ELIMINATION OF NONCONFORMING USES

by

KENT ALAN SCHELL

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Glenn R. Edmonds

PREFACE

This report deals with the subject of nonconforming zoning uses. It begins with a survey and analysis of the state enabling legislation laying the groundwork for a comprehensive study of the nonconforming use problem. In surveying this legislation, the author wished to determine not only the parameters under which municipal authorities must work, but how arbitrary and undirective this legislation is. A need for strong legislation providing guidance should become apparent. A review of significant ordinances and case law will be undertaken to show the evolution of regulation from simple restriction of nonconforming uses to such recently popular techniques as termination through amortization. Of special interest will be the Kansas situation, with a comprehensive sample of Kansas zoning ordinances taken and analyzed.

Many sources believe that amortization methods constitute the best means to confront nonconforming uses. This report will attempt to show that although the amortization technique is widely favored, performance standards hold much promise for future land-use regulation. Realizing that the majority of Kansas communities cannot implement performance standards because of a lack of trained technical staff and the necessary equipment, an amortization table will be constructed which will suggest by specific land use type what amortization periods should be found acceptable based on the review of significant case law.

The state enabling legislation was obtained directly from each state's annotated statutes. This task was complicated by the diversity

of subject headings under which this material could be found. Zoning legislation could be found under municipalities, municipal corporations, cities, cities and towns, villages, and counties. Several statutes also made distinctions between different classes of communities. The cumulative supplement of each state's enabling legislation was surveyed to make the information current.

For the survey of ordinances and case law, Anderson's Law of Zoning provided a valuable reference source. This source is the most recent legal text on zoning providing reference to important case law, significant law school reviews, and important writings in each area. Approximately twenty major references were consulted for this section.

Originally forty Kansas communities were chosen and supplied with a questionaire to determine if the community had established a zoning ordinance and if so, what provisions were made for nonconforming uses. The author attempted to survey the largest communities from every area of the state. Although the response to the questionaire was good, the survey was expanded through an additional survey of ordinances maintained by the Kansas League of Municipalities. These ordinances were listed in alphabetical order. Every other ordinance was sampled. This brought the total number of communities surveyed to sixty one.

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INTRODUCTION

The draftsmen of early zoning legislation believed that some uses of land were incompatible with others and that more efficient use of land resources would be achieved if incompatible uses were clearly separated. They sought to avoid harm and confusing land uses by dividing the communtiy into tight compartments or districts. Zoning on this premise drew its name from the village of Euclid, Ohio, upon which the landmark case in zoning was based.[1] The intended product of such Euclidian zoning is a community in which use districts are so rigidly drawn that no residence has a commercial neighbor and no business is subjected to the nuisances of industry.

If this notion of homogeneous land use was sound in it conception, it was less than practical in its application. No community with so tidy a separation of land uses exists, and none is likely to be achieved through Euclidian zoning. No matter how carefully the districts boundaries are drawn, certain lands, buildings, or structures already in existence at the time the zoning ordinance is adopted do not meet the district requirements as set out in the ordinance. These conconforming uses posed a formidable threat to the success of zoning as conceived by the Euclidian zoners. The above problem was observed and its implications understood when zoning began. But the early draftsmen avoided a direct attack on nonconforming uses. Their original attitude was perhaps characteristically Victorian in that they felt that if the problem was ignored, sooner or later it would go away. They

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[1]Euclid Reality Co. v Village of Ambler, Ohio, 272 U.S. 365, 1926.

permitted existing uses to continue and undertook to reduce their life expectency by limiting their right to change, expand, alter, repair, restore, or recommence after abandonment. It was believed that the process of economic attrition and physical obsolescence or decay would finally foreclose uses subject to these restrictions. But the expected demise of nonconforming uses did not occur. Nonconforming uses have survived and even florished under the restrictions imposed by early zoning ordinances.

State and local legislative response to the failure of these restrictions has been to include in contemporary zoning legislation essentially the same type of restrictions and remedies which proved ineffective in the earlier ordinances. Legislative, judicial, and administrative actions concerning nonconforming uses have created a reasonable amount of confusion. The question of what to do, if anything, with nonconforming uses still remains.

ENABLING LEGISLATION

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The authority of a municipality to deal with nonconforming uses may be broadened or narrowed by the enabling act which is the source of its zoning power. The enabling acts of the several states reflect a wide range of policy with respect to the preservation or termination of these uses. The earlier acts, many of which were modeled after the Standard State Zoning Enabling Act, commonly made no mention of nonconforming uses. This disposition to leave the problem to local authorities is reflected in the enabling legislation of about one-forth of the states. Enabling acts which omit any mention of nonconforming uses do not, however, by negative implication, deny to local legislatures the authority to preserve, limit, or terminate nonconforming uses. The municipal legislative authorities in states having such acts are simply free to seek solutions to the nonconforming use problem which seems feasible under their particular local circumstances. They are limited only by the reach of their local zoning powers and the constitutional limitations which protect existing uses of land.

The statutes of some jurisdictions place certain existing uses beyond the reach of local zoning power. Idaho protects land used to extract forest or mineral products, if such use commenced prior to the enactment of a restrictive ordinance (Idaho Code 31-3803). The statutes of the District of Columbia protect nonconforming buildings used by foreign governments (D.C. Code 5-418a, 5-418c). Arkansas requires that commercial uses be zoned commercial on request (Arkansas Statutes Annotated 19-2832). The statutes of a number of states specifically authorize the termination of noncomforming

uses through amortization, condemnation, or otherwise (Colorado Revised Statutes Annotated Ch. 106-2-19; Deleware Code Annotated 9:2621; Michigan Statutes Annotated 5:2933(1); Missouri Statutes Annotated 89.230; New Jersey Statutes Annotated 40:55.23; Rhode Island General Laws Annotated Article 45:24-10, 45:24-11; Texas Statutes Annotated Article 1011c, 1011i).

The state statutes are quite general in nature and leave much room for interpretation. Each locality is free to develop their own regulations as they see fit. This leads to diverse and often arbitrary local provisions which have lead to much confusion in the courts. There is grave need for uniform enabling legislation that would give detailed guidance to local government and take the burden of ruling on individual incidents off the court's shoulders. A summary of the state enabling legislation follows. Table 1. has also been constructed to show the degree of restriction each state places on nonconforming uses.

Summary of State Enabling Legislation

Alabama. The enabling act contains no specific provisions for the preservation, limitation, or termination of nonconforming uses (Code of Alabama Annotated--1958).

Alaska. The enabling act contains no specific provisions for the preservation, limitation, or termination of nonconforming uses (Alaska Statutes--1968).

Arizona. The enabling acts for all local governments contain provisions for nonconforming uses. Uses may be continued if in existence at the time an ordinance in a city or town (9-462) or county (11-830) takes effect. A nonconforming business use in a county may expand if the expansion does not exceed 100 percent of the area of the original use (Arizona Revised Statutes Annotated--1956).

Arkansas. In a first class city which has a planning commission, any property used continuously for commercial use since before the adoption of the planning acts, together with contiguous retail or commercial property regardless of the time of use, must be zoned commercial on application to the planning commission, the governing body or both (19-2832). The zoning ordinance in a city or town which has a planning commission may provide for the elimination of nonconforming uses (19-2829). In a city of the second class which enacts setback legislation, persons affected have six months to remove nonconforming buildings or discontinue nonconforming uses (19-2808). The planning and zoning powers of a county may not be

exercised to deprive an owner of a use existing when a zoning ordinance is made (17-1103).(Arkansas Statutes Annotated--1947).

California. A nonconforming use existing when the ordinance was adopted may be continued, but may not be enlarged or extended. The lawful use of a building at the time of passage of the ordinance may, however, be extended throughout the building if no structural alterations are made therein. A nonconforming use shall not be continued following a change in use to a less noxious use (65850). (California Codes Annotated--1955).

Colorado. The county enabling act provides for nonconforming uses (106-2-19). Uses in existence at the time of enactment or amendment of a restrictive ordinance may be continued, and may be extended throughout the same building if no structural alterations are made (9:2620). The legislative body may provide for the restoration, reconstruction, extension, or substitution of such uses (9:2620). If the county acquires title because of a tax delinquency, and if the land is not redeemed, all future use must be in conformity with the ordinance. The legislative body may provide for the termination of nonconforming uses, either by specifying a period in which a use must cease or by prescribing a formula allowing for the recovery or amortization of the investment in the use (106-2-19).(Colorado Revised Statutes--1963).

Connecticut. The enabling act provides that a municipality may not prohibit the continuance of a nonconforming use, building, or structure existing at the time of the adoption of a zoning regulation (8-2).(General Statutes of Connecticut--1967).

Delaware. The enabling act for New Castle County provides for nonconforming uses (no other mention is made of nonconforming uses). Uses in existence at the time of enactment or amendment of a restrictive ordinance may be continued, and may be extended throughout the same building if no structural alteration is made (9:2620). The legislative body may provide for the restoration, reconstruction, extension, or substitution of such uses (9:2620). If the county acquires title because of tax delinquency, and the land is not redeemed, all future use must be in conformity with the ordinance. The building inspector is required to prepare periodic lists of nonconforming uses (9:2621). (Delaware Code Annotated--1953).

District of Columbia. Uses in existence at the time of enactment of a restrictive ordinance may be continued (5-419). A license may be granted to conduct a retail or wholesale business in a residential district where the zoning classification was changed while the former license was in effect, if the license is still in force and the business has not changed (25-116). The statute contains prohibitions against enlargement of a nonconforming use, against new building, and against structural alterations except as required by law (5-419). The zoning commission may provide for the extension of a nonconforming use throughout the building and for substitution of nonconforming uses (5-419). If the District establishes building lines, existing nonconforming buildings may remain until reconstructed or substantially altered (5-205). Restrictions on the use of buildings by foreign governments do not prohibit future or continued use of a building as a chancery or the making of repairs where the use existed lawfully on October 13, 1964. Also permitted are construction, reconstruction, expansion, or alteration in accordance with a permit issued on or before February 18, 1964

(5-418a). After October 13, 1964, no building or chancery may be transfered to or used by another foreign government unless in accordance with either the restrictions on the use of buildings by foreign governments or the applicable law at the time the restrictions were passed (5-418c). (District of Columbia Code--1967).

Flordia. The enabling act contains no specific provisions for the preservation, limitation, or termination of nonconforming uses. (Flordia Statutes Annotated--1961).

Georgia. Uses in existence at the time of enactment or amendment of a restrictive ordinance may be continued (69-835, 69-1208). Such use may be extended throughout the same building if no structural alteration is made (69-835). The legislative body may provide for the restoration, reconstruction, extension, and substitution of nonconforming uses. It may provide for the termination on specific dates of nonconforming uses either by specifying a period in which the use must cease or by prescribing a formula allowing for the recovery or amortization of the investment in the use (69-835, 69-1208). (Code of Georgia Annotated--1935).

Hawaii. The lawful use of land or buildings existing on the date of establishment of any interum agricultural district and rural district in final form may be continued although such use is nonconforming. However, no nonconforming use shall be expanded or changed to another nonconforming use. If any nonconforming use of land or building is discontinued for a period of one year, the further continuation of such use shall be prohibited (98H-8). (Hawaii Revised Statutes--1968).

Idaho. The enabling act contains no provision for nonconforming uses in general. However, a county ordinance does not apply to land used to extract and process forest and mineral products, or to the adjacent area, if the use existed on March 15, 1957. Reasonable expansion of the use is also permitted (31-3803). (Idaho Code--1949).

Illinois. In cities, towns, and villages, due allowance must be made for uses existing at the time of adoption of a zoning ordinance (24:11-13-1). If setback regulations are enacted, existing uses are not affected (24:11-14-1). Provision may be made for the gradual elimination of nonconforming uses, including but not limited to the following: (a) elimination of the use of unimproved land when the rights of the possessor are terminated or the use is discontinued; (b) elimination of the use of buildings and structures which are adoptable to permitted uses; (c) elimination of nonconforming buildings or structures which are destroyed or damaged in major part or which have reached the end of their normal useful lives as determined by the municipal authorities (24:11-13-1). In counties, zoning powers may not be exercised so as to deprive an owner of existing uses (34:3151, 34:3201). No provision is made for the limitation or termination of such uses. (Illinois Annotated Statutes--1962).

Indiana. The enabling act contains no provision for the preservation, limitation, or termination of nonconforming uses, but the statute relating to Marion County planning and zoning provides that in all cases the burden of proving the existence of a nonconforming use is on the party asserting it (53-982a). (Indiana Statutes Annotated--1955).

Iowa. The enabling act contains no specific provision for the preservation, limitation, or termination of nonconforming uses. (Iowa Code Annotated--1973).

Kansas. A city ordinance does not apply to existing structures or uses (12-709), and the setback regulations of a first-class city may not deprive an owner of an existing use to which the property was lawfully devoted (13-1113). The ordinance does apply to a different use or manner of use, but does not prevent the use or restoration of a building damaged not more than 50 percent of its structural value by fire, explosion, act of God, or public enemy (12-709). Counties are governed by similar restrictions (19-2908, 19-2921, 19-2930). In addition, a small county may adopt reasonable regulations for the gradual elimination of nonconforming uses (19-2930). (Kansas Statutes Annotated--1973).

Kentucky. The enabling act relating to a city of the first class provides for nonconforming uses. The lawful use of land for trade, industry, or residence existing at the time of adoption or amendment of a zoning ordinance may be continued (100.068). If a property owner does not own the adjacent land, and the deed to his land was on record before the ordinance was passed, he may violate restrictions on the width of lots and on the amount of area per family (100.073). The statute permits a change to another nonconforming use of the same or more restricted classification (100.069). (Kentucky Revised Statutes Annotated--1971).

Louisiana. No municipal regulation may change the status of premises which have been continuously used for commercial purposes since January 1, 1929,

and without interruption for more than six consecutive months at a time (33:4722). (Louisiana Statutes Annotated--1951).

Maine. A zoning ordinance does not apply to structures and uses existing at the time of enactment. It does apply to new structures and uses, and to changes in structures and uses made after the adoption of the ordinance. The changes to which the ordinance applies may be defined in the regulations themselves (30:4953). (Maine Revised Statutes Annotated--1964).

Maryland. The statutes contain no general provisions for the preservation, limitation, or termination of nonconforming uses. However, in Anne Arundal County, group houses, otherwise prohibited, may be constructed on land zoned or rezoned for such purposes prior to June 1, 1961 (66B:21). Where a historic area is established, the statute does not prevent ordinary maintenance or the completion of work covered by a permit issued before June 1, 1963 (66B:49). (Annotated Code of Maryland--1957).

Massachusetts. Regulations do not apply to existing buildings or structures or to the existing use of structures or land to the extent used at the time of adoption of the regulations. They do apply to a change of use and to an alteration of a building or structure that amounts to a reconstruction, extension, or structural change. They also apply to alteration for a different use. A city or town may regulate nonuse so as not unduly to prolong the life of the existing use. This authority does not apply to a nonuse for agriculture, horticulture, or floriculture which has existed for less than five years, and the ordinance may not prohibit the expansion of such uses. No ordinance may forbid the alteration, rebuilding, or expansion of noncon-

forming buildings within applicable setback requirements, with the exception of greenhouses located in residential areas (40A:5). Detailed provision is made for the effect of a change in minimum area, frontage, width, and depth requirements on approved residential subdivisions (40A:5). No zoning ordinance or amendment has any effect on a permit issued or structure lawfully begun before the first notice is given in the enactment of a zoning regulation, if construction under the permit is begun within six months after the issuance of the permit, and the work proceeds in good faith continuously to completion as far as is reasonably practicable under the circumstances (40A:11). In a historic district, the statutes allow an owner to pursue work under a permit issued prior to the establishment of the district (40C:8). (Annotated Laws of Massachusetts--1971).

Michigan. A lawful use existing at the time of enactment or amendment of a zoning ordinance may continue although nonconforming (5.2933(1), 5.2963(16), 5.2961(16)). In townships and counties the legislative body must provide for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses on such terms and conditions as may be set forth in the ordinance (5.2963(16), 5.2961(16)). In cities and villages the legislative body may in its discretion provide for the resumption, restoration, reconstruction, extension, or substitution of uses on terms and conditions provided in the ordinance, and may also acquire land by purchase, condemnation, or otherwise for the purpose of removing nonconforming uses and structures (5.2933(1)). (Michigan Statutes Annotated--1969).

Minnesota. In a city of the first class which establishes a district

permitting only certain classes of industry, no industry established prior to the creation of the district may be disturbed unless it becomes a public nuisance (462.11). A first class city may, by a two-thirds vote of the legislature permit an addition or improvement to any hospital actually operated and maintained on its premises on the date of passage of the enabling act (462.18). The zoning resolution of a town may not prohibit the continuance of the use of any building for trade or industry where the use existed at the time the resolution took effect. It may not prohibit an alteration or addition of an existing building or structure for the purpose of carrying on any prohibited trade or industry within the zone in which the structure is located (366.18). In a conservation county, the lawful use or occupation of land or premises, existing at the time of adoption of an ordinance may be continued but if such use is discontinued for more than two years, any subsequent use must conform to the ordinance. If the state acquires title to any land or premises, all further use or occupancy must be conforming (396.12). The legislative body must keep a current list of nonconforming uses (396.14). The legislative body may prescribe such regulations as it deems desirable or necessary to regulate and control or reduce the number or extent of nonconforming uses or to produce their gradual elimination (394.36). (Minnesota Statutes Annotated--1946).

Mississippi. The enabling act contains no specific provision for the preservation, limitation, or termination of nonconforming uses. (Mississippi Codes 1942 Annotated).

Missouri. The statutes provide for nonconforming uses in counties. Planning and zoning powers do not deprive an owner, lessee, or tenant of an existing

lawful property use (64.090, 64.255, 64.620). In class one counties, reasonable regulations may be adopted for the gradual elimination of nonconforming uses (64.090). In non-charter class one counties, such regulations may be adopted for nonconforming uses in residential districts (64.255). There is no specific provision for nonconforming uses in municipalities. In St. Louis, however, if a building line ordinance is adopted, property owners have not more than twenty five years to comply (89.230). (Missouri Statutes Annotated--1970).

Montana. In counties, existing nonconforming uses may be continued although not in conformity with the zoning regulations (16-4102). The city and town enabling statute does not provide for the preservation, limitation, or termination of nonconforming uses. (Revised Codes of Montana--1947).

Nebraska. The zoning regulation of a county (23-161) or of a primary city (15-902) may include reasonable provisions regarding nonconforming uses and their gradual elimination. In a metropolitan city, the lawful use of land or of a building existing on April 1, 1925, may be continued although nonconforming, and may be extended throughout the building. When a district is changed, an existing nonconforming use may be continued if all other regulations are followed. If a use of land is abandoned, all future use must conform to the ordinance. No structural alteration of a building may be made except as required by law. The use of a building may be changed to another nonconforming use of the same or higher class. If the use of a building is changed to a more restricted use, it may not be changed back again (14-406). (Revised Statutes of Nebraska--1943).

Nevada. The enabling act contains no specific provision for the preservation, limitation, or termination of nonconforming uses. (Nevada Revised Statutes--1957).

New Hampshire. Existing uses may be contained even though nonconforming, but the zoning ordinance must be complied with in the case of an alteration of a building for a purpose or in a manner substantially different from the use before the alteration (31:62). Nothing in the enabling act may be constructed to prevent ordinary maintenance or repair of any structure or prevent construction, alteration, repair, moving, or demolition under a permit issued prior to the establishment of the district (31:89-g). (New Hampshire Revised Statutes Annotated--1968).

New Jersey. Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the building so occupied. A nonconforming structure may be restored in the event of partial destruction (40:55-45). If a municipality establishes building lines, it may fix the time after which no existing structure may remain beyond the applicable line (40:55-23). (New Jersey Statutes Annotated--1971).

New Mexico. Nonconforming uses may continue (14-40-18) but no permit may be allowed to create a greater hazard. If such nonconforming use has been abandoned or 80 percent deteriorated, no permit may allow it to deviate from regulations (40-140-19). However, a political subdivision may remove or require removal of the hazard by eminent domain, or may, by purchase or grant, obtain an easment to terminate a nonconforming use (14-40-24). (New Mexico Statutes--1953).

New York. The power of local governments to deal with uses which do not conform to the zoning regulation is neither limited nor enhanced by statute. (Consolidated Laws of New York Annotated--1969).

North Carolina. In counties there is a provision for the continuance of nonconforming uses as well as for regulation of their extension, restoration, or alteration (153-259). (General Statutes of North Carolina--1965).

North Dakota. In counties, lawfully existing uses and structures may be continued (11-33-13) subject to reasonable regulation (11-33-14). No similar provisions are made for cities, townships, and villages. (North Dakota Century Code Annotated--1952).

Ohio. The enabling acts for all local governments contain similar provisions for nonconforming uses (713.15, 519.19, 303.19). Uses in existence at the time of enactment of a restrictive ordinance may be continued, but the local legislative authority may provide for the completion, restoration, reconstruction, extension, or substitution thereof. The acts also provide that a nonconforming use which has been voluntarily discontinued for two years or more shall be terminated. (Ohio Revised Code Annotated--1960).

Oklahoma. In counties containing a city of 180,000-240,000 population, lawfully existing uses and structures may be continued (19:863.16). No similar provision is made for counties with a city under 180,000 in population, but land devoted to manufacturing or industrial use, or acquired for expansion for such uses is protected from zoning restrictions (19:866.30). Both large and small counties may provide for the amortization of nonconform-

ing uses (19:865.14, 19:866.19). City and town enabling legislation is silent with respect to nonconforming uses. (Oklahoma Statutes Annotated--1952).

Oregon. A city or town may place reasonable regulation on the height and bulk of buildings constructed after May 29, 1919, with due respect to the use and occupancy of such buildings (227.230), but it must pay reasonable regard to buildings erected before that date (227.240). The county enabling act provides that a lawful use of any building, structure, or land at the time of enactment of a zoning regulation may be continued although it does not conform to such ordinance (215.130), that a nonconforming use shall not be increased, changed, or resumed after a period of interruption, and that a nonconforming use shall include the initiation, maintenance, or continuation of any use, construction, activity, improvement, building, or structure (215.360). It is also provided that a county may regulate height and bulk of buildings erected after July 5, 1947 (215.330). (Oregon Revised Statutes--1953).

Pennsylvania. The lawful use of buildings or structures or land existing at the time of the enactment of the ordinance may be continued even though they are nonconforming. Provisions are also made for limitation and termination of these nonconforming uses (16:2033, 16:5233). The county must immediately after the ordinance is passed, make and keep a list of names, addresses, and uses of all nonconforming uses (16:2034, 16:5234). (Pennsylvania Statutes Annotated--1962).

Rhode Island. Lawfully existing uses at the time of the passage of the

ordinance may continue (45:24-10). However, this provision does not create vested rights (45:24-11). (Rhode Island General Laws Annotated--1968).

South Carolina. In counties containing a city of over 70,000 in population, provisions are made for the preservation, limitation, and termination of nonconforming uses (14-365). City and town enabling legislation is silent with respect to nonconforming uses. (Code of Laws of South Carolina--1962).

South Dakota. In counties, provisions are made for the preservation of nonconforming uses and for their removal if the use is discontinued for a period greater than one year (12:20A08). No provisions are made for cities, towns, or townships. (South Dakota Compiled Laws Annotated--1967).

Tennessee. The enabling act contains no specific provisions for the preservation, limitation, condemnation, or termination of nonconforming uses. (Tennessee Code Annotated--1968).

Texas. The enabling act authorizes the termination of nonconforming uses through amortization, condemnation, or otherwise (1011c, 1011i). (Texas Civil Statutes Annotated--1969).

Utah. In cities and towns the zoning power can not be extended to deprive the owner of any property of its use for the purpose to which it is then lawfully devoted (10-9-6). In counties lawfully existing uses may also be continued. Provisions are made for the limitation and termination of nonconforming uses (17-27-18). (Utah Code Annotated--1953).

Vermont. Zoning regulations do not apply to existing structures or use of any building but they do apply to such structures or buildings used if there is any alteration for the purpose of or in a manner substantially different from the use before alteration (3010). No nonconforming use may be required to terminate in less than three years from the date of adoption of the applicable zoning regulations or amendment. A nonconforming structure may continue in perpetuity. However, a by-law may provide that the extension or enlargement of the particular aspect or portion of that structure which is nonconforming shall not be permitted (24:4408). (Vermont Statutes Annotated--1966).

Virginia. No regulation is authorized to impair any vested right, but the ordinance may provide that nonconforming uses may be continued only so long as the existing use continues; and such use is not discontinued for more than two years, and so long as the buildings and structures are maintained in their structural condition. The uses of such buildings or structures must conform to the legislation whenever they are enlarged, extended, reconstructed, or structurally altered (15.1-492). (Code of Virginia--1950).

Washington. The enabling act contains no specific provisions for the preservation, limitation, or termination of nonconforming uses. (Revised Code of Washington--1968).

West Virginia. Lawfully existing uses and structures may be continued, but any addition thereon may be prohibited, and provision is made for termination of nonconforming uses. (525ii). (West Virginia Code--1955).

Wisconsin. Lawfully existing uses and structures may be continued in cities and villages (62.23(7)), towns (60.74(4)), and counties (59.97(7)). Nonconforming uses may not be extended. Total structural repairs or alterations shall not during its life exceed 50 percent of the assessed value of the building unless changed to a conforming use. If a nonconforming use is discontinued for twelve months, future use will be conforming (62.23-(7)(h)). (Wisconsin Statutes Annotated--1958).

Wyoming. In county zoning areas a zoning regulation may not prohibit the continuance of a use as long as it is used for the same purpose as when the ordinance took effect and there is no need to obtain a certificate to permit such continuance; but an alteration or addition to an existing building for the purpose of effecting any change in use may be regulated or prohibited by zoning regulation. If the use has been discontinued, any further use must be a conforming one (18-289.9). Farming and ranching are exempt from regulation of a county zoning area, and city and town enabling legislation is silent with respect to nonconforming uses. (Wyoming Statutes--1957).

TABLE 1

Degree of Restriction on Nonconforming Uses

State	May not affect	May control	May terminate
Alabama	No Provision	No Provision	No Provision
Alaska	No Provision	No Provision	No Provision
Arizona	(ct) 9-462 (co) 11-830	(co) 11-830	
Arkansas	(c) 19-2832 (co) 17-1103		(ct) 19-2829 (ct) 19-2808
California	(c) 65850	(c) 65850	
Colorado	(co) 106-2-19	(co) 106-2-19	(co) 106-2-19
Connecticut	(m) 8-2		
Delaware	(co) 9:2620	(co) 9:2620 (co) 9:2621	(co) 9:2621
Dist. of Columbia	5-418a 5-418b 5-418c 5-419 25-118	5-418c 5-419	
Flordia	No Provision	No Provision	No Provision
Georgia	(m) 69-835 (m co) 69-1208	(m) 69-835 (m co) 69-1208	(m) 69-835 (m co) 69-1208
Hawaii	(co) 138-42		(co) 138-42
Idaho	(co) 31-3803		
Indiana	No Provision	No Provision	No Provision
Iowa	No Provision	No Provision	No Provision
Kansas	(c) 12-709 (c) 13-1113 (co) 19-2908 (co) 19-2919 (co) 19-2921 (co) 19-2930	(c) 12-709 (co) 19-2908 (co) 19-2919 (co) 19-2921	(co) 19-2919 (co) 19-2930

TABLE 1--Continued

Degree of Restriction on Nonconforming Uses

State	May not affect	May control	May terminate
Kentucky	(c co) 100.068 (c co) 100.073	(c co) 100.069 (c co) 100.253	
Louisiana	(m) 33:4722	(m) 33:4722	(m) 33:4722
Maine	(m) 30:4953	(m) 30:4953	
Maryland	(m co) 66B21 (m co) 66B49		
Massachusetts	(ct) 40A:5 (ct) 40A:11 (ct) 40C:8	(ct) 40A:5	
Michigan	(cv) 5.2933(1) (t) 5.2963(16) (co) 5.2961(16)	(cv) 5.2933(1) (t) 5.2963(16) (m) 5.2961(16)	(cv) 5.2933(1)
Minnesota	(c) 462.11 (t) 366.18 (co) 394.38 (co) 396.12	(c) 462.18 (co) 394.38 (co) 396.12 (co) 396.14	(co) 394.36
Mississippi	No Provision	No Provision	No Provision
Missouri	(co) 64.090 (co) 64.225 (co) 64.620		(co) 23.161 (co) 89.230
Montana	(co) 16-4102		
Nebraska	(co) 14-406	(c) 14-406	(c) 15-902 (co) 23-161
Nevada	No Provision	No Provision	No Provision
New Hampshire	(ct) 89-g (ct) 31:62	(ct) 31:62	
New Jersey	(m co) 40:55-23	(m co) 40:55-23	(m co) 40:55-23
New Mexico	(m co) 14-2-22 (m co) 14-40-18	(m co) 14-40-19	(m co) 14-40-24
New York	No Provision	No Provision	No Provision

TABLE 1--Continued

Degree of Restriction on Nonconforming Uses

State	May not affect	May control	May terminate
North Carolina	(co) 153-259	(co) 153-259	
North Dakota	(co) 11-33-13	(co) 11-33-14	
Ohio	(m) 713.15 (t) 519.19 (co) 303.19	(m) 713.15 (t) 519.19 (co) 303.19	(m) 713.15 (t) 519.19 (co) 303.19
Oklahoma	(c) 19:863.15 (c) 19:866.30		(c) 19:863.16 (c) 19:866.19
Oregon	(ct) 227.230 (ct) 227.240 (co) 215.130 (co) 215.330	(co) 215.360	
Pennsylvania	(co) 16:2033 (co) 16:5233	(co) 16:2033 (co) 16:5233	(co) 16:2033 (co) 16:5233
Rhode Island	(ct) 45-24-10	(ct) 45-24-11	(ct) 45-24-10
South Carolina	(co) 14-365	(co) 14-365	(co) 14-365
Tennessee	No Provision	No Provision	No Provision
Texas			(c) 1011c (c) 1011i
Utah	(ct) 10-9-6 (co) 17-27-18	(co) 17-27-18	(co) 17-27-18
Vermont	(m) 24:3010 (m) 24:4408	(m) 24:3010 (m) 24:4408	
Virginia	(ct co) 15.1-492	(ct co) 15.1-492	
Washington	No Provision	No Provision	No Provision
West Virginia	(ct co) 525ii	(ct co) 525ii	(ct co) 525ii
Wisconsin	(co) 62.23(7) (t) 60.74(4) (co) 59.97(7)	(co) 62.23(7) (t) 60.74(4) (co) 59.97(7)	

TABLE 1--Continued

Degree of Restriction on Nonconforming Uses

State	May not affect	May control	May terminate
Wyoming	(co) 18-289.9		

Key

c---City
co--County
ct--City & Town
cv--City & Village
m---Municipal
t---Town or Township

EARLY PATTERN

EARLY PATTERN

Although the early proponents of zoning appreciated the hazards of incompatible uses, they elected to permit existing uses to continue as nonconforming. It apparently was felt that an attempt to zone out existing uses would increase the likelihood of court decisions which would disapprove the whole scheme of comprehensive zoning. In addition, it was thought that the political and financial obstacles to the elimination of existing uses were insurmountable. Zoning with some nonconforming uses was believed to be better than no zoning at all. Accordingly, the exception of existing uses became a standard feature of municipal zoning regulation.

Section 6 of the building zone resolution of the city of New York (1916), the first comprehensive zoning ordinance in the United States, provided "Any use existing in any building or premises on July 25, 1916,(the effective date of the ordinance) and not conforming to the regulations of the use district in which it is maintained, may be continued." This language, copied without material change into numerous zoning restrictions, insulated existing uses from the effect of general zoning restrictions. The limitations imposed upon nonconforming uses follow a pattern nearly as simple as that of the language protecting such uses from the impact of zoning regulation. The common ordinances prohibited change of use, change of use permitted in a less restricted district, or any change without administrative approval. Most ordinances prohibit extension or expansion of a nonconforming use. They outlaw structural alteration, repair, and restoration in the event of a specified amount of destruction. Most ordinances terminate a nonconforming

use after a prescribed period of abandonment.

KANSAS ORDINANCES

KANSAS ORDINANCES

A good number of Kansas Municipal Zoning Ordinances fit well within this established pattern. Upon review of a fair sample of ordinances it would appear that in most cases they follow a common model. With slight deviation, each ordinance contains several, if not all, of the following provisions:

1. Lawful use of a building may be continued although such use does not conform with the provisions of the ordinance and may be continued throughout the building if no structural alterations are made.

2. If such nonconforming use is discontinued for a specific period of time, then any future use shall be in accordance with the provisions of the ordinance.

3. A nonconforming use of a building may be changed to another nonconforming use of the same or more restricted use classification.

4. Whenever a nonconforming use of a building has been changed to a more conforming use, such use shall not thereafter be changed to a less conforming use.

5. A nonconforming building which has been damaged to a certain extent of its structural value by fire, explosion, act of God, or the public enemy shall not be restored, except in accordance with all zoning regulations.

Several of the ordinances sampled contained termination provisions. The most common uses to be eliminated after a specific period of time were auto wrecking yards, junk storage yards and signs on vacated land or buildings. The following table presents the date of enactment of each local ordinance and its provisions.

TABLE 2

SURVEY OF KANSAS ORDINANCES

Community	Date of Ordinance	No provision for nonconforming uses	Lawful nonconforming use may continue	May be continued throughout building	May not extend or expand	May not return after discontinuance	May change to other nonconforming use	May not return after change to a higher use	No return after a certain amount of damage	Termination provision	Termination provisions
Abilene *	1970		x		x	x	x	x	x		
Arkansas City *	1964		x	x	x		x	x	x	x	2 year amort. on open land uses & billboards, auto wrecking and junk yards, golf courses and trailer camps.
Atchison *	1964		x	x		x		x	x	x	5 year amort. on auto wrecking yards; 2 year amort. on billboards; 15 days on signs located on vacant land.
Belleville *	1970		x			x					
Beloit *	1973		x	x		x	x	x	x		
Bonnor Springs *	1960		x	x		x		x	x		
Chanute *	1966		x	x		x	x	x	x		
Cherryvale	1927		x								
Colby	1953		x		x	x	x	x	x		
Concordia *	1972		x	x				x			
Dodge City *	1969		x							x	Termination of signs
El Dorado *	1972		x		x	x	x	x	x	x	2 year amort. of signs & storage lots
Elwood	1965		x		x	x			x		

TABLE 2--Continued

SURVEY OF KANSAS ORDINANCES

Community	Date of Ordinance	No provision for nonconforming uses	Lawful nonconforming use may continue	May be continued throughout building	May not extend or expand	May not return after discontinuance	May change to other nonconforming use	May not return after change to a higher use	No return after a certain amount of damage	Termination provision	Termination provisions
Emporia *	1965		x	x		x	x	x	x	x	5 year amort. on auto wrecking yards & signs; 45 days on signs on vacant buildings.
Garden City	1938		x	x		x	x	x	x		
Gardner	1955		x			x		x	x		
Goodland *	1968		x	x		x		x	x	x	2 year amort. on land or structure with assessed value under $250.
Great Bend *	1968		x		x	x		x	x	x	3 year amort. of auto wrecking yards; 2 year amort. of signs & stored material in residential areas.
Hays *	1968		x	x		x	x	x	x		
Hiawatha	1955		x	x			x	x	x		
Hill City *	1948		x		x	x		x	x		
Humboldt	1960		x	x		x		x	x		
Hutchison *	1957		x		x	x		x	x	x	5 year amort. on signs in residential areas.
Independence	1949		x					x			

TABLE 2--Continued

SURVEY OF KANSAS ORDINANCES

Community	Date of Ordinance	No provision for nonconforming uses	Lawful nonconforming use may continue	May be continued throughout building	May not extend or expand	May not return after discontinuance	May change to other nonconforming use	May not return after change to a higher use	No return after a certain amount of damage	Termination provision	Termination provisions
Iola *	1956		x		x	x		x	x	x	Auto wrecking & storage yards discontinued by 1990. Industrial uses in residential areas discontinued by 1999.
Junction City	1936		x								
Kansas City *	1940		x		x	x			x		
Kingman	1960		x	x		x		x	x		
Lansing	1962		x	x		x	x	x	x	x	1 year amort. of open land unless wholly or partially occupied by permanent enclosed building.
Larnered *	1956		x		x				x		
Lawrence *	1966		x		x	x					
Leavenworth *	1949		x	x		x	x	x	x	x	1 year to end open land use in residential areas.
Liberal	1966		x	x		x	x	x	x	x	5 year amort. on auto wrecking, storage, & signs.
Lindsborg *	1964		x			x					
Marysville *	1961		x		x	x		x	x		
McPherson *	1948		x					x			

TABLE 2--Continued

SURVEY OF KANSAS ORDINANCES

Community	Date of Ordinance	No provision for nonconforming uses	Lawful nonconforming use may continue	May be continued throughout building	May not extend or expand	May not return after discontinuance	May change to other nonconforming use	May not return after change to a higher use	No return after a certain amount of damage	Termination provision	Termination provision
Meade	1945		x			x		x	x		
Merriam	1952		x	x		x				x	1 year amort.in residential are
Minneapolis	1958		x	x		x		x	x		
Mission	1954		x			x		x	x		
Mulvane	1956		x		x				x		
Newton *	1969		x	x	x	x	x	x	x		
Norton	1931		x	x		x	x		x		
Oberlin	1954	x									
Odgen	1959		x		x			x	x		
Olathe *	1970		x		x	x		x	x		
Osborne	1959		x		x	x		x	x		
Ottawa	1969		x	x	x		x	x	x		
Parsons *	1969		x		x						
Pittsburg *	1960		x		x	x			x		
Pratt *	1970		x	x		x		x	x	x	5 year amort. on auto wrecking, junk yards, & signs; 12 month on inoperable autos.

TABLE 2--Continued

SURVEY OF KANSAS ORDINANCES

Community	Date of Ordinance	No provision for nonconforming uses	Lawful nonconforming use may continue	May be continued throughout building	May not expand or extend	May not return after discontinuance	May change to other nonconforming use	May not return after change to a higher use	No return after a certain amount of damage	Termination provision	Termination provisions
Russell	1970		x	x		x		x	x	x	5 year amort. on auto wrecking & junk yards & sign
Salina *	1962		x	x		x	x	x	x		
Shawnee	1960		x			x		x	x		
Topeka *	1920		x		x	x	x	x	x	x	Discontinuance by annexation. Discontinuance of signs in Residential area by January 1950; auto wrecking by January 1946.
Ulysses	1959		x	x		x	x	x	x		
Valley Center	1958		x		x	x			x		
Wamego	1964		x		x	x		x			
Wellington	1958		x	x		x	x	x	x		
Westwood	1963		x		x	x		x	x		
Wichita *	1970		x		x	x	x	x	x	x	60 year amort.; 6 months on junk yards.

* Original mailed survey.

CASE LAW

CASE LAW

Background

While the mainstream of regulation moved firmly toward the protection of vested rights in the use of land, neither the courts nor the legislators have forgotten that the ultimate purpose of zoning is finally to eliminate nonconforming uses. The courts have made equally clear commitments to the proposition that zoning policy requires the limitation and eventual termination of nonconforming uses. Thus the Supreme Court of Connecticut said: "Viewed in terms of widest legislative intent, the purpose of zoning ordinances is to confine certain classes of buildings and uses in certain localities. So far as a nonconforming use is inconsistent with this objective, the nonconforming use should, consistently with the property rights of the individual affected and substantial justice, be reduced to conformity as quickly as possible (Beenwort v Zoning Board of Appeals, 144 Conn. 731, 137 A2d 756 (1958))." Other courts have expressed a similar view of the policy to discourage rather than to encourage nonconforming uses (Board of Zoning Adjustment v Boykin, 265 Ala. 504, 92 SO2d 906 (1957); Wilson v Edgar, 64 Cal. App. 654, 222P 623 (1923); Wasinger v Miller, 154 Colo. 61, 388 P2d 250 (1964)). Thus through the years the attitude in American law toward nonconforming uses has changed markedly. Starting from an enthustastic protection of such uses, it gradually shifted toward a rather widespread, though not universal, judicial policy of approving almost anything which will make their continuance miserable. The sections which follow

are devoted to some of the devices which municipalities have used in their effort to terminate nonconforming uses, not by restriction as to change, expansion, restoration; but by commanding them to cease.

Summary Termination

Before comprehensive zoning began, the Supreme Court of the United States examined and approved a number of ordinances which imposed specific land-use restrictions and did not except existing uses. An ordinance of Little Rock, Arkansas, prohibited stables in a business area and made no concession to existing uses. The court sustained the regulation although it required the immediate termination of a stable which preceeded the ordinance (Reinman v Little Rock, 237 U.S. 171, 59L ed 900, 35 Sct 511 (1915)). Similarly, a municipal ordinance which outlawed the manufacture of brick in prescribed residential areas was upheld although its application to an existing plant inflicted a substantial loss upon the owners (Hadacheck v Sebastian, 239 U.S. 394, 60L ed 348, 36 Sct 143 (1915)). While these decisions suggested that an existing use might be zoned out under some circumstances, they did not finally determine that a zoning ordinance properly may provide for the summary termination of all existing uses which are inconsistent with the zoning plan. The ordinances upheld in Reinman and Hadacheck affected uses which were noxious in character. They were not comprehensive zoning ordinances in the usual sense, but were necessarily single restrictions on limited areas. It did not follow that the courts would approve the summary termination of uses less obviously related to the health or safety. The proponents of comprehensive zoning probably felt that the political, financial, and legal hazards inherent in zoning out existing uses outweighted the potential benefits of such actions. As stated earlier, they

avoided any direct assualt on existing uses and sought to contain rather than abolish them. So widespread was the technique of preserving and limiting nonconforming uses that the courts seldom were confronted with cases which required a ruling on the validity of summary termination.

The early attempts that did attempt to zone out existing uses were not well received by the courts. When the City of Los Angeles excluded sanitariums from certain districts, and made no provision for the continuation of existing sanitariums, the California Court said: "Our conclusion is that where as here a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifable exercise of the police power (Jones v Los Angeles, 211 Cal. 304, 295 P14 (1930)). The New York Court of Appeals held that an ordinance which prohibits an existing use will be sustained where the resulting loss to the owner is "relatively slight and insubstantial", but a substantial user has a "vested right" which enjoys constitutional protection against municipal zoning power." In this state, then, existing nonconforming uses will be permitted to continue, despite the enactment of a prohibitory zoning ordinance, if, and only if, enforcement of the ordinance would, by rendering valueless substantial improvements or business built up over the years, cause serious financial harm to the property owner (People v Miller, 304 NY 105, 106 NE 2d 34 (1952)). Similar results have been reached in other jurisdictions where the question was squarely presented and decided. An ordinance excluding gas stations from a residential district was invalidated as applied to a station erected six years before enactment of the ordinance (Standard Oil Co. v Bowling Green, 244 KY 362, 50 SW2d 960, 86Alr. 648 (1932)). Some courts disapproved retroactive ordinances on the grounds that there was no public necessity

for their retroactive effect (Jones v Los Angeles, 211 Cal. 304, 295 P14 (1930)), or no real relation to the public health, safety, morals, or welfare (Kessler v Smith, 104 Ohio App. 213, 4 Ohio App. 2d 375, 77 Ohio L App. 104, 142 NE2d 231 (1957)). Others held retroactive zoning legislation invalid because it was not authorized by the state enabling acts (Bane v Pontiac, Oakland County, 343 Mich. 481, 72 NW2d 134 (1955)), or applicable city charter (Denver v Denver Buick, Inc., 141 Colo. 121, 347 P2d 919 (1959)).

It seems clear that a zoning ordinance which seeks summarily to terminate an existing use is unlikely to accomplish that end. The probable result in any state is that the intended effect will be nullified by narrow construction, or that the ordinance will be declared invalid because it is retroactive, and because it destroys a vested property right. It can be argued that all zoning regulations are retroactive, and that all such regulations destroy vested property rights. But the courts distinguish between uses which exist and those which do not, at the time of enactment; and a zoning ordinance which terminates the former is unlikely to be approved.

Eminent Domain

Assuming an appropriate enabling act (for example, Michigan Statutes Annotated 5.2933(1)), it seems that condemnation of a nonconforming use, to implement the community's comprehensive plan, is a taking of property for the public purpose. Thus the legal problems inherent in condemnation of land uses seem less imposing than the economic and political ones. Condemnation has the great advantage of swiftness, and it imposes the cost on the community which enjoys the benefits, not upon the nonconforming user

whose initially innocent use of his property has been overtaken by changes in the community and outlawed by restrictive ordinances. The overall effectiveness of eminent domain, however, is restricted by the complexities of administrative procedures, and by the high cost of reimbursing the property owners.

Law of Nuisances

The law of nuisances has limits that make its use as an effective tool against nonconforming uses fall short. Some courts will restrain only strict common law nuisances and even where the lawmakers have expanded the nuisance category, judicial enforcement seems to have been restricted to uses that cause 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. When the offending nuisance caused damage with a physical basis that was one thing; damages would be awarded. But the law has generally been reluctant to credit sensibilities, and so the courts have been reluctant to credit a nuisance based on damage which was merely intangible. Injury to the aesthetic sense alone was not enough to justify an action in nuisance. It would seem that if nonconforming uses are to be dealt with effectively they must be under the law of zoning, a law not limited in its controls to harmful and noxious uses in the common law sense.

Termination by Onerous Restrictions

A nonconforming use is restricted by municipal ordinances which apply to similar uses, conforming or nonconforming, maintained in the community. A nonconforming user is not immune from safety regulations. A person who maintains a nonconforming roof sign may be required to register the sign

and secure a permit for it (Lyman Realty Corps. v Gillroy, 5 App. Div. 2d 520, 172 NY S2d 907 (1958)). A nonconforming quarry must comply with municipal regulations concerning fences (Hempstead v Goldblatt, 9 NY2d 101, 211 NY S2d 185, 172 NE2d 562 (1961)). A nonconforming user has no greater right to maintain a nuisance than does a user who conforms to the zoning restrictions (Livingston Rock and Gravel Co. v Los Angeles County, 43 Cal. 2d 121, 272 P2d 4 (1954)). The right to continue a nonconforming use does not include the right to alter it in violation of setback requirements (Taft v Zoning Board of Review, 75 RI 117, 64 A2d 200 (1949)); or regulations concerning yard areas (McJimsey v Des Moins, 231 Iowa 693, 2 NW2d 65 (1942)).

Sunday restrictions (Akron v Klein, 171 Ohio 207, 12 Ohio App. 2d 331, 168 NE2d 564 (1960)); and limitations on the number of months during which a business may remain open (Hautman v Randolph, 58 NJ Supr. 127, 155 A2d 554 (1959)) apply equally to conforming and nonconforming uses. The courts, however, are alert to the possibility that a municipal corporation may seek to terminate a nonconforming use by the imposition of regulations so onerous as to render further use impractical. A village in New York, for example, amended its zoning ordinance in order to require a nonconforming private school to meet parking, heating, and construction standards which would have rendered continuance of the school economically impossible. The court declined to enjoin continuance of the school without compliance with the regulations (Brookville v Paulgene Realty Corp. 24 Misc. 2d 790, 200 NY S2d 126 (1960)). In Hempstead v Goldblatt, a nonconforming quarry resisted compliance with municipal regulations which allegedly would have involved an outlay of $1,000,000 (Hempstead v Goldblatt, 9 NY 2d 101, 211 NY S2d 185, 172 NE 2d 562 (1961)). The uses urged that the regulations

were not bona fide safety measures, but were extravagent requirements designed to force discontinuance of the use. The Goldblatt case was reviewed by the state supreme court and the court of appeals decision was unamiously affirmed. This case underlines the difficulty of determining whether a particular regulation, onerous to a user, is an unlawful attempt to destroy the use, or a legitimate means of regulating it.

Amortization

Several of the state zoning enabling act authorize municipalities to terminate nonconforming uses. Some mention termination through condemnation or amortization, but most simply delegate the power to terminate, leaving the dimensions of the power to the municipalities and the courts.

Amortization provisions have become common. Some are aimed toward the limited objective of terminating junk yards (Buffalo, New York, Ordinance, Ch. LXX 1957) and other uses which are singularly destructive of their surroundings. Others have a broader thrust, imposing limits upon commercial and industrial uses located in certain restricted residential districts (Atlanta, Georgia Zoning Manual, Article XX, 1965). While most amortization provisions are simple, and impose relatively short periods of permitted nonconformity, usually 5-10 years and seldom more than 20 years, a few describe a complex system of amortization with periods of grace up to 60 years.

Municipalities which seek to terminate nonconforming uses through amortization proceed on the assumption that the public welfare requires that such uses cease, but that summary termination is illegal, impractical, or unfair. They find a middle ground, between immediate cessation

of use and the indefinite continuance thereof. The term "amortization" is derived from the notion that the nonconforming user can amortize his investment during the period of permitted nonconformity. It is reasoned that this opportunity to continue for a limited time cushions the economic shock of the restriction, dull the edge of popular disapproval, and improves the prospects of judicial approval.

The amortization technique is not new. As early as 1929 the Supreme Court of Louisiana upheld an ordinance which required nonconforming business uses in residential districts to be discontinued in one year (State ex rel. Dema Realty Co. v Jacoby, 168 La 752, 123 SO 314 (1929)). However, judicial approval in Louisiana was not immediately followed by wide use of amortization. The case was probably regarded as unique, and critics were skeptical of the final outcome of constitutional litigation. Doubt was expressed as to whether the courts would approve zoning regulation which sought to foreclose nonconforming uses, except those which fell conveniently into the category of common-law nuisance.[2]

Following World War II, amortization ordinances have won a mixed but fair measure of judicial approval. The reasoning of the courts which approve amortization is exampled by the opinion of a California court in Los Angeles v Gage (127 Cal. App. 2d 442. 274 P2d 34 1954). It observed that every zoning ordinance affects some impairment of vested property rights and said: "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 extend or enlarge an existing nonconforming use, which deny the right to substitute new buildings for those

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[2]Columbia Law Review, "Retroactive Zoning and Nuisances, Vol. 41, 1941.

devoted to a nonconforming use--all of which have been held to be valid exercises of the police power."

Most decisions upholding amortization ordinances have done so for reasons similar to those articulated by the California court. Thus, a Maryland court approved an ordinance which required that nonconforming billboards be removed within five years, saying that the difference between an ordinance restricting past use and one restricting future use is one of degree and not of kind (Grant v Baltimore, 212 Md. 301 129 A2d 363 (1957)). In washington, the test of validity of an amortization ordinance and its application to specific property is whether hardship to the owner overbalances benefit to the public from termination of the use (Seattle v Martin, 54 Wash. 2d 541, 342 P2d 602 (1959)). And a federal court in Flordia simply found the right to require the discontinuance of nonconforming uses well established in that state and turned to the question of whether the particular ordinance was unreasonable or arbitrary (Standard Oil Co. v Tallahassee, 87 F Supp. 145 (1949, D.C. Fla.)).

Where amortization ordinances have been disapproved, the decision generally have been based upon an unreasonable period of amortization, or upon the court's conclusion that the municipality lacked power under the state enabling statutes to enact the measures in question. Thus a three year amortization of auto wreaking yards was held invalid, and unreasonable by a Michigan court, because it was not specifically authorized by statute (De Mill v Lowell, 368 Mich. 242, 118 NW2d 232 (1962)). In Texas, an ordinance requiring the amortization of nonconforming junkyards by a specific date was held invalid as applied to a particular yard which the court found not to be a nuisance or a hazard to the public

health, morals or welfare (Corpus Christi v Allen, 152 Tex. 137, 254 SW3d 759 (1953)). Apparent disapproval of amortization was expressed by a South Carolina court which held invalid an ordinance which required discontinuance of a nonconforming trailer camp within one year (James v Greenville, 227 Sc 565, 88 SE2d 661 (1955)). Illinois without announcing a blanket disapproval of amortization, held an amortization ordinance invalid as it applied in a specific case, on the grounds that the financial loss to the individual property owner was not justified by the public benefit to be derived from the restriction in issue (Oak Park v Gordon, 32 Ill. 2d 295, 205 NE2d 464 (1965)).

Since the courts seem willing to approve the amortization technique as a proper use of the police power, the recurrent question will be whether a particular period of grace is sufficient as applied to a specific nonconforming use. This problem has been singularly troublesome in New York, where the courts gave late and qualified approval to amortization, and where the amortization period is regarded as the key to constitutionality. Accordingly, the New York decisions provide a rather thorough articulation of the issues and extensive discussion of the leading cases seems warranted.

The first New York court of Appeals test of the power of a municipal corporation to terminate a nonconforming use after a period of permitted nonconformity occurred in Somers v Camarco (308 NY 537, 127 NE2d 327 (1955)). A town amended its zoning ordinance to provide that nonconforming "natural product uses" must be licensed annually. The amendment authorized the board of zoning appeals to require the cessation of any such use upon the termination of its license. The town sought to enjoin operation of a sand and gravel business which had existed prior to the ordinance. The court of appeals held that the termination provisions of the ordinance

were unconstitutional as applied to the quarrying operation, a use involving a "substantial investment". The Camarco decision provided apparent support for the common assumption that nonconforming uses which involve substantial investment or an established business or use are impervious to the zoning power of local legislatures. Would the decision have been the same if the ordinance had given the defendent a definite and substantial period within which to discontinue operations? The answer was provided a few years later in Harbison v Buffalo (4 NY2d 553, 176 NYS2d 598, 152 NE2d 42 (1958)) where an amortization ordinance survived its initial encounter with the New York Court of Appeals. The court said that an ordinance which requires the cessation of a nonconforming use after a reasonable amortization is not unconstitutional. The opinion effectively disposed of the contention that nonconforming uses enjoy some sort of perpetual existence, beyond the reach of the police power. It reflects some disposition on the part of the court to respect a legislative determination that the public health, safety, and welfare require the termination of certain nonconforming uses.

People v Miller involved a zoning ordinance which prohibited the harboring of pigeons in any residential or commercial zone. The ordinance did not except nonconforming uses. Miller, prior to enactment of the ordinance, constructed suitable inclosures and maintained pigeons in a residential district. He continued the use beyond the effective date of the ordinance and was convicted under its penalty provisions. The court of appeals upheld the conviction. Specifically avoiding a decision based on the nuisance character of Miller's case, the court proceeded to examine the alleged "vested rights" of the prior existing use. It found that every zoning ordinance curtails vested rights, but that an ordinance which

prohibits the continuation of an existing use "almost always imposes substantial loss and hardship upon the individual property owner; a loss much greater than that sustained by reason of a use restriction only, and that the imposition of such substantial loss is not balanced or justified by an advantage to the public, in terms of more complete and effective zoning, accruing from the cessation of such uses. The court concluded that an ordinance which prohibits a prior nonconforming use will be sustained where the resulting loss to the owner is relatively slight and insubstantial. The Miller case attracted wide attention because of its view that nonconforming uses enjoy constitutional protection only if they involve substantial improvements to land or business use built up over the years. It implies that an amortization ordinance will be upheld only if it provides a period of amortization which is sufficient to reduce the nonconforming user's loss to a point where it is insubstantial. This standard clearly requires that amortization ordinances be clearly tailored to each use that is to be terminated.

The difficulty involved in drafting an ordinance which provides a period of amortization for certain nonconforming uses is reflected in an opinion of the state comtroller of New York, issued in responce to a town inquiring about the validity of a three year amortization period for nonconforming signs. The comtroller advised that the amortization period must be set in relation to (1) the nature of the business, (2) the amount of the investment, (3) the number of improvements, (4) the detriment caused by the nonconforming use, (5) the character of the neighborhood, and (6) the amount of time needed by the owner to amortize his investment. He concludes that only the courts can say whether these factors have been properly applied, and that each case must be evaluated

by its individual circumstances.[3]

An alignment of the amortization decisions with relation to the length of time allowed for the amortization of particular uses may be of some use to the draftsmen. Ordinances requiring the removal of outdoor advertising signs within rather short amortization periods generally have been approved. The courts have upheld provisions which require termination of nonconforming signs in one year (Santa Barbara v Modern Sign Co. 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (1961)); fifteen months (Larchmont v Sutton, 30 Misc. 2d 245, 217 NY S2d 929 (1961)); two years (Murphy Inc. v Board of Zoning Appeals, 147 Conn. 358, 161 A2d 185 (1960)); and five years (National Advertising Co. v County of Monterey, 211 Cal. App. 2d 375, 27 Cal. Rptr. 135 (1962)).

Ordinances requiring the termination of nonconforming junk yards or automobile wrecking yards have been approved where they allowed one year and two years (McKinney v Riley, 105 NW 249, 197 A2d 218 (1964)); (Spurgeon v Board of Commissioners, 181 Kansas 1008, 317 P2d 798 (1957)).

A five year amortization period was approved as applied to a plumbing business (Los Angeles v Gage, 127 Cal. App. 2d 442, 274 P2d 34 (1954)); and a provision for the termination of a nonconforming use of wooden buildings within twenty years after construction, but in no less than five years after notification by the city council, was disapproved as applied to a planing mill (La Mesa v Tweed and Gambrell Planning Mill, 146 Cal. App. 2d 762, 304 P2d 803 (1956)).

One year amortization periods have been upheld as applied to a

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[3]Robert M. Anderson, American Law of Zoning, New York, 1968.

drugstore (State ex Rel. Dema Realty Co. v McDonald, 169 La 172, 121 SO 613 (1929)); a gasoline station (Standard Oil Co. v Tallahassee, 87 F Supp. 145 (1949, D.C. Fla.)); and to outdoor uses generally (Seattle v Martin, 54 Wash. 2d 541, 342 P2d 602 (1959)).

A seven year amortization period was upheld as applied to dog kennels (Wolf v Omaha, 177 Neb. 545, 129 NW2d 501 (1964)); and eighteen months was held sufficient in the case of a check-cashing agency (Eutaw Enterprises Inc. v Baltimore, 241 Md. 686, 217 A2d 348 (1966)).

Some municipalities have met the difficult problem of fixing a fair period of amortization by delegating to an administrative board authority to fix the termination date. An ordinance of a Texas municipality empowered the board of adjustment to require the termination of a nonconforming use if the value of the structure could be amortized within a reasonable number of years, considering the character of the neighborhood and the need for the property to conform to the zoning regulations. Another ordinance, in the same state, authorized a board to require discontinuance of nonconforming uses under any plan whereby the full value of the structure could be amortized within a definite period of time, taking into consideration the general character of the neighborhood and the necessity for all property to conform to the zoning regulation. Amortization of a drive-in grocery store under this provision was approved, since the owner of the store had realized a profit from his investment (Dallas v Tifley, 359 SW2d 177 (1962, Tex. Civ. App.)).

A novel approach to amortization is reflected in an agreement entered into by a California municipality with the owner of a trailer park. The municipality granted a special permit to expand a nonconforming park in three years rather than to continue it for the full twenty years

permitted by the ordinance. The court held that the agreement to terminate was valid (Edmonds v Los Angeles County, 40 Cal. 2d 642, 255 P2d 772 (1953)). A similar agreement was entered into between a New York municipality and a corporation engaged in the sand and gravel business. The company agreed to abandon its business upon the completion of a certain lake and residential area, or on a specific date, whichever was earlier. The court determined that the time was sufficient to permit the company to amortize its investment (North Castle v Windmill Farm Homes Inc., 36 Misc. 2d 303, 232 NY S2d 551 (1962)). These isolated instances of a special type of voluntary amortization do not provide a hopeful solution to the problem of terminating nonconforming uses generally. However, they have survived judicial scrutiny and may supply a convenient means of solving individual problems which have resisted the more orthodox approach through legislation.

EVALUATION AND ALTERNATIVES

EVALUATION AND ALTERNATIVES

As has been shown, many means of controlling and eliminating nonconforming uses have been proposed and tried. Among these means are retroactive zoning, condemnation through eminent domain, abatement of nonconforming uses as nuisances, the use of onerous restrictions, and amortization provisions. Most of these proposals have been tried and found wanting. Of the group, amortization appears to hold the most favor. Amortization ordinances have been described by many as the fairest and possibly the most effective means of solving the nonconforming use problem. But although the amortization technique has been widely discussed in the literature, and although amortization regulations are found in a large number of zoning ordinances, there is little evidence that any substantial number of nonconforming land uses have been eliminated as a result of amortization to date. This does not condemn amortization forever as an ineffective land use regulation. As will be shown, amortization is presently ineffective because of a lack of definitive state enabling legislation, enforcement staff, and official desire to take a strong stand against nonconforming uses. Once these factors become present, amortization may well indeed become a very effective land regulation tool.

To gauge the effectiveness of amortization programs to date, the American Society of Planning Officials in the summer of 1971 surveyed over 800 towns, cities, and counties across the country. In addition, planners and zoning officials in eight communities that have active amortization programs were interviewed. The findings as reported in the May 1972 Planning Advisory Service Report # 280 follow.

Approximately 2/3 of the 489 communities responding did not have ordinances requiring the amortization of nonconforming uses. The tendency among communities is not to adopt amortization ordinances.

TABLE 3

ORDINANCES WITH AMORTIZATION

	No.	%
Those requiring amortization	159	33
Those not requiring amortization	330	67
	489	100

When examining the variable of community size, roughly the same distribution was reported for communities between 0 and 500,000 in population. In the group having populations over 500,000 almost the reverse is true; 77 percent have ordinances and 23 percent do not.

TABLE 4

DISTRIBUTION BY POPULATION

Population	Communities without Ordinances No.	%	Communities with Ordinances No.	%
0-50,000	136	68	62	32
50,000-100,000	86	68	39	32
100,000-500,000	84	68	40	32
500,000 and over				

When classified as to type of jurisdiction, cities have a higher tendency to have amortization ordinances than the other jurisdictional units. The percentage of communities having amortization authority is roughly the same for towns, counties, and city-counties: 23 percent of the sampled towns; 28 percent of the counties; and 24 percent of the

city-counties. By contrast, 36 percent of all cities reporting have amortization ordinances.

TABLE 5

DISTRIBUTION BY JURISDICTIONAL UNIT

Jurisdiction	Communities without Ordinances No.	%	Communities with Ordinances No.	%
Town, Mun. & village	33	77	10	23
City	195	64	112	36
County	65	72	25	28
City-County	36	76	11	24

Within those communities with amortization programs, the most commonly amortized use concerned signs and billboards--54 percent of the communities reported amortizing them. The incidence of amortization for other uses did not exceed 25 percent: land is the highest with 25 percent followed by nonconforming uses in conforming buildings with 18 percent; buildings and junk yards each with 17 percent. There was negligible incidence of amortization among other uses such as stables, mobile homes, unsafe buildings, quarries, and race tracts. Almost 1/3 of those communities with amortization ordinances reported no actual amortization.

TABLE 6

NONCONFORMING USES AMORTIZED BY THOSE COMMUNITIES WITH ORDINANCES

Uses	No.	%
Signs & Billboards	92	54
Land	40	25
Nonconforming use in conforming building	29	18
Junk Yards	27	17
Buildings & structures	27	17
No actual amortization	46	29

Several of the communities surveyed by ASPO indicated that the present ineffectiveness of their program was due to technical difficulties in administration. Corona, California, said, "The periods are too confusing for nonconforming land, buildings, and nonconforming uses in conforming buildings." Salinas, California, found it difficult to find an adequate amortization period. Three communities suggested that their amortization periods were too long: Anchorage, Alaska; Tracy, California; and Kettering, Ohio.

Certain other causes responsible for ineffectiveness were outlined by other communities. Bakersfield, California, cited the granting of variances as a reason more nonconforming uses are not amortized. Richmond, Virginia, indicated that a profitable nonconforming use goes to the council or board of zoning appeals and is legalized when the amortization period nears. The respondent from a North Carolina community says that "Amendments to sections of the zoning ordinance have weakened it to the point of ineffectiveness." In a California city the provisions have not been enforced because enforcement officers must wait for a city council directive before

taking action. The same is true in Miami, Flordia.

In many communities, the administration of amortization programs are low on the priority scale. One effect of low priority in administration has been the failure to have a staff large enough to conduct a survey of existing nonconforming uses as a guide to their eventual elimination. This has occurred in communities such as Montogomery, Alabama among others.

Those communities using building inspectors or other enforcement officers to administer amortization programs indicate that their time is spent elsewhere. In Simi, California, there is only one enforcement officer for over 50,000 people. In Tueson, Arizona, the building inspector does not have enough staff to implement the program. This is also true for Bakersfield, California; Miami, Flordia; Homewood, Illinois; and Portland, Oregon. In other instances the enforcement credibility is undermined by few cases of actual prosecution, since attorneys have more important litigation priorities.

In summary, these ASPO statistics reveal that the adoption of amortization ordinances is presently in the minority by at least 2 to 1, (although the opposite is true for communities with large populations) Cities tend to have amortization ordinances more so than other jurisdictional units. All communities have their greatest success in amortizing billboards and signs. And finally, not only are amortization ordinances not presently pervasively adopted as a means of dealing with nonconforming uses, but they are not effectively administered when adopted. Sound enabling legislation, adequate enforcement staffs, and strong public support would seem to be necessary for future effectiveness.

The whole concept of nonconforming uses depends on self-executing regulations that have long-term stability. If the local government

frequently provides opportunities for new land uses that break the pattern of the regulations, how can it penalize existing uses that break the pattern? In many communities, commission leaders are happy to encourage a mixture on a case-by-case basis. Many communities have used variances, spot amendments, special permits, or other devices to permit the mixing of land uses. It would appear that "wait and see" zoning makes traditional concepts of nonconforming use obsolete. The courts have long recognized this inconsistency as a very early commentator noted: "The conditions which have influenced the court to loose confidence in the regulation of future uses must be corrected before the court can reasonably be expected to uphold elimination of existing nonconforming uses."[4]

The time has come to face squarely the issue of why one wants to eliminate nonconforming uses. It would seem that in the majority of cases, it is not because the nonconforming user violated the zoning ordinance. It is because he is operating a nuisance. The ASPO report shows that it is only signs, billboards and junk yards that are being eliminated in any substantial numbers.

If this is true, it is time to get rid of this fiction of nonconforming uses and frankly authorize city planning departments to order the cessation of land uses that create a serious nuisance. The first and most important part in redirecting the zoning effort should be an attempt to create meaningful regulations clearly related to the public interest. If there is reason for a regulation, it must be placed in a form least likely to restrict private action consistent with the public purpose. If possible, the regulation should be based on performance rather than stated as inflexible specifications.

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4 Los Angeles v Gage, 127 Cal. App. 2d 442, 274 P2d 34, 1954.

PERFORMANCE STANDARDS

PERFORMANCE STANDARDS

Communities have an entering wedge in this direction with the use of "industrial performance standards". Under this concept the permissable location of a particular plant depends upon the nuisance characteristics of the plant irrespective of what it produces. The test is based on noise, odor, smoke, vibration, and fire hazards generated by that particular plant. Precise formulae for these characteristics would be set out in the zoning ordinance.

There is no logical reason why the intermixing that is now acceptable in the case of industry should not be equally valid in other districts. The concept of "vertical zoning" reflected in the stratification of apartments and shops in one building requires the use of nuisance techniques similar in concept to those employed in industrial performance standards. This concept is also apparent in the current popularity of the so-called "Planned Unit Development".

Performance standards should be designed with a particular community in mind. The performance standards should be developed to meet the goals or philosophy established by the community. The engineer who draws up performance standards must design the standards so they are consistent with the desires and objectives of the growing community.

There are two methods for establishment of performance standards: (1) ambient standards and (2) emission rates. With the ambient standards approach, the community determines the level of a particular environmental contaminant that it will tolerate in each zone, e.g., the noise level or

the level of air purity. The community then establishes the performance standards which will ensure that these levels are not exceeded. For example, ambient air standards are based on the effects of particular contaminants on human health, vegetation and livestock, materials, visibility, and so forth. The alternate route to formulating performance standards is the establishment of emission standards that deal with the technical capacity of desired industries to meet specified nuisance outputs. In this case the starting point is a source control rather than an ambient level control. A source control may take the form of an emission rate, indicative of the strength of the source. Ambient controls on nuisance effects are a more logical approach than emission controls for describing an acceptable environment. The setting of ambient standards, whether for particulates or noise, can be based upon human response or property damage or whatever criteria are desired. Source controls, on the other hand, are gauged to the ability of the industry to comply. The nuisance or environmental effect is not necessarily resolved by an emission control.

An important element, and a basic problem, in setting standards for environmental effects is to equate the ambient standard to the emission standard. In air pollution, the science of micrometeorology and diffusion helps to relate these two factors. Given a certain source strength and various meteorological conditions, one can compute the ambient air quality. Conversely, with a given air quality, one can compute the total allowable emission rate. In noise, the ambient noise level can be computed through the disciplines of acoustics and physics to establish acceptable source strengths.

Applications of the standards

Performance standards are not a solution to all of a community's problems. There are many sources of nuisance which would not be regulated by performance standards under a zoning ordinance. However, techniques have been developed to measure such nuisances as air pollution, toxic matter, noise, vibration, fire and explosive hazards, and glare; and controls have been established to relate such nuisances to specific land uses and densities.

Air pollution

Performance standards governing air pollution have traditionally covered smoke, particulate matter, odor, and toxic matter. Most municipal air pollution ordinances started out as smoke control codes. Smoke emissions were evaluated by means of the Ringelmann chart which contains graduated shades of gray varying in equal steps from white to black. The numbers run from 0 to 5, Ringelmann No. 0 being all white and Ringelmann No. 5 completely black. In practice, the chart is used by a smoke inspector to determine the darkness or light obscuring capacity of smoke being emitted from a stack or other source of air pollution. The Ringelmann test is not particularly scientific because it does not yield valid results with respect to the actual amount of pollutants being released. The test is valid only in determining the appearance of the emission and not the quality or type of air pollutant i.e., it deals only with aesthetics and not the quantity or effect of smoke. If for aesthetic reasons it is desired to have a community free of smoking stacks, then the Ringelmann number concept is useful. Areas priding themselves on scenic vistas and tourist attractions may wish to completely

eliminate the sight of smoking stacks, in which case, Ringelmann No. 0 would be an appropriate limit. An example of a smoke performance standard in a residential district might be stated as follows: The emission of smoke from any chimney, stack, vent, opening, or combustion process shall not exceed a density or equivalent opacity of Ringelmann No. 2.

Particulate matter

Particulate matter is defined generally as fine particles, either solid or liquid, which are small enough to be dispersed and carried in the air. Emission standards have governed the release of particulate matter into the atmosphere for many years. "The Model Smoke Regulation Ordinance, prepared by the American Society of Mechanical Engineers in 1949, provided that the emission of particulate matter shall not exceed 0.85 lbs. per thousand lbs. of flue gases, except that a dust collecting efficiency of not more than 85% shall be required for dust separating equipment".[5] Note that these restrictions apply in general to all sources, not simply industrial works.

Odor

Perhaps the most difficult performance standard to prescribe are those dealing with odor. The only instrument for measuring odor is the human nose and there may be little agreement whether an odor is pleasant or unpleasant. Thus the variety of responses to a given odor makes it difficult to define an objectionable odor. Even pleasant odors can become objectionable due to continuous exposure. Thus, in the present state of

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[5]Marvin A. Salzenstein, "Industrial Performance Standards", Planning Advisory Service Report # 272, September 1971.

odor analysis, all odors, whether pleasant or objectionable, come under odor standards. Because odor cannot be evaluated as precisely as other nuisances, many zoning ordinances simply omit all reference to odor or use nonspecific terminology such as: "No emission of objectionable odors outside the lot lines shall be permitted."

Toxic matter

The control of toxic materials in the industrial plant has been of concern for many decades and has led to the establishment of maximum allowable concentrations or what are now known as threshold limit values, or TLVs. The TLV for some 475 toxic materials have been established for industrial workers by the American Conference of Governmental Industrial Hygienists. The listing consists of the name of the compound and its maximum allowable concentration in air. "For example, the TLV for carbon monoxide is 50 parts per million."[6] The U.S. Public Health Service has been charged by Congress to undertake and supply to the states a complete study of the various common air pollutants and their long-term effects on human beings, animals, vegetation, and property. It is anticipated that it will take several years before criteria are formulated for the most common air pollutants. In the interim, it is suggested that the performance standards for toxic matter be set at some fraction of the industrial workers TLV. A typical performance standard relating to toxic matter follows.

> The measurement of toxic matter shall be at ground level or habitable elevation and shall be the average of any 24-hour sampling period. The release of any airborne toxic matters currently listed in the Threshold Limit Values adopted by the

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[6]Ibid.

American Conference of Governmental Industrial Hygienists shall not be exceeded. Each use district would then be given a restriction or percentage of TLV allowed.

Noise

Noise can be defined as unwanted or unpleasant sound. Human response to noise is complex, but the following factors appear to determine the nuisance value of a noise: intensity, pitch or frequency, duration, time of day, background noise, number of exposures, adjustment to exposure, individual sensitivity, and psychological factors. The intensity (loudness) is measured with a sound level meter and is expressed in decibels. Pitch describes the frequency of the sound in cycles per second. While there is instrumentation to measure sound levels at particular frequencies, it is most conviently done by measuring intensity levels over an octave band, that is, a prescribed set of frequencies. These octave bands have been standardized by the American National Standards Institute and are referred to as preferred frequencies.

The selection of noise preformance standards at times poses a dilemma. One hand, if a less strict limitation is imposed in recognition of the present high ambient levels, there will be no effective control over noise levels and the ambient level will probably rise in the future. On the other hand, an ordinance which specified limits that are at or below the existing ambient noise levels near highways will be unenforceable in the vicinity of highways. While it may seem at first glance reasonable to establish noise performance standards based upon ambient noise levels, one finds that the ambient level is not well defined and rises and falls from moment to moment.

"The performance standards of Sedgwick County, Kansas, represent a good example of performance standards for noise in business and manufacturing

districts. In Light Industrial District (M-1), and the Business Districts, the noise limits have been set at levels which have been found to exist in the residential areas of Wichita and environs".[7] It is felt that all of the classically light industries, if enclosed within substantial buildings and set back a reasonable distance from property lines, will have no difficulty complying with the specified noise levels. The same is true of business and commercial uses in various districts.

Vibration

Vibration, as used in performance standards, refers to ground transmitted oscillations. Earthborne vibrations are measured with a seismograph or accelerometer, the former being preferred. With the seismograph, the earth vibrations are measured in three mutually perpendicular directions (one vertical and two horizontal). The three motions are added vectorially and the resultant maximum vibration given is a single number. "The following table is illustrative of the amplitude or movement measured from various industrial and traffic sources."[8]

TABLE 7

VIBRATION AMPLITUDES

Source	Displacement in Thousandths of an Inch
Small punch press at lot line	0.1-0.2
Medium punch press	1-2
Large punch press	3-5
Forging operation at 13 ft., 500 lbs.	2.5
Forging operation at 13 ft., 4000 lbs.	25
Air compressor, steady state at 20 ft.	4
Air compressor, steady state at 30 ft.	3
Printing press, large, steady state	5
Diesel engine, power plant, steady state	1-2

[7] Ibid.

[8] Ibid.

TABLE 7--Continued

VIBRATION AMPLITUDES

Source		Displacement in Thousandths of an Inch
Train moving rapidly	at 10 ft.	2
	at 35 ft.	1
	at 75 ft.	0.6
Elevated train	at 30 ft.	0.4
	at 100 ft.	0.2
	at 150 ft.	0.1
Buses, trucks	at 10 ft.	2
	at 40 ft.	1
	at 70 ft.	0.5

The performance standards would then set vibration standards for each zoning district.

Fire and Explosive Hazards

Certain uses have fire or explosive hazards associated with them. Most communities have building codes and fire prevention codes which provide protection to the community with respect to these hazards. Building codes will require the diking of flammable liquid storage tanks so that if the contents are spilled they will be contained. Certain operations are considered hazardous and must be conducted within fire protected buildings with automatic fire extinguishing systems. Such controls are useful but do not negate the need for zoning classification of hazardous uses.

A typical performance standard for fire and explosive hazards would restrict activities involving the storage, utilization, or manufacture of materials which decompose by detonation to specific zoning districts. While certain materials might be permitted in a district, they must be handled, stored, utilized, or manufactured in accordance with the National

Fire Codes published by the National Fire Protection Association.

Glare

Illumination from activities at night can be disturbing to neighborhood residences. Possible sources of glare are signs, flares, welding, and floodlighting. Commercial areas generally cause more problems in illumination and glare than industrial uses. Signs, floodlighting, and interior lighting from commercial activities are annoying, particularly when directed toward residential areas. The reduction of glare is generally a simple problem which can be alleviated by shielding or aiming a light source away from homes and apartments. Illumination levels are measured with a footcandle meter and expressed in footcandles. This is the measure of the amount of light falling on a unit surface.

Some recommended wattages for sign lamps, luminous background signs, poster panels, and bulletin boards are extracted from the forth edition of the Illumination Engineering Society (IES) Lighting Handbook.

TABLE 8

RECOMMENDED LAMP WATTAGES

District Brightness	Wattage
Low	6, 10
Medium	10, 15, 25
Bright	25, 40

One the basis of this table one might consider restricting the use of bare bulbs in or near residential districts to no greater than 10 watts. In addition, provisions can be made to include a buffer around residential districts in which bare bulbs may not exceed 15 watts when visible in the residential district. An example of performance standards restricting light sources follows.

TABLE 9

MAXIMUM INTENSITY OF LIGHT SOURCES

Source	Residential	Commercial & industrial
Bare incandescent bulbs	15 watts	40 watts
Illuminated buildings	15 footcandles	30 footcandles
Back lighted or luminous background signs	150 footcandles	250 footcandles
Outdoor Illuminated sign and poster panels	25 footcandles	50 footcandles
Any other unshielded source	50 candles per sq. centimeter	50 candles per sq. centimeter

Performance standards were originally designed to classify industries by their environmental impact. The nuisance characteristics just discussed represent this industrial viewpoint; but with the extension of performance standards to other districts, the depth and value of these techniques should increase. The point to be established is that inflexible land-use specifications are not accomplishing the goals of zoning. Performance standards, however, would put reason back into zoning. They would allow planners to abandon extreme segregation in favor of controlled integration. They would allow each case to be considered on its merits, but would state what merits are to be considered. They would encourage site planning and development in relation to surrounding planning and development, not in accordance with fixed rules having little demonstrable relation to public benefits.

AN AMORTIZATION TABLE

AN AMORTIZATION TABLE

While performance standards offer much potential for land-use control, the ability adequately to enforce the standards is open to serious question when the community cannot obtain the instruments or personnel to determine whether the use is in compliance or not. Small communities, and more specifically the majority of Kansas communities, simply do not have the budget necessary to obtain the needed equipment or specially trained personnel.

Realizing the problems inherent in amortization, these smaller community's most feasible means of confronting the nonconforming use problem would seem to be a well developed amortization policy, backed up with a strong enforcement program. Realizing that only a few Kansas communities have any type of amortization provisions, the following amortization table has been developed to suggest reasonable amortization periods for specific types of nonconforming uses. The amortization periods are based on the case law reviewed earlier in this paper and are presented as parameters within which a community should be reasonably sure of success.

TABLE 10

AMORTIZATION TABLE

Nonconforming Use	Amortization Period
An industrial or commercial use in a non-residential building.	25-40 years
An industrial or commercial use in a residential building.	5-10 years

TABLE 10--Continued

AMORTIZATION TABLE

Nonconforming Use	Amortization Period
Specified objectionable uses (Junk yards, auto wrecking, ect.)	5-10 years
Open uses and advertisements (small investments)	2-3 years

CONCLUDING REMARKS

CONCLUDING REMARKS

This report has surveyed the nonconforming use situation from a variety of angles. Beginning with a survey of state enabling legislation, it has shown that the majority of state acts set very general guidelines for dealing with nonconforming uses. Termination provisions, in the few cases found, provide few guidelines for implementation. This has caused great variety in local community actions leading to much confusion in the courts. The need for a uniform and more definitive enabling act would seem apparent.

Results of the Kansas community survey show a common pattern of restricting nonconforming uses as to growth or expansion. All communities given the mailed questionaire have recent zoning ordinances with similar formats, suggesting the widespread use of consultants. The few communities which seek to eliminate nonconforming uses through amortization provisions deal basically with auto wrecking yards, junk yards, and signs. The amortization table was constructed to suggest an expansion of their limited provisions.

The survey of case law presents a mixed reaction from the courts toward the techniques dealing with nonconforming uses. Although amortization has a growing popularity in the literature, no positive trend can be established within the case law. The ASPO report on amortization discredits it as an effective means of dealing with nonconforming uses to date. Amortization, however, should not be permanently discredited. With more definitive enabling legislation and sufficient enforcement staff,

amortization may prove an effective land-use regulation tool.

Finally, this report suggested moving away from inflexible zoning restrictions toward land-use regulation based on the relationships between types of land use. Nuisance characteristics regulated under industrial performance standards were highlighted. Such performance standards do not represent a solution for all land-use conflicts, nor in their present form do they accurately quantify all existing frictions between the various land uses. However, performance standards do provide an alternative method of dealing with nonconforming uses and show much potential for future development in land-use regulation.

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ELIMINATION OF NONCONFORMING USES

by

KENT ALAN SCHELL

B.S., Kansas State University, 1970

AN ABSTRACT OF A MASTER'S REPORT

submitted in partial fulfillment of the

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MASTER OF REGIONAL AND COMMUNITY PLANNING

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PROBLEM

The draftsmen of early zoning legislation believed that some uses of land were incompatible with others and that more efficient use of land resources would be achieved if incompatible uses were clearly separated. But no matter how carefully district boundaries are drawn, certain lands, buildings, or structures already in existence at the time the zoning ordinance is adopted do not meet the district requirements. Developing a means to eliminate such nonconforming uses has posed a difficult problem for community planners since the inception of land-use zoning.

PURPOSE

This report begins with a survey and analysis of the state enabling legislation laying the groundwork for a comprehensive study of the nonconforming use problem. In surveying this legislation, the author wished to determine not only the parameters under which municipal authorities must work, but also to what degree these statutes are arbitrary and undirective in nature.

A review of significant zoning ordinances and case law was undertaken to show the evolution of regulation from the simple restriction of nonconforming uses to such recently popular techniques as termination through amortization. Special interest was placed on the Kansas situation, with a comprehensive sample of Kansas zoning ordinances taken and analyzed.

While many sources believe that amortization methods constitute the best means to confront nonconforming uses, this report attempts to refute the amortization technique as the best method in favor of the use of performance standards. Realizing, however, that the majority of Kansas

communities cannot implement performance standards because of a lack of trained staff and necessary equipment, an amortization table was constructed which suggests by specific land use type what amortization periods should be found acceptable based on the review of significant case law.

PROCEDURES

The state enabling legislation was obtained directly from each state's annotated statutes. For the survey of ordinances and case law, Anderson's Law of Zoning provided a valuable reference source. Forty Kansas communities were randomly sampled to determine whether the community had established a zoning ordinance and if so, what provisions were made for nonconforming uses.

FINDINGS AND RECOMMENDATIONS

The survey of state enabling legislation indicates that the majority of state acts set very general guidelines for dealing with nonconforming uses. Termination provisions, where found, provide few guidelines for implementation. This lack of direction has caused great variety in local government action leading to much confusion in the courts. The need for a uniform and more definitive enabling act dealing with nonconforming uses is indicated.

Results of the Kansas community survey show a common pattern of restricting nonconforming uses as to growth or expansion. A majority of the communities sampled have recent zoning ordinances with similar formats, suggesting the widespread use of consultants. The few communities which seek to eliminate nonconforming uses through amortization deal basically with auto wrecking yards, junk yards, and signs. The amortization table was constructed to suggest a needed expansion of their limited

provisions.

The survey of case law presents a mixed reaction from the courts toward the techniques dealing with nonconforming uses. Although amortization has a growing popularity in the literature, no positive trend can be established within the case law.

Finally, this report suggests moving away from inflexible restrictions toward land-use regulation based on the relationship between types of land uses. Performance standards are offered as an alternative to present methods of dealing with nonconforming uses. While such performance standards do not represent a cure-all for all land-use conflicts, nor in their present form do they accurately quantify all existing frictions between the various land uses, they do show much potential for future development in land-use regulation.