evidence of the above factors that it can be ascertained "whether the resultant injury to petitioners would be so substantial"[108] as to render the ordinance unconstitutional in its application.[109]

It is submitted that there is no reason why amortization provisions should doctrines in New York, where they have figured prominently, is essentially similar to the balancing approach in *Gage.* The question in any case involving the present or postponed abatement of nonconforming uses is whether the ordinance is *reasonable* as applied in the facts of the particular case. If unreasonable, this conclusion is expressed in the phrase "vested rights"; *i.e.,* the landowner has a vested right to continue his nonconforming use in contravention of the zoning ordinance. He has such a vested right if the operation of the ordinance would work "substantial injury" on him. Finally, the determination of the sub-

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106. Harbison v. City of Buffalo, 4 App. Div.2d 999, 169 N.Y.S.2d 598, 599 (1957).

107. Harbison v. City of Buffalo, *supra* note 103, at 562-63, 176 N.Y.S.2d at 605, 152 N.E.2d at 47 (numerals and italics added).

108. *Ibid.*

109. It is uncertain, however, just how radical a departure from *Miller Harbison* represents. The decision was split (4-3), with only two judges joining in the court's opinion and the other two judges of the majority concurring in the result "upon the principles stated in People v. Miller." One writer has expressed the opinion that "it is doubtful if the Court of Appeals as a whole intended to move too far away from that decision and its fundamental principle that a prior nonconforming use can be terminated only where it is insubstantial." Note, 44 CORNELL L.Q. 450, 457 (1959). For the purpose of discussion in this comment, the doubtful value of *Harbison* as precedent is ignored.

The same note writer reports that on remand the trial court (whose opinion is unreported) found that to move the business to new premises would cost the nonconforming users approximately $20,000. On the other hand, the benefit to the city would be slight, because near the junk yard was a "mercantile area" in which were located used car lots and a storage place for concrete blocks. The trial court thus found the ordinance unconstitutional as applied, and no appeal was taken. *Id.* at 451.

stantiality of his injury rests on a judicial balancing of the social benefits of abatement against his financial loss. Factors to be taken into account in estimating the public gain include the nature of the nonconformities, the nature of the improvements erected on the land, and the character of the neighborhood. The individual detriment includes such factors as the value of nonconforming improvements on the land, their condition and useful life, and the damages, both direct and consequential, of being required to cease operations and move to new premises.

It seems that the Missouri court's use of the "substantial use" or "detriment" doctrine in *Hoffman v. Kinealy* is not well founded. The rule first made its appearance in *Miller,* where the injury to the nonconforming landowner resulting from the abatement of his use was so obviously minimal that the New York court had no need to apply a more elaborate balancing test. As set forth in *Harbison,* the substantial use doctrine is a restatement (in somewhat obscure terms) of the same sort of balancing test as is found in *Grant* and *Gage.* The degree of injury which the nonconforming user will suffer through enforcement of the amortization provision is only one of the factors to be weighed on the scales.

V. Conclusion

It is submitted that there is no reason why amortization provisions should be singled out as unreasonable exercises of the police power. The vested rights theory, most often advanced to defeat such ordinances, is logically defective. Differing only in *degree* from ordinary zoning, amortization must be tested in each case by the reasonableness of the grace period provided the nonconformity, and the ordinance should be overturned only where reasonable men could not think it just.

The approach enunciated in such cases as *Harbison* and *Grant* envisions a balancing test in the best tradition of the common law. That such a test is appropriate is obvious when the purposes of amortization provisions and the law of nuisance are compared. The purpose of amortization is to eliminate nonconforming uses which are not so substantial or noxious as to be actionable as nuisances. Since the harm they do to the community is less damaging than that done by nuisances, they should be afforded correspondingly greater protection. Nevertheless, they should not be given eternal life. As one writer has pointed out, it is error to assume that "all use restrictions are created equal and that all nonconforming uses short of nuisances pose the same threat to effective zoning."[110]

The practical effectiveness of amortization is quite another problem, and is beyond the scope of this comment. It should be noted, however, that amortization cannot be a panacea for the ills that plague zoning. In many cases the

110. Anderson, *Amortization of Nonconforming Uses—A Preliminary Appraisal of Harbison v. City of Buffalo,* 10 Syracuse L. Rev. 44, 48-49 (1959).

nonconforming use will represent so substantial an investment that a grace period to be reasonable, may have to allow fifty or more years of continued use.[111] Nevertheless, new measures must be adopted to meet the increasing pressures of our highly urbanized society. Reasonable amortization amendments to a municipality's comprehensive zoning plan would seem to be a step in the right direction.

DAVID M. ROBERTS

111. Katarincic, *Elimination of Nonconforming Uses, Buildings and Structures by Amortization—Concept v. Law,* 2 DUQUESNE L. REV. 1, 43-45 (1963).