

THE REASONABLENESS OF  
AMORTIZATION PERIODS FOR  
NONCONFORMING USES—BALANCING  
THE PRIVATE INTEREST AND THE  
PUBLIC WELFARE

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I. INTRODUCTION

Following the general rule against retroactive application of legislation, most courts hold that a zoning law is inapplicable to uses or structures already existing at the time the law goes into effect.<sup>1</sup> Often, the legislation itself expressly provides for the exemption of such “nonconforming uses.”<sup>2</sup> Even when the zoning legislation makes no specific reference to the question of retroactivity, courts have taken the view that nonconforming uses are exempt from the legislation’s restrictions. In the early years of zoning, this was true largely because courts thought that the contrary view would raise serious constitutional questions. Courts also believed that nonconforming uses would disappear

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1. See Annot., *Validity of Provisions for Amortization of Nonconforming Uses*, 22 A.L.R.3d 1134 (1968). See generally 82 AM. JUR. 2d *Zoning and Planning* § 178 (1976).

2. A “nonconforming use” for purposes of applying this policy is one that is in actual and lawful existence at the time the zoning law becomes operative. *Board of Supervisors v. Miller*, 170 N.W.2d 358, 361 (Iowa 1969) (quoting E. McQUILLIN, 8A MUNICIPAL CORPORATIONS § 25.185, at 21 (rev. ed. 1965)).

soon after the enactment of the zoning ordinance.<sup>3</sup> The right to a nonconforming use exists only so long as the property owner continues the use itself.<sup>4</sup> Moreover, this right gives no protection to any use that is different from that in existence when the zoning law takes effect.<sup>5</sup> The individual property owner does not possess the right to a nonconforming use. Rather, the right runs with the land and is passed to subsequent owners.<sup>6</sup>

Although some commentators forecasted a rapid demise in nonconforming uses, their prediction has proven incorrect. One critic called this development "one of the great disappointments of the zoning movement."<sup>7</sup> Indeed, the continued existence of nonconforming uses has, in many communities, become the greatest obstacle to the orderly development that these communities seek to achieve through zoning.<sup>8</sup>

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3. See Mandelker, *Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa*, 8 DRAKE L. REV. 23 (1958). See generally O. REYNOLDS, LOCAL GOVERNMENT LAW 387 (1982), noting four reasons for the allowance of nonconforming uses under early zoning laws: (1) local governments considered zoning largely a matter of prospective control, not a tool for changing existing development; (2) early zoning authorities felt that a few nonconforming uses would not interfere with the overall plan; (3) strong political opposition to the first zoning ordinances; and (4) constitutional arguments against zoning would have been strengthened if nonconforming uses had been eliminated. On the history of nonconforming uses, see Krause, *Nonconforming Uses in Illinois*, 43 CHI.-KENT L. REV. 153 (1966); Strong, *Nonconforming Uses: The Black Sheep of Zoning*, 7 INST. ON PLAN., ZONING & EMINENT DOMAIN 25 (1968).

4. *League to Save Lake Tahoe v. Crystal Enterprises*, 685 F.2d 1142, 1146 (9th Cir. 1982) (interpreting ordinance under which construction could amount to nonconforming use but right to such use lost if construction ceased for period of one year). On the manner in which the right to a nonconforming use may be lost through "abandonment," see notes 15-17 *infra* and accompanying text.

5. See *Hanna v. Board of Adjustment*, 408 Pa. 306, 313-14, 183 A.2d 539, 543-44 (1962) (new building for new use, in same or higher nonconforming classification, may not be erected).

6. *Marchese v. Norristown Borough Zoning Bd. of Adjustment*, 2 Pa. Commw. 84, 98, 277 A.2d 176, 184 (1971); *Eitnier v. Kreitz Corp.*, 404 Pa. 406, 412, 172 A.2d 320, 323 (1961). There is also some authority that a zoning ordinance may validly provide for the termination of a nonconforming use upon a change in ownership. See Annot., *Zoning: Change in Ownership of Nonconforming Business or Use as Affecting Right to Continuance Thereof*, 9 A.L.R.2d 1039 (1950).

7. Mandelker, *Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa*, 8 DRAKE L. REV. 23 (1958). See generally Norton, *Elimination of Incompatible Uses & Structures*, 20 LAW & CONTEMP. PROBS. 305 (1955).

8. *Board of Supervisors v. Miller*, 170 N.W.2d 358, 361-62 (Iowa 1969) (preexisting nonconforming uses do not dissipate of their own accord, so municipalities have the authority, through their police power, to require termination of nonconforming uses after reasonable amortization period). See Note, *Termination of Nonconforming Uses—*

Some commentators have blamed nonconforming uses for limiting the effectiveness of land use controls<sup>9</sup> and for contributing to urban blight in some areas.<sup>10</sup> Originally, attacks on nonconforming uses mainly took the form of limitations on growth or repair.<sup>11</sup> Thus, courts generally denied property owners the right to expand a nonconforming use.<sup>12</sup> Prohibiting substantial alterations,<sup>13</sup> courts allowed only routine

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Harbison to the Present, 14 SYRACUSE L. REV. 62 (1962). See generally Graham, *Legislative Techniques for the Amortization of the Nonconforming Use: A Suggested Formula*, 12 WAYNE L. REV. 435 (1966) ("Such incompatible uses often result in inconveniences and undesirable circumstances such as increased and noisier traffic, unpleasant odors, polluted air and water, increased noise generally, diminished aesthetic appearance, and decreases in property values.").

9. See MESSER, *NON-CONFORMING USES, MUNICIPALITIES AND THE LAW IN ACTION* 374 (1951).

10. See Anderson, *Amortization of Nonconforming Uses—A Preliminary Appraisal of Harbison v. City of Buffalo*, 10 SYRACUSE L. REV. 44 n.5 (1958) (citing Guandolo, *Housing Codes in Urban Renewal*, 25 GEO. WASH. L. REV. 1 (1956)).

11. See Note, *Termination of Nonconforming Uses—Harbison to the Present*, 14 SYRACUSE L. REV. 62 (1962).

12. See *Dienelt v. Monterey County*, 113 Cal. App. 2d 128, 131, 247 P.2d 925, 926 (1952) (resort located in residential zone not allowed to expand); *Mercer Lumber Co. v. Village of Glencoe*, 390 Ill. 138, 144, 60 N.E.2d 913, 916 (1945) (zoning ordinance restricting expansion of lumber yard to 30% of its current capacity presumptively valid); *Seekonk v. Anthony*, 339 Mass. 49, 55, 157 N.E.2d 651, 655 (1959) (enlargement of plant from gravel processing to cement manufacturing violated zoning ordinance); *Piscicchio v. Board of Appeals*, 165 Misc. 156, 157, 300 N.Y.S. 368, 370 (1937) (coal yard's increase of coal sale volume extended a nonconforming use contrary to zoning ordinance); *State ex rel. Miller v. Cain*, 40 Wash. 2d 216, 242 P.2d 505 (1952) (denial of building permit to expand service station was valid exercise of police power). Cf. *State ex rel. City Ice & Fuel Co. v. Stegner*, 120 Ohio St. 418, 425, 166 N.E. 226, 228 (1929) (proper to deny permit for manufacturing ice where premises previously used only for storage). But see *Jahnigen v. Staley*, 245 Md. 130, 138, 225 A.2d 277, 282 (1967) (pier owner could increase number of boats rented from dock; increase in volume was a mere intensification, rather than an expansion, of a nonconforming use). See generally, Note, *Municipal Corporations—Police Power and Regulations—Whether or Not Provision in Zoning Ordinance Restricting Extension of Nonconforming Use Is Arbitrary and Unreasonable*, 23 CHI-KENT L. REV. 349 (1945); Annot., *Construction of New Building or Structure on Premises Devoted to Nonconforming Use as Violation of Zoning Ordinance*, 10 A.L.R.4th 1122 (1981). There is some authority, chiefly in Pennsylvania, allowing expansion of a nonconforming use if such expansion is in response to normal growth of a business. See *Jackson v. Pottstown Zoning Bd. of Adjustment*, 426 Pa. 534, 233 A.2d 252 (1967).

13. See *Earle v. Shackelford*, 177 Ark. 291, 293, 6 S.W.2d 294, 295 (1928) (structural alterations forbidden); *Seligman v. Von Allmen Bros., Inc.*, 297 Ky. 121, 126, 179 S.W.2d 207, 210 (1944). On what alterations amount to a sufficiently great structural change that they will be forbidden, see *Pross v. Excelsior Cleaning & Dyeing Co.*, 110 Misc. 195, 179 N.Y.S. 176 (1919) (consideration given whether the change affects a vital and substantial portion of the premises, whether it alters appearance of the use, whether

repair and maintenance.<sup>14</sup> Furthermore, once the property owner abandons the use, he is unable to resume it.<sup>15</sup> Courts upheld abandonment only upon a showing of intent to abandon,<sup>16</sup> as exhibited by some

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it is extraordinary in scope or unusual in amount of expenditure, etc.). See generally Young, *Regulation and Removal of Nonconforming Uses*, 12 CASE W. RES. L. REV. 681 (1961); Annot., *Validity and Construction of Zoning or Building Ordinance Prohibiting or Regulating Subsequent Alteration, Addition, Extension, or Substitution of Existing Buildings*, 64 A.L.R. 920 (1929).

14. See *City of Madison Heights v. Manto*, 359 Mich. 244, 249-50, 102 N.W.2d 182, 185 (1960) (repair of trailer park's septic tank and sewer system was not an enlargement, but routine maintenance, permissible under zoning ordinances); *Horwitz v. Dearborn Township*, 332 Mich. 623, 52 N.W.2d 235 (1952) (aluminum covering could be used to replace canvas); *Zoning Bd. v. Lawrence*, 309 S.W.2d 883 (Tex. Civ. App. 1958) (moving one part of veterinary clinic 150 feet to attach to another building not a structural alteration). See generally Babcock, *What Should and Can be Done with Nonconforming Uses*, 1972 INST. ON PLAN., ZONING & EMINENT DOMAIN 23; Annot., *Zoning: Changes, Repairs, or Replacements in Continuation of Nonconforming Use*, 87 A.L.R.2d 4 (1963). Some zoning ordinances forbid extensive repairs. See Fratcher, *Constitutional Law: Zoning Ordinances Prohibiting Repair of Existing Structures*, 35 MICH. L. REV. 642 (1937).

15. See *Grushkin v. Zoning Bd.*, 26 Conn. Supp. 457, 227 A.2d 98 (1967) (although building in residential zone was never abandoned as a business site, liquor license would substantially change nature of business, and therefore denial of license was proper to prevent expansion of nonconforming use); *City of Las Cruces v. Neff*, 65 N.M. 414, 338 P.2d 731 (1959) (temporary suspension of use of nonconforming advertising sign after sign blew down did not constitute an abandonment; therefore, repairing sign did not violate ordinance). See generally Annot., *Zoning: Right to Resume Nonconforming Use of Premises After Voluntary or Unexplained Break in the Continuity of Nonconforming Use*, 57 A.L.R.3d 279 (1974).

16. *Auditorium, Inc. v. City of Wilmington*, 47 Del. 373, 91 A.2d 528 (1952) (abandonment not found from mere discontinuance of activity); *Paul v. Selectmen of Scituate*, 301 Mass. 365, 370, 17 N.E.2d 193, 196 (1938) (abandonment is a question of law; mere nonuse of a building for its nonconforming use for a period of time insufficient to show abandonment); *City of Binghamton v. Gartell*, 275 A.D. 457, 90 N.Y.S.2d 556 (1949) (little activity in junk business for four years, but no abandonment). Ordinances sometimes indicate that nonuse for a prescribed period is determinative of abandonment, and courts have held that such provisions remove the need for a showing of intent if the legislation makes such removal clear. See *Franmor Realty Corp. v. LeBoeuf*, 201 Misc. 220, 104 N.Y.S.2d 247 (1951), *aff'd*, 279 A.D. 795, 109 N.Y.S.2d 525, *appeal denied*, 279 A.D. 874, 110 N.Y.S.2d 910 (1952) (zoning ordinance which prohibited resumption of nonconforming use if use discontinued more than 12 months held valid, regardless of reason for discontinuance); *State ex rel. Peterson v. Burt*, 42 Wis. 2d 284, 166 N.W.2d 207 (1969) (municipality not required to prove intent to abandon when ordinance provided that one-year discontinuation of use effected an abandonment). Similarly, ordinances that forbid resumption after a designated period of discontinuance remove the need for a showing of intent to abandon. See *Wilson v. Edgar*, 64 Cal. App. 654, 222 P. 623 (1923) (ordinance prohibited use of building for nonconforming business other than business engaged in at time of passage of ordinance; closing of milk bottling business effected an abandonment, so that cloth dyeing business could not be

voluntary act.<sup>17</sup>

conducted in building after milk bottling business shut down); *State ex rel. Brill v. Mortenson*, 6 Wis. 2d 325, 96 N.W.2d 603 (1959) (ordinance providing for termination of nonconforming use after 12-month cessation of business does not permit substitution of a new nonconforming use after original nonconforming use is discontinued). Some ordinances prohibit an owner from resuming a nonconforming use or regard a use as abandoned after a prescribed period of nonuse. In those situations, courts will find abandonment only if the legislators establish the owner's intent to abandon and rule that otherwise the owner may resume the use. See *Smith v. Howard*, 407 S.W.2d 139 (Ky. 1966) (intent to abandon required, or such lack of diligence as to amount to abandonment); *Dusdal v. City of Warren*, 387 Mich. 354, 196 N.W.2d 778 (1972). If the premises are used for a purpose that conforms to the zoning law, the same rules are applied as where the property is not used at all. A temporary change, absent intent to abandon the nonconforming purpose, will not work an abandonment. *State ex rel. Morehouse v. Hunt*, 235 Wis. 358, 291 N.W. 745 (1940) (temporary use of a nonconforming structure as a conforming structure, with intent to return to nonconforming use, is insufficient to show abandonment). But a lengthy period of use for a conforming purpose is strong evidence of abandonment. See *Branch v. Powers*, 210 Ark. 836, 197 S.W.2d 928 (1946) (use of nonconforming structure for storage, a conforming purpose, for 11 years constituted abandonment of nonconforming use). A change from one nonconforming use to another is ordinarily not allowed and can also result in a finding of abandonment. See *Town of Montclair v. Bryan*, 16 N.J. Super. 535, 85 A.2d 231 (1951) (change of use from nonconforming multiple family dwelling to conforming single family home was fatal to nonconforming use). Some ordinances, however, allow a change in the direction of conformity. See D. HAGMAN, J. LARSON & C. MARTIN, CALIFORNIA ZONING PRACTICE § 9.22 (1969).

17. See *Green v. Copeland*, 286 Ala. 341, 239 So. 2d 770, 56 A.L.R.3d 134 (1970) (suspension of beer license not sufficient to show abandonment of nonconforming use; rather, some voluntary act necessary to show abandonment); *Empire City Racing Ass'n v. City of Yonkers*, 132 Misc. 816, 230 N.Y.S. 457 (1928) (destruction of nonconforming structure by fire insufficient to show abandonment; property owner may lawfully erect nonconforming structures to replace those which had burned down); *Rowton v. Alagood*, 250 S.W.2d 264 (Tex. Civ. App. 1952) (nonconforming use not abandoned when building inspector denied permit to occupy the building for commercial purposes). Thus, in the absence of legislation to the contrary, a temporary discontinuance due to fire, act of God, or governmental activities will not effect an abandonment. See Annot., *Zoning: Right to Repair or Reconstruct Building Operating as Nonconforming Use, After Damage or Destruction by Fire or Other Casualty*, 57 A.L.R.3d 419 (1974); Annot., *Zoning: Right to Resume Nonconforming Use of Premises After Involuntary Break in the Continuity of Nonconforming Use Caused by Governmental Activity*, 56 A.L.R.3d 138 (1974); Annot., *Zoning: Right to Resume Nonconforming Use of Premises After Involuntary Break in the Continuity of Nonconforming Use Caused by Difficulties Unrelated to Governmental Activity*, 56 A.L.R.3d 14 (1974). But legislation providing that a nonconforming use may not be resumed or rebuilt if destroyed, even without fault or voluntary act of the owner, is frequently encountered and has been upheld. See *D'Agostino v. Jaguar Realty Co.*, 22 N.J. Super. 74, 91 A.2d 500 (1952) (total destruction); *State ex rel. Covenant Harbor Bible Camp v. Steinke*, 7 Wis. 2d 275, 96 N.W.2d 356 (1959) (substantial destruction). *But cf.* *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987), regarding an ordinance forbidding the construction or reconstruction of any structures in a flood protection area and holding

Increasingly, however, courts and commentators have recognized that the law should go beyond the limitations described and should instead encourage the gradual elimination of nonconforming uses.<sup>18</sup> In accord with this policy, zoning legislation today often provides for the termination of these uses—most frequently through the process known as “amortization.”<sup>19</sup> An amortization scheme requires the nonconforming use to cease at the end of a definite period of time.<sup>20</sup> Supporters of this method have generally agreed that “constitutional limitations, or considerations of fairness require that existing uses be allowed to continue until the user has had a reasonable opportunity to amortize his investment.”<sup>21</sup>

The purpose of this Article is to consider the validity of amortization for terminating nonconforming uses and to determine how to decide what amounts to a “reasonable” period of time for amortization.

## II. VALIDITY OF AMORTIZATION LAWS

The traditional rule is that a zoning law that requires the immediate *cessation* of a nonconforming use is unreasonable and is an unconstitu-

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that if the ordinance denied the owner all use of his property, the ordinance was invalid as a police-power restriction and compensation must then be paid the owner for the time this excessive regulation was in effect. Some laws provide that the use may not be resumed or rebuilt if destroyed to the extent of a stated percentage of its former value. See *Moffatt v. Forrest City*, 234 Ark. 12, 350 S.W.2d 327 (1961) (if destroyed to extent of 60% of value); *Bobandal Realities, Inc. v. Worthington*, 21 A.D.2d 784, 250 N.Y.S.2d 575 (1964) (50% of value), *aff'd* 15 N.Y.2d 788, 205 N.E.2d 685, 257 N.Y.S.2d 588 (1965).

18. See *Attorney General v. Johnson*, 355 S.W.2d 305 (Ky. 1962) (policy and spirit of law of the state ordains gradual elimination of nonconforming uses, and general intent of ordinance on nonconforming uses is to hold them within strict limits). Cf. *Wilson v. Edgar*, 64 Cal. App. 654, 222 P. 623 (1923) (ultimate purpose of legislation is elimination of nonconforming uses; therefore, one such use should not be allowed to succeed another).

19. See Annot., *Validity of Provisions for Amortization of Nonconforming Uses*, 22 A.L.R.3d 1134, 1138 (1968), also listing five other methods of attempting to eliminate nonconforming uses: (1) condemnation through eminent domain; (2) the use of nuisance law; (3) forbidding the resumption of the use after abandonment, or after a prescribed period of time; (4) prohibiting or limiting expansion and/or repairs; and (5) offering inducements to move.

20. *Graham, Legislative Techniques for the Amortization of the Nonconforming Use: A Suggested Formula*, 12 WAYNE L. REV. 435, 442 (1966) [hereinafter *Graham, Legislative Techniques*].

21. *Anderson, The Nonconforming Use—A Product of Euclidean Zoning*, 10 SYRACUSE L. REV. 214, 237 (1959).

tional taking of property without compensation.<sup>22</sup> A number of courts have reached the same conclusion when the zoning law provides an amortization period after which the use must terminate.<sup>23</sup> Some cases overlook any distinction between immediate cessation and cessation after a grace period.<sup>24</sup>

Other authority has relied on a lack of legislative authorization. For instance, in *De Mull v. City of Lowell*,<sup>25</sup> a Michigan court noted that the state legislature had expressly permitted ordinances providing for resumption, reconstruction, extension or substitution of nonconforming uses, but had refrained from authorizing ordinances providing for their destruction.<sup>26</sup> The court reasoned that the legislature intended to withhold permission to order nonconforming uses destroyed, through a time limitation or otherwise. Similarly, the court in *United Advertising Corporation v. Borough of Raritan*,<sup>27</sup> a New Jersey case, relied on a state statute allowing nonconforming uses to continue despite passage of an ordinance prospectively outlawing them. The court held that a municipality lacked the power to limit by zoning ordinance the express statutory right to continue such uses indefinitely. *Hoffman v. Kinealy*,<sup>28</sup> a Missouri case, invalidated an amortization provision. The

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22. *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14 (1930); *Standard Oil Co. v. City of Bowling Green*, 244 Ky. 362, 50 S.W.2d 960 (1932); *Amereihn v. Kotras*, 194 Md. 591, 71 A.2d 865 (1950); *Des Jardin v. Town of Greenfield*, 262 Wis. 43, 53 N.W.2d 784 (1952). See *Grant v. Mayor & City Council of Baltimore*, 212 Md. 301, 129 A.2d 363 (1957).

23. See *De Mull v. City of Lowell*, 368 Mich. 242, 118 N.W.2d 232 (1962); *Hoffmann v. Kinealy*, 389 S.W.2d 745 (Mo. 1965) (review of many cases); *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A.2d 362 (1952); *Town of Somers v. Camarco*, 308 N.Y. 537, 127 N.E.2d 327, *reh'g denied*, 309 N.Y. 772, 128 N.E.2d 813 (1955); *City of Akron v. Chapman*, 160 Ohio St. 382, 52 Ohio Ops. 242, 116 N.E.2d 697 (1953), *criticized in* 67 HARV. L. REV. 1283 (1954); *Concord Township v. Cornogg*, 9 Pa. D. & C.2d 79 (Del. Co. 1956); *James v. City of Greenville*, 227 S.C. 565, 88 S.E.2d 661 (1955); *City of Corpus Christi v. Allen*, 152 Tex. 137, 254 S.W.2d 759 (1953).

24. See *Town of Greenburgh v. General Outdoor Advertising Co.*, 109 N.Y.S.2d 826 (N.Y. Sup. Ct. 1951); *James v. City of Greenville*, *supra* note 23.

25. 368 Mich. 242, 118 N.W.2d 232 (1962) (Michigan municipalities had no authority to terminate nonconforming uses after set period of time).

26. *Id.*

27. 11 N.J. 144, 93 A.2d 362 (1952). The court failed to address the issue of the constitutionality of an amortization ordinance if the legislature delegated the power to pass such an ordinance to municipalities. On the amendment subsequently proposed to the state's zoning enabling legislation, see C. HAAR, LAND-USE PLANNING 347 (3d ed. 1977).

28. 389 S.W.2d 745 (Mo. 1965). Commentators criticized this case as incorrectly distinguishing between an exercise of police power, such as the attempt here presented

court commented that a taking of private property without compensation by the government cannot be justified merely because the property is not too valuable or because the taking does not occur too soon.

The Ohio courts have ruled that amortization provisions are unconstitutional takings of property without just compensation.<sup>29</sup> Several courts have held that an owner of property used for a lawful purpose prior to enactment of the zoning ordinance has acquired a vested right to continue that use.<sup>30</sup> A contrary conclusion would be unfair to an owner who, in reliance on the prior zoning law, made substantial expenditures to improve his property. Furthermore, such a result would discourage owners from improving their property.<sup>31</sup> Although one Ohio decision recognized that most modern authority is to the contrary, that decision still followed the traditional rule. *Aristo-Craft v. Village of Evendale*<sup>32</sup> prevented legislative interference which could result in the destruction of value absent a showing of nuisance or other special circumstances.<sup>33</sup>

Iowa courts have long permitted the indefinite prolongation of a nonconforming use.<sup>34</sup> Additionally, Iowa courts have approved employment of the amending process to validate such a use.<sup>35</sup> Extending

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to reconcile neighborhood land uses or prevent imposition of harm on neighbors, and use of the taking power of eminent domain, such as when the public acquires some property or rights. D. HAGMAN & J. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT LAW* 126-27 (2d ed. 1986) (citing *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950)) (termination of a gasoline station after an amortization period of ten years was upheld in support of the use of the police power to terminate a nonconforming use).

29. The Constitution prohibits the taking of property without just compensation. U.S. CONST., amend. V. See Note, *Amortization: A Means of Eliminating the Nonconforming Use in Ohio*, 19 CASE W. RES. L. REV. 1042 (1968).

30. *City of Akron v. Chapman*, 160 Ohio St. 382, 52 Ohio Ops. 242, 116 N.E.2d 697 (1953); *Clifton Hills Realty Co. v. City of Cincinnati*, 60 Ohio App. 443, 21 N.E.2d 993 (1938).

31. See *Gibson v. City of Oberlin*, 171 Ohio St. 1, 167 N.E.2d 651 (1960) (amortization law held retroactive and unconstitutional); *Kessler v. Smith*, 104 Ohio App. 213, 142 N.E.2d 231 (1957) (amortization provision held confiscatory).

32. 69 Ohio Ops. 2d 118, 322 N.E.2d 309 (1974).

33. *Id.* (unless it causes a nuisance, nonconforming use cannot be constitutionally terminated by municipal ordinance).

34. See *Granger v. Board of Adjustment of City of Des Moines*, 241 Iowa 1356, 44 N.W.2d 399 (1950) (municipality's power to restrict property use via zoning laws to be strictly construed; municipality cannot gradually extinguish nonconforming use by denying property owner right to repair property).

35. *Keller v. City of Council Bluffs*, 246 Iowa 202, 66 N.W.2d 113 (1954) (zoning is



the reasoning of those rulings, an Iowa court invalidated an amortization ordinance that allowed the forced removal of nonconforming billboards after two years.<sup>36</sup> The court reasoned that although billboards could in the future be prohibited in residential zones of a city in the interests of safety, morality, health and decency, the owners of lawfully erected existing billboards had vested property rights which could not be terminated without compensation.<sup>37</sup> Similarly, a New York court concluded that a zoning law enacted subsequent to the establishment of a nonconforming use which involved a substantial investment or an established business could not terminate such use.<sup>38</sup>

The cases that reject the possibility of amortization are in the minority. It is true that statutes sometimes expressly provide for the continuation of nonconforming uses.<sup>39</sup> Moreover, many common-law countries regard the forced termination of nonconforming uses as possible only if the owner is compensated.<sup>40</sup> In the United States, however, courts have developed a different majority rule.

An amortization ordinance provides a period of time within which the property owner must terminate the nonconforming use, and thereby permits the owner to spread the loss of his present beneficial use of the property over the specified time. Like any other ordinance, an amortization statute is entitled to a presumption of validity, and courts will uphold it if they find that it is a reasonable exercise of the

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within legislative discretion of city council, and council's acts are presumed valid if not arbitrary or capricious).

36. *Stoner McCray Sys. v. City of Des Moines*, 247 Iowa 1313, 78 N.W.2d 843 (1956) (ordinance which prohibits repair and maintenance of nonconforming use is an unconstitutional deprivation of property without due process). See generally Mandelker, *Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa*, 8 DRAKE L. REV. 23 (1958).

37. *Stoner McCray*, 247 Iowa at 1320-21, 78 N.W.2d at 848, (citing *Crow v. Board of Adjustment*, 227 Iowa 324, 288 N.W. 145 (1939); *Rehmann v. City of Des Moines*, 200 Iowa 286, 204 N.W. 267 (1925)).

38. *Town of Somers v. Camarco*, 308 N.Y. 537, 127 N.E.2d 327 (1955) (owner of a nonconforming use has a vested right in that use; use cannot be terminated unless loss to property owner will be small). For more recent New York case law, see *infra* notes 57-60 and accompanying text.

39. See, e.g., *Murphy, Inc. v. Board of Zoning Appeals*, 147 Conn. 358, 161 A.2d 185 (1960) (though finding inapplicable in the particular case, a statute providing that zoning regulations should not prohibit the continuance of any nonconforming use existing at the time of adoption of such regulations).

40. See D. HAGMAN, *PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT* 769 n. g (2d ed. 1980).

state's police power.<sup>41</sup> Of course, if no public interest is served by a particular application of the amortization provision, courts will deem the provision unconstitutional as applied to that property.<sup>42</sup> A court will almost certainly refuse to rule that an amortization ordinance is valid *regardless* of the time period contained therein.<sup>43</sup> The owner of a nonconforming use must at least be allowed a reasonable opportunity to recover the original cost.<sup>44</sup> As with any exercise of the police power, a reasonable expectation of public benefit must outweigh the harm an amortization ordinance causes an individual.<sup>45</sup> With those qualifications, most courts reject the attempt to make "a constitutional principle of the right of a preexisting use to continue to exist indefinitely."<sup>46</sup> Courts generally hold to the contrary that a great public need, such as the need to rid an area of incompatible uses, may justify the termination of nonconforming uses without compensation. Otherwise, a neighborhood may find itself forever with preexisting structures or enterprises that lower property values, interfere with orderly planning,

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41. The rule is well stated in *Village of Oak Park v. Gordon*, 32 Ill. 2d 295, 205 N.E.2d 464 (1965) (zoning ordinance unconstitutional as applied to owner of nonconforming use when ordinance required owner to decrease number of boarders in his boarding house, causing financial loss to owner, and no evidence of benefit to the public as a result of enforcement of the ordinance). On the widespread acceptance of this rule, see Annot., *Validity of Provisions for Amortization of Nonconforming Uses*, 22 A.L.R.3d 1134, 1139-40 (1968) (with list of authorities).

42. *Village of Oak Park*, 32 Ill. 2d 295, 205 N.E.2d 464.

43. See *Ailes v. Decatur County Area Planning Comm'n*, 448 N.E.2d 1057 (Ind. 1983), *cert. denied sub nom.*, *Ripley County Area Plan. Comm'n v. Rouse*, 465 U.S. 1100 (1984).

44. See *National Advertising Co. v. Monterey County*, 1 Cal. 3d 875, 464 P.2d 33, 83 Cal. Rptr. 577, *cert. denied sub nom.*, *National Advert. Co. v. County of Monterey*, 398 U.S. 946 (1970) (removal of billboards under zoning ordinance should await expiration of reasonable amortization period in order to permit billboard company to recover original cost). Cf. *City of Santa Barbara v. Modern Neon Sign Co.*, 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (1961) (ordinance applying one-year amortization period to recently installed signs held invalid); *McCaslin v. City of Monterey Park*, 163 Cal. App. 2d 339, 329 P.2d 522 (1958) (sixty-day amortization period invalidated as applied to gravel pit operation); *City of La Mesa v. Tweed & Gambrell Planning Mill*, 146 Cal. App. 2d 762, 304 P.2d 803 (1956) (five-year period as applied to two-year-old building with estimated remaining economic life of twenty years held invalid).

45. See *City of Corpus Christi v. Allen*, 152 Tex. 137, 254 S.W.2d 759 (1953) (ordinance requiring termination of four automobile salvage and wrecking yards unreasonable because benefit to others would be very small).

46. D. HAGMAN & J. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 126 (2d ed. 1986), discussing *Hoffmann v. Kinealy*, 389 S.W.2d 745 (Mo. 1965).

and prevent aesthetic regulations<sup>47</sup> that would upgrade the area's appearance. Indeed, one scholar declared that nonconforming uses help cause the exodus of home builders and buyers from the cities to the newly developing suburban areas.<sup>48</sup>

In the early years of zoning, most cities found mandatory phaseout programs as to nonconforming uses unnecessary since natural attrition of such uses was expected and was less controversial than imposition of a cutoff date. Frequently, however, nonconforming uses thrived due to the protection from new competition given them by the zoning laws. At the same time, limits on the expansion of nonconforming uses often caused their owners to continue their operations in inadequate and shabby quarters.<sup>49</sup> The situation led to increased legislative adoption of amortization provisions and to inevitable court challenges to such provisions. Gradually, most courts held that amortization provisions are valid if they are reasonable in nature.<sup>50</sup> This is currently the majority view in America.<sup>51</sup>

Authorities adopting the majority view often regard amortization programs<sup>52</sup> as the only effective means of dealing with nonconforming uses.<sup>53</sup> The first appellate court to approve an amortization provision

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47. The prevention of aesthetic regulation is likely to occur because courts often find aesthetic restrictions unreasonable and thus invalid as applied to areas with large numbers of nonconforming uses. See Schropp, *The Reasonableness of Aesthetic Zoning in Florida: A Look Beyond the Police Power*, 10 FLA. ST. U.L. REV. 441, 457-58 (1982) (citing *Hankins v. Borough of Rockleigh*, 55 N.J. Super. 132, 150 A.2d 63 (1959)).

48. Bartholomew, *Non-Conforming Uses Destroy the Neighborhood*, 15 J. LAND & PUB. UTIL. ECON. 96 (1939). See also Note, *Amortization and Performance Standards in Zoning Regulations: Study of Existing Nonconforming Uses in an Indiana Community*, 30 IND. L.J. 521 (1955) (examining the problem of nonconforming uses in Bloomington, Indiana).

49. See R. ELLICKSON & A.D. TARLOCK, *LAND-USE CONTROLS* 196 (1981).

50. See Annot., *Validity of Provisions for Amortization of Nonconforming Uses*, 22 A.L.R.3d 1134, 1138-41 (1968).

51. 82 AM. JUR. 2D *Zoning and Planning* § 188, at 702 (1976). See generally Note, *A Suggested Means of Determining the Proper Amortization Period for Nonconforming Structures*, 27 STAN. L. REV. 1325, 1328-33 (1977) [hereinafter Note, *Determining Proper Amortization Period*].

52. Amortization programs involve the determination of the useful remaining economic life of a use and the prohibition of the use's continuation after expiration of that time.

53. See Crolly & Norton, *Termination of Nonconforming Uses*, 61 ZONING BULL. 1 (June, 1952), cited in *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 454-55, 274 P.2d 34, 41 (1954); *Grant v. Mayor & City Council of Baltimore*, 212 Md. 301, 309, 129 A.2d 363, 366 (1957). Although the economic life of a structure is often an important factor in the establishment of an amortization period, scholars have observed that legis-

was the Supreme Court of Louisiana, which looked to the common law of nuisance for precedent. The court stated that any business operated or maintained in opposition to the general zoning for that area amounts to a public or common nuisance.<sup>54</sup> The first federal case<sup>55</sup> to approve amortization provisions treated a municipality's power to terminate an existing property use as well established, and regarded vested property rights as clearly subject to elimination under the police power.

After these early decisions, the use of amortization by local governments increased.<sup>56</sup> In *City of Los Angeles v. Gage*,<sup>57</sup> a landmark case on the validity of amortization laws,<sup>58</sup> the court relied on authorities allowing restriction on additions or extensions to nonconforming uses. The *Gage* court considered the distinction between an ordinance limiting future uses and one requiring the termination of present uses to be

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lation may reach a fairer result, and one more acceptable to the courts, if it emphasizes the length of time necessary for the recovery of the original investment. See Note, *Determining Proper Amortization Period*, *supra* note 51, at 1335-36 and 1340-42. See *infra* notes 101-130 and accompanying text.

54. *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613 (1929), *cert. denied sub nom.*, *McDonald v. Louisiana ex rel. Dema Realty Co.*, 280 U.S. 556 (1929) (continuing violations of a zoning ordinance which required termination of nonconforming uses within one year constituted a nuisance; private party may bring quasi-criminal actions for abatement of the nuisance). *Accord*, *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 123 So. 314 (1929) (termination of small retail drug store after one year). The approach taken by the Louisiana court and the outcome of the above-cited cases is criticized in Comment, *Retroactive Zoning Ordinances*, 39 YALE L.J. 735 (1930). The one-year period of amortization provided by the ordinance upheld in those cases is criticized as being too short in Note, *Elimination of Nonconforming Uses*, 6 CASE W. RES. L. REV. 182, 185 (1955). In both cases a private party, not the municipality, was the complaining party. In such instances, the better course is to require that the private party establish a private nuisance, in the common-law sense, before being allowed to compel termination of the use. Graham, *Legislative Techniques*, *supra* note 20, at 443 n.53.

55. *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950) (zoning ordinance which required termination of service stations in a particular area within ten years of passage was a valid exercise of the municipality's police power and does not unconstitutionally deprive station owners of their property, regardless of owner's expenditures).

56. See Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROBS. 305, 308 (1955).

57. 127 Cal. App. 2d 442, 274 P.2d 34 (1954) (ordinance which required discontinuance of nonconforming uses within five years not unconstitutionally arbitrary or unreasonable; hardship to property owner not a material consideration when ordinance furthers public health, safety, or welfare).

58. Graham, *Legislative Techniques*, *supra* note 20, at 443-44.

merely one of degree. The court found that both types of ordinances were valid exercises of the police power so long as the owner could use the property for reasonable purposes. Noting that the owner of the use enjoys a monopolistic position until forced to terminate, the *Gage* court stated that any loss suffered is spread over a number of years. Thus, the loss to the owner may be small when compared to the benefit to the public.<sup>59</sup>

Soon after the *Gage* decision, the New York Court of Appeals used a similar "balancing" approach. The court ruled that a legislative body could reasonably conclude that requiring the termination of a use, after a period sufficient to allow a property owner to amortize his investment and make other plans, is a valid method of solving the problem of nonconforming uses.<sup>60</sup> One commentator hailed this decision as disposing of "the contention that nonconforming uses enjoy some sort of perpetual existence, beyond the reach of the police power."<sup>61</sup> A strong dissent in the case demonstrated the persistence of the view that the owner of a preexisting use has vested property rights that a state cannot constitutionally terminate under its police power.<sup>62</sup> New York courts, however, have applied the majority's view in subsequent cases.<sup>63</sup> This position received important support from a 1962 United States Supreme Court opinion that allowed even the immediate termination of a nonconforming use that presented a potential threat to pub-

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59. *City of Los Angeles v. Gage*, 127 Cal. App. 2d at 460, 274 P.2d at 44. *Cf. Spurgeon v. Board of Comm'rs of Shawnee County*, 181 Kan. 1008, 317 P.2d 798 (1957), upholding a two-year amortization period for a junkyard. *See generally Crolley, How to Get Rid of Nonconforming Uses*, 67 AM. CITY 106, 107 (1952).

60. *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958) (upholding a three-year amortization period for a junkyard).

61. Anderson, *Amortization of Nonconforming Uses—A Preliminary Appraisal of Harbison v. City of Buffalo*, 10 SYRACUSE L. REV. 44, 47 (1958) [hereinafter Anderson, *A Preliminary Appraisal*].

62. *Harbison v. City of Buffalo*, 4 N.Y.2d at 564, 176 N.Y.S.2d at 606, 152 N.E.2d at 48 (Van Voorhis, J., dissenting). In *Harbison*, "the margin of success was narrow, the dimensions of approval were ambiguous, and the dissent was sharp and provocative." Anderson, *A Preliminary Appraisal*, *supra* note 61, at 45.

63. *Village of Larchmont v. Sutton*, 30 Misc. 2d 245, 217 N.Y.S.2d 929 (Sup. Ct. 1961) (fifteen-month amortization period as to signs upheld). *Cf. Town of Hempstead v. Romano*, 33 Misc. 2d 315, 226 N.Y.S.2d 291 (Sup. Ct. 1962) (although court followed *Harbison*, a nonconforming use, the three-year amortization period for which had expired twenty-eight years before the city brought an action to terminate it, was allowed to remain). *See generally Note, Termination of Nonconforming Uses—Harbison to the Present*, 14 SYRACUSE L. REV. 62 (1962).

lic safety.<sup>64</sup>

Several more recent cases expressly reject the notion that property owners acquire a constitutionally protected right to a use that is commenced prior to the enactment of a zoning classification.<sup>65</sup> In upholding amortization provisions, a court may cite the likelihood that a nonconforming use will otherwise remain indefinitely.<sup>66</sup> To the same end, a court may rely on the general policy of the law encouraging the elimination of nonconforming uses so as to promote orderly community development.<sup>67</sup> To justify amortization, some courts emphasize that all property is held subject to the state's reasonable exercise of the police power.<sup>68</sup> Other opinions stress the presumption of validity that

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64. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (court upheld an ordinance prohibiting future excavations below water level and requiring existing excavations below that level to be filled, despite the resulting near-exclusion of quarries from the area; since party failed to show that the land involved in the litigation lacked other profitable uses, court found no taking). *Cf. Consolidated Rock Products Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962). On these cases, *see generally Sax, Takings and the Police Power*, 74 *YALE L.J.* 36, 42-44 (1964). The ordinance involved in the *Goldblatt* case was not actually a zoning ordinance, though similar to one in nature and effect. Moreover, the Supreme Court in *Goldblatt* did not discuss the law of nonconforming uses. D. HAGMAN & J. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* § 4.36, at 127-28 (2d ed. 1986). When a land use restriction exceeds the police power and becomes a "taking" of the property, the landowner is now entitled both to invalidation of the law and to compensation for harm suffered while the restriction was in force. *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987). *See No Taking Without Paying*, *TIME*, June 22, 1987, at 64. As to when to draw the line between police-power restrictions and takings, *see Keystone Bituminous Coal Ass'n v. De Benedictis*, 107 S. Ct. 1232 (1987).

65. *See Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964) (ordinance which provided for termination of nonconforming dog kennels 12 years after passage is a valid exercise of police power and may be overturned only with clear evidence that the ordinance is arbitrary or unreasonable); *City of University Park v. Benners*, 485 S.W.2d 773 (Tex), *appeal dismissed sub nom.*, *Benners v. City of University Park*, 411 U.S. 901, *reh'g denied*, 411 U.S. 977 (1972) (property owners have no vested right in nonconforming uses; municipal ordinances which terminate such uses are within police power and are beneficial to the public).

66. *City of University Park*, 485 S.W.2d at 778 n.6 (citing Note, *Amortization of Property Uses Not Conforming to Zoning Regulations*, 9 *U. CHI. L. REV.* 477, 479 (1942)).

67. *Lachapelle v. Town of Goffstown*, 107 N.H. 485, 225 A.2d 624 (1967) (termination of junkyard within one year of effective date of ordinance unless certain conditions met as to screening of yard).

68. *See National Advertising Co. v. State ex rel. State Highway Comm'n*, 91 N.M. 191, 571 P.2d 1194 (1977) (termination of advertising signs along highway).

attaches to any zoning ordinance, even an amortization provision.<sup>69</sup> In some instances, the legislature has delegated to an administrative body the task of recommending whether a nonconforming use should be terminated, with final authority resting in the administrative body to order termination. Courts have upheld this method so long as a reasonable period of amortization is allowed.<sup>70</sup>

A growing number of jurisdictions authorize counties to engage in zoning, and therefore to validly enact amortization provisions even as to rural areas.<sup>71</sup> In such situations, however, a court will often find that the development of the area has not yet reached the point where termination of nonconforming uses is reasonably necessary to serve the public welfare.<sup>72</sup>

At least one court has held that amortization provisions do not require the government to compensate a property owner who is forced either to terminate his nonconforming use or to make it comply with the law.<sup>73</sup> If the provision involves a reasonable exercise of the police power, the "just compensation" requirements of eminent domain do not apply.<sup>74</sup> Ordinances can order the removal of nonconforming billboards and other signs after a reasonable period of time, even though

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69. See *Village of Gurnee v. Miller*, 69 Ill. App. 2d 248, 215 N.E.2d 829 (1966) (defendant found guilty of failing to terminate junkyard within required period did not overcome presumption of ordinance's validity).

70. See *People v. Gates*, 41 Cal. App. 3d 590, 116 Cal. Rptr. 172 (1974) (zoning ordinance provided that nonconforming use could be terminated by board of supervisors on recommendation of planning commission within period specified in board of supervisors' order).

71. See *Spurgeon v. Board of Comm'rs of Shawnee County*, 181 Kan. 1008, 317 P.2d 798 (1957) (upholding a county zoning resolution requiring that nonconforming automobile wrecking business be terminated within two years). On the growth and urban development occurring in many counties within metropolitan areas, see *The Boom Towns*, TIME, June 15, 1987, at 14.

72. See *National Advertising Co. v. County of Monterey*, 211 Cal. App. 2d 375, 27 Cal. Rptr. 136 (1962) (termination of signs not allowed in areas the character and use of which is as yet undetermined).

73. *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 646 P.2d 565 (1982) (amortization provision did not connote a requirement of compensation, but merely put sign owner on notice that he had certain period within which to bring his structure into conformity).

74. *Art Neon Co. v. City & County of Denver*, 488 F.2d 118 (10th Cir. 1973), cert. denied, 417 U.S. 932 (1974). Compensation is required if the police power is exceeded and a taking occurs. See *First English Evangelical Lutheran Church v. Los Angeles County*, 107 S. Ct. 2378 (1987).

the government pays no compensation for removal.<sup>75</sup> This is true so long as the value of the signs is either extinguished before or at the end of the grace period. Alternatively, the nonconforming use may be removed when the value of the freedom from competition assured by the amortization ordinance for the prescribed period equals any value remaining in the sign at the end of the period.<sup>76</sup> Furthermore, the power of a local government to enact an amortization law may be inferred from a grant of power to legislate for the general welfare, or from authorization to create various zoning districts.<sup>77</sup> A law may validly provide for termination of a nonconforming use after a reasonable period of time, despite the continuation of such use during that time; *a fortiori* a law may also provide for termination after a designated, reasonable period of disuse (or of conforming use), even if the usual requirements for abandonment are not met.<sup>78</sup> Thus, legislation may provide that if a nonconforming building is allowed to remain vacant for a number of months, the owner must thereafter use it only in conformity with the zoning laws. Here again, the property owner need not receive compensation for the termination of the nonconforming use.<sup>79</sup>

Some laws providing for the termination of nonconforming signs or other uses authorize compensation by the government that requires the termination. Courts will uphold such a law if it serves a public purpose.<sup>80</sup> Indeed, courts will uphold the law even if it provides for compensation only in those situations when, as under some provisions restricting signs along highways, compensation is necessary for compliance with federal requirements, or where federal aid might otherwise

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75. See *Webster Outdoor Advertising Co. v. City of Miami*, 256 So. 2d 556 (Fla. Dist. Ct. App. 1972).

76. *Naegle Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 162 N.W.2d 206 (1968) (if value of plaintiff's property interest was extinguished before expiration of three-year amortization period, there would be no taking; alternatively, if value of freedom from competition for the statutory period equalled the value of the property interest remaining at the end of the period, there would be just compensation for the taking).

77. *Id.* at 504, 162 N.W.2d at 215.

78. See *State ex rel. Brill v. Mortenson*, 6 Wis. 2d 325, 96 N.W.2d 603 (1959).

79. *State ex rel. Harris v. Zoning Bd. of Appeal & Adjustment*, 221 La. 941, 60 So. 2d 880 (1952).

80. See *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741 (N.D. 1978), *appeal dismissed*, 440 U.S. 901 (1979) (North Dakota Highway Beautification Act entitled sign owner to compensation for damages resulting from removal of its signs which were lawfully erected but became nonconforming due to passage of the Act).



be lost.<sup>81</sup> Federal statutes governing nonconforming signs do not preempt the power of local governments to enact stricter regulations than the federal law provides, or to regulate signs in areas not covered by federal provisions.<sup>82</sup> Courts strictly construe provisions for compensation and apply the general rule against compensation in any situation that fails clearly to fall within the statutory requirement, such as where a nonconforming use is unlawfully erected.<sup>83</sup>

### III. THE REASONABLENESS OF THE AMORTIZATION PERIOD: THE BALANCING TEST

Amortization of nonconforming uses is widely accepted as a constitutional means of removing such uses.<sup>84</sup> When the law requires the termination of nonconforming uses, however, courts must determine whether the amortization period is reasonable in light of the investment involved. Thus, courts must determine what is a reasonable time period on a case-by-case basis.<sup>85</sup> Disputes necessarily center on the

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81. See *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510, (1980), *rev'd on other grounds*, 453 U.S. 490 (1981) (state statute required compensation for removal of billboards only when such payment is necessary to comply with federal law). On the federal law, see generally Lamm & Yasinow, *The Highway Beautification Act of 1965*, 46 DENVER L.J. 437 (1969).

82. *E.B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970); *Lamar-Orlando Outdoor Advertising v. City of Ormond Beach*, 415 So. 2d 1312 (Fla. App. 1982); *City of Doraville v. Turner Communications Corp.*, 236 Ga. 385, 223 S.E.2d 798 (1976); *State v. National Advertising Co.*, 387 A.2d 745 (Me. 1978); *Donnelly Advertising Corp. v. City of Baltimore*, 279 Md. 660, 370 A.2d 1127 (1977); *Ackerly Communications, Inc. v. City of Seattle*, 92 Wash. 2d 905, 602 P.2d 1177 (1979), *cert. denied*, 449 U.S. 804 (1980). See *City of Lake Wales v. Lamar Advertising Ass'n*, 339 So. 2d 981 (Fla. Dist. Ct. App. 1981), *rev'd on other grounds*, 414 So. 2d 1030 (Fla. 1982).

83. See *LaPointe Outdoor Advertising v. Florida Dep't of Transp.*, 398 So. 2d 1370 (Fla. 1981) (statute governing compensation for removal of highway signs did not require compensation for unlawfully erected billboards); *Hiway Ads, Inc. v. State ex rel. Dept. of Highways*, 356 So. 2d 501 (La. App. 1977) (no constitutional requirement of compensation where plaintiff had unlawfully erected signs along highways). Cf. *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977), *appeal dismissed*, 439 U.S. 809 (1978) (by choosing to provide compensation for billboards removed to beautify federally aided highways, legislature did not relinquish its authority under the police power to terminate billboards without compensation).

84. See *Beals v. County of Douglas*, 93 Nev. 156, 560 P.2d 1373, 1374 (1977) (amortization has received widespread acceptance as a constitutionally permissible method of removing signs).

85. *National Advertising Co. v. County of Monterey*, 1 Cal. 3d 875, 464 P.2d 333, 83 Cal. Rptr. 577, *cert. denied*, 398 U.S. 946 (1970); *Village of Oak Park v. Gordon*, 32

definition of a "reasonable period." It is important, therefore, to consider the tests courts use to determine reasonableness. The basic test involves balancing the public gain against the private loss.<sup>86</sup> Indeed, some commentators describe the courts as willing to consider "any circumstances bearing upon a balancing of the public gain against the private loss."<sup>87</sup> Generally, the relevant considerations include the nature of the present use, the length of the amortization period, and the present characteristics of, and foreseeable prospects for, development of the area. Courts consider all of these factors only in determining the "true issue" of whether beneficial effects on the community resulting from discontinuance of the use will outweigh the losses to the individual landowner.<sup>88</sup>

New York courts have upheld amortization provisions as applied to various nonconforming uses, including parking lots,<sup>89</sup> and uses in which the investment has been small.<sup>90</sup> In such cases, the public benefit often outweighs the private loss. Absent a showing of unreasonable or arbitrary conduct, courts will uphold a legislative determination of this balancing.<sup>91</sup> Furthermore, where the legislative body has ruled the

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Ill. 2d 295, 205 N.E.2d 464 (1965). See G. LEFCOE, *LAND DEVELOPMENT LAW* 924 (2d ed. 1974).

86. See Annot., *Validity of Provisions for Amortization of Nonconforming Uses*, 22 A.L.R.3d 1134, 1141 (1968) (citing numerous cases).

87. 82 AM. JUR. 2d *Zoning and Planning* § 189, at 703 (1976).

88. See *Sullivan v. Zoning Bd. of Adjustment*, 83 Pa. Commw. 228, 247, 478 A.2d 912, 920 (1984).

89. *People ex rel. Meyer v. Kesbec, Inc.*, 257 A.D. 941, 13 N.Y.S.2d 104 (Sup. Ct.), *aff'd*, 281 N.Y. 785, 24 N.E.2d 476 (1939), *reh'g denied*, 282 N.Y. 676, 26 N.E.2d 808 (1940) (owner of a parking lot had no vested right in continuation of the lot, a nonconforming use); *People v. Wolfe*, 248 A.D. 721, 290 N.Y.S. 131 (Sup. Ct.), *aff'd*, 272 N.Y. 608, 5 N.E.2d 355 (1936), *reh'g denied*, 273 N.Y. 498, 6 N.E.2d 422 (1937) (same).

90. *New York Trap Rock Corp. v. Town of Clarkstown*, 3 N.Y.2d 844, 144 N.E.2d 725, 166 N.Y.S.2d 82, *appeal dismissed*, 356 U.S. 582 (1957) (property owner precluded from attaching validity of zoning ordinance which prevented him from using his land as a rock quarry where property owner had not applied for a permit to remove rock); *Rice v. Van Vranken*, 255 N.Y. 541, 175 N.E. 304 (1930) (property owner denied permit to erect apartments when property was zoned to prohibit apartments); *Fox Lane Corp. v. Mann.*, 216 A.D. 813, 215 N.Y.S. 334 (Sup. Ct.), *aff'd per curiam*, 243 N.Y. 550, 154 N.E. 600 (1926) (when construction of planned apartment complex had not yet begun, and property owner had made no significant expenditures, denial of building permit because of zoning ordinance prohibiting apartment held valid). See generally Noel, *Retrospective Zoning and Nuisance*, 41 COLUM. L. REV. 457 (1941).

91. See *Grant v. Mayor & City Council of Baltimore*, 212 Md. 301, 129 A.2d 363 (1957); *Suffolk Outdoor Advertising Co. v. Town of Southampton*, 88 A.D.2d 601, 449 N.Y.S.2d 766 (1982), *aff'd*, 60 N.Y.2d 70, 455 N.E.2d 1245, 468 N.Y.S.2d 450 (1983)

public gain to be greater than the private loss, the court will treat the ordinance as facially valid. A property owner, however, may still challenge the constitutionality of the statute as applied in the particular situation.

Courts will determine the validity of the statute as applied on the basis of the specific surrounding circumstances. Courts can determine neither the reasonableness of the amortization period nor the constitutionality of the law without evidence regarding the balancing of public benefit and individual loss.<sup>92</sup> When evidence of these competing interests exists, and when reasonable minds could differ on the outcome of the balancing, the jury must determine whether the potential harm to society outweighs and thus justifies the cost of the private injury.<sup>93</sup> The protesting property owner has the burden of establishing that his loss outweighs the public gain.<sup>94</sup> The same test is used where the protesting party is a lessee rather than a fee simple owner of property which has been put to a nonconforming use.<sup>95</sup>

A factor that may affect the outcome of the balancing is the motive or the justification for the termination provision. For example, a court will be more likely to find a greater public benefit when the legislature desires termination for reasons of safety rather than when it seeks ter-

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(court could not impose on town board its judgment that benefit to public from removal of billboards outweighed adverse effect on billboard owners).

92. *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 646 P.2d 565 (1982) (without evidence bearing on balancing of public gain against individual loss, court cannot determine whether amortization period is a reasonable and constitutional alternative to just compensation).

93. See *Plaza Health Clubs, Inc. v. City of New York*, 76 A.D.2d 509, 430 N.Y.S.2d 815 (1980) (if plaintiffs had standing, reasonableness of amortization period would present potential actionable issue); *Modjeska Sign Studios v. Berle*, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977), *appeal dismissed*, 439 U.S. 809 (1978) (reasonableness of period is question of fact for trial).

94. "If an owner can show that the loss he suffers as a result of the removal of a nonconforming use at the expiration of an amortization period is so substantial that it outweighs the public benefit gained by the legislation, then the amortization period must be held unreasonable." *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d at 480, 373 N.E.2d at 262, 402 N.Y.S.2d at 367 (1977). See *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), *rev'd on other grounds*, 453 U.S. 490 (1981) (owner of billboard has burden of proving the invalidity of an amortization period contained in ordinance which prohibited its billboards). Cf. *Board of Supervisors v. Miller*, 170 N.W.2d 358 (Iowa 1969) (ordinance upheld as applied to property owner who made no showing as to investments, value of improvements on land, or extent of hardship in complying).

95. *City of Seattle v. Martin*, 54 Wash. 2d 541, 342 P.2d 602 (1959) (month-to-month tenancy).

mination for aesthetic purposes.<sup>96</sup> Even though the immediate removal of a billboard may sometimes be justified for safety reasons, in the absence of compensation courts will require an amortization period of between one year and ten years<sup>97</sup> when the law is designed to serve aesthetic needs.<sup>98</sup> Although this "balancing" test may seem to be a vague standard, it is very similar to the balancing test employed in taking cases, or in cases involving the enjoining of a nuisance.<sup>99</sup> Since the balancing test lacks specificity and necessitates an examination of the facts of each case,<sup>100</sup> courts have sought a more defined standard. In seeking to give substance to the balancing test, most courts have employed the "investment theory."

#### A. *Performing the Balancing: The "Investment Theory"*

The "investment theory" holds an amortization provision valid if it provides a reasonable period of time commensurate with the investment involved.<sup>101</sup> The period provided by the law is presumed reasonable, and a protesting property owner has the burden of establishing unreasonableness.<sup>102</sup> "Reasonableness commensurate with the investment" does not necessarily mean that the statute must give the owner enough time entirely to recoup his investment. At a minimum, how-

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96. See Schropp, *The Reasonableness of Aesthetic Zoning in Florida: A Look Beyond the Police Power*, 10 FLA. ST. U.L. REV. 441, 465 (1982).

97. The length of the amortization period may depend on the amount of investment and other relevant factors.

98. See *Art Neon Co. v. City & County of Denver*, 488 F.2d 118 (10th Cir. 1973), cert. denied, 417 U.S. 932 (1974) (court upholds ordinance providing amortization period of up to five years for general nonconforming signs but only a thirty-day removal period for signs posing safety risk); *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977) (ordinance should require immediate removal of billboard which poses a threat to safety of motorists, but one that merely impairs aesthetics of community fails to provide compelling reason for immediate removal).

99. See R. ELLICKSON & A.D. TARLOCK, *LAND-USE CONTROLS* 196 (1981).

100. See *Keller v. City of Council Bluffs*, 246 Iowa 202, 208, 66 N.W.2d 113, 117 (1954).

101. See *Livingston Rock & Gravel Co. v. County of Los Angeles*, 43 Cal. 2d 121, 127, 272 P.2d 4, 8-9 (1954). See generally Note, *A Suggested Means of Determining the Proper Amortization Period for Nonconforming Structures*, 27 STAN. L. REV. 1325, 1333 (1977) (noting that an amortization period allowing recovery of investment in a nonconforming structure is generally acceptable to the courts).

102. *Castner v. City of Oakland*, 129 Cal. App. 3d 94, 180 Cal. Rptr. 682 (1982); *United Business Comm'n v. City of San Diego*, 91 Cal. App. 3d 156, 154 Cal. Rptr. 263 (1979).

ever, the period must be long enough to prevent a substantial loss of investment.<sup>103</sup> Thus, the owner may still suffer some monetary loss, but the ordinance provides for a reasonable period within which to recover most of his investment.<sup>104</sup> Where a nonconforming structure is involved, the test may include consideration of the estimated remaining life of the building to be amortized.<sup>105</sup> Since the emphasis is always on the monetary value of the nonconforming use, a more valuable use will command a longer amortization period than a less valuable one.<sup>106</sup>

One court has held that amortization is completely prohibited unless the resulting loss to the owner is insubstantial compared with his total investment.<sup>107</sup> Another authority has suggested that when the investment in a nonconforming structure is so great that it would require an amortization period of ten years or more, the amortization method is inadequate because it fails to provide the prompt elimination that the community needs.<sup>108</sup> The majority view is that states can validly amortize nonconforming uses by varying the amortization period according to the owner's financial investment.

One commentator suggested<sup>109</sup> that courts evaluate an investment's value by looking chiefly to five factors: (1) initial cost of the use or structure, (2) present depreciated value, (3) remaining useful life, (4) existence of any lease or other obligations on the property, and

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103. *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 468 (1977). See Comment, *The Abatement of Pre-existing Nonconforming Uses Under Zoning Laws: Amortization*, 57 NW. U.L. REV. 323, 332 (1962).

104. See Note, *Amortization: A Means of Eliminating the Nonconforming Use in Ohio*, 19 CASE W. RES. L. REV. 1042, 1048-49 (1968) [hereinafter Note, *Eliminating the Nonconforming Use in Ohio*].

105. See Graham, *Legislative Techniques*, *supra* note 20, at 450 (citing a Los Angeles, California, ordinance).

106. See *id.*, citing a Fernandina, Florida, ordinance. See generally Note, *Eliminating the Nonconforming Use in Ohio*, *supra* note 104, at 1049.

107. See *People v. Miller*, 304 N.Y. 105, 106 N.E.2d 34 (1952) (preexisting use of harboring pigeons on property could be terminated when loss to the property owner would be insubstantial; hobby, rather than business, is not sufficient to give property owner vested right in nonconforming use).

108. Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROBS. 305, 311 (1955) ("To wait a generation or two before eliminating or even lessening the effect of an incompatible use is futile as a means of preventing the spread of the infection of incompatibility, unless the incompatibility is more imaginary than real.").

109. Schropp, *The Reasonableness of Aesthetic Zoning in Florida*, 10 FLA. ST. U.L. REV. 441, 466 (1982), (citing *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 468 (1977)).

(5) realization of investment to date.<sup>110</sup> It is difficult to determine the monetary amount or length of time involved in each of these factors. There is some authority that courts can use the Internal Revenue Service depreciation methods in determining the economic value of improvements.<sup>111</sup> This method fails to reflect the actual value remaining at the time of the amortization. The mere fact that a structure has been fully depreciated for tax purposes does not indicate that it is really without value.<sup>112</sup> Indeed, even recovery of the owner's original investment, with allowance for depreciation, is inadequate assurance that the amortization period is reasonable, since other losses may occur as a result of the forced termination.<sup>113</sup> Clearly, courts must recognize the need to weigh all five factors in regard to the specific use or structure under consideration.

It is also necessary to consider the harm that would result to the public if courts permitted the use to remain beyond the prescribed amortization period.<sup>114</sup> When potential for this problem exists, a court may conclude that the owner has no right to depreciate fully the value of his property. Instead, a court should find that the owner is entitled only to recover the cost of bringing his property into compliance with the present zoning law.<sup>115</sup> In one instance, a city reclassified property from commercial to residential and gave the owner twenty-five years in which to continue the nonconforming commercial use.<sup>116</sup> The court

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110. *Id.*

111. *National Advertising Co. v. County of Monterey*, 1 Cal. 3d 875, 464 P.2d 33, 83 Cal. Rptr. 577 cert. denied, 398 U.S. 946 (1970). See Leonard, *Amortization of Non-Conforming Uses—What Are the Limits?*, 45 TEX. B.J. 1485, 1489 (1982).

112. *National Advertising Co.*, 1 Cal. 3d at 887, 464 P.2d at 41, 83 Cal. Rptr. at 585, (dissent of Sullivan, J.). "That a taxpayer's adjusted basis in property is zero hardly means that such property is in fact without market value." See also Note, *Zoning: Amortization of Nonconforming Uses for Aesthetic Purposes*, 39 U.M.K.C. L. REV. 179, 192-94 (1971).

113. See Graham, *Legislative Techniques*, supra note 20, at 449 (discussing such factors as cost of relocation and character and age of nonconforming structures).

114. *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 884, 610 P.2d 407, 428, 164 Cal. Rptr. 510, 531 (1980), rev'd on other grounds, 453 U.S. 490 (1981). See *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 448-49, 274 P.2d 34, 37 (1954) (disturbance caused by the use is to be considered).

115. See *Harris v. Mayor & City Council*, 35 Md. App. 572, 371 A.2d 706 (1977) (upholding ordinance that established minimum lot size per dwelling unit and required plaintiff-owners to reduce number of dwellings in multiple-family structures to comply with the lot size; 15-year period of amortization).

116. *City of University Park v. Benners*, 485 S.W.2d 773 (Tex. 1972), see supra note 65.

held the amortization reasonable because the property owner had sufficient time in which to recoup any loss in property value occasioned by the reclassification.<sup>117</sup> The court emphasized that the reasonableness of the opportunity for recoupment must be measured according to conditions existing when the use is declared nonconforming, rather than by conditions as they exist at the end of the tolerance period.<sup>118</sup>

A court will almost certainly uphold an amortization ordinance if all factors indicate that the prescribed period is adequate for recovery of a substantial part of the investment. When the owners of nonconforming billboards had fully recouped their original investment, substantially depreciated their billboards for income tax purposes, and would, under lease and license obligations, incur no substantial economic losses, a court held the period reasonable.<sup>119</sup> In addition, when an ordinance allowed a check-cashing agency to take five years to remove its business from a district and fully to depreciate its investment, a court held the amortization law valid.<sup>120</sup>

In less clear cases, courts must weigh the five factors previously discussed to determine whether, under the circumstances, the period is reasonable. Disputes often center on particular elements of monetary loss and on whether the amortization period is sufficient to allow recovery. Courts will also consider expenditures for improvements to the property when determining the reasonableness of the amortization period.<sup>121</sup> This is qualified, however, by the general rule that once a statute renders a use nonconforming, the property owner cannot ordinarily expand or substantially alter the use, but can only engage in basic repair and maintenance. The investment that the owner is allowed to

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117. 485 S.W.2d 773 (Tex. 1972).

118. *Id.* at 779. See generally Katarincic, *Elimination of Non-conforming Uses, Buildings, and Structures by Amortization—Concept versus Law*, 2 DUQUESNE L. REV. 1 (1963).

119. *Suffolk Outdoor Advertising Co. v. Town of Southampton*, 88 A.D.2d 601, 449 N.Y.S.2d 766, *appeal dismissed*, 57 N.Y.2d 1047, 444 N.E.2d 38, 457 N.Y.S.2d 788 (1982), *aff'd*, 60 N.Y.2d 70, 455 N.E.2d 1245, 468 N.Y.S.2d 450 (1983). See generally Note, *A Suggested Means of Determining the Proper Amortization Period for Nonconforming Structures*, 27 STAN. L. REV. 1325, 1335-36 (1977) (legislation should set amortization period to require termination of a nonconforming structure when the original investment is fully returned).

120. *Eutaw Enterprises, Inc. v. City of Baltimore*, 241 Md. 686, 217 A.2d 348 (1966).

121. See *Board of Supervisors v. Miller*, 170 N.W.2d 358, 364 (1969) (courts evaluating the validity of an amortization period can consider expenditures though they are not necessarily determinative).

recover during the amortization period must be limited accordingly.<sup>122</sup> Similarly, since there is no right to replace a nonconforming use with another use of the same kind, the replacement cost of the property is irrelevant and should be disregarded in determining the reasonableness of the amortization period.<sup>123</sup>

One general rule that overrides other considerations is that the property owner has no right to recover losses caused by his own fault. For example, the state granted a lessee a three-year grace period after which he was to terminate his nonconforming use. The court held that the lessee had no right to recover money he invested in an additional long-term lease, nor for improvements that he continued to make on the premises following the effective date of the amortization ordinance.<sup>124</sup>

Another generally accepted rule is that the owner of a terminated nonconforming use is not entitled to recover his moving expenses, even if they are substantial.<sup>125</sup> A court refused to allow the owner of an automobile junkyard to recover the cost of removing the junk automobiles. Moreover, the court rejected the junkyard owner's contention that the resulting hardship of moving the cars at his own expense justified his continuation of the nonconforming use.<sup>126</sup> The rule against considering expenses of removal is strengthened when the value of the nonconforming use has largely been extinguished by the end of

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122. *See Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741 (N.D. 1978), *appeal dismissed*, 440 U.S. 901 (1979) (interpreting North Dakota Highway Beautification Act; to construe statute to compensate sign owner according to value of sign after it had been expanded, reconstructed, or substantially altered would be to violate standard of "reasonable damages").

123. *Art Neon Co. v. City & County of Denver*, 488 F.2d 118, 122 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974) (portion of ordinance providing different periods of amortization for signs having different replacement costs was unreasonable since replacement cost presents no valid basis for different treatment).

124. *State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320, *appeal dismissed*, 422 U.S. 1002 (1975).

125. *See Shifflett v. Baltimore County*, 247 Md. 151, 230 A.2d 310 (1967) (fact that moving businesses might entail substantial expenses is not controlling in determining validity of an ordinance requiring termination). *But see Graham, Legislative Techniques*, *supra* note 20, at 449, discussing some authorities in which cost of relocation has been mentioned as a possible factor in determining the reasonableness of the amortization period. *Cf. Harbison v. City of Buffalo*, 4 N.Y.2d 553, 563-64, 152 N.E.2d 42, 47, 176 N.Y.S.2d 598, 606 (1958) (listing cost of relocation as a factor bearing on the reasonableness of amortization provisions).

126. *Town of Schroepfel v. Spector*, 43 Misc. 2d 290, 251 N.Y.S.2d 233 (N.Y. Sup. Ct. 1963).



the grace period, and therefore, moving the use is impractical.<sup>127</sup>

A court will always find an amortization period valid if there is no evidence of economic harm,<sup>128</sup> or if the property owner fails to show some loss due to the termination.<sup>129</sup> In contrast, a court will hold the amortization provision invalid if the property owner shows both a resulting financial loss and a lack of public benefit from the law's application.<sup>130</sup> Between these extremes, a court must determine the reasonableness of the period upon a consideration of the relevant elements of investment in each individual case.

### B. *The Balancing of Noninvestment Factors*

Since a use can often be more readily moved to another location, courts generally provide a shorter amortization period for a nonconforming use than for a nonconforming structure.<sup>131</sup> When a use is in-

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127. See *Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 162 N.W.2d 206 (1968) (failure to compensate for removal of billboards did not render ordinance unconstitutional when value of billboards would either be extinguished before or at end of grace period, or by virtue of monopoly, would equal their increased worth enjoyed during period of amortization).

In determining that an amortization provision is reasonable, a court may, however, bolster its conclusion by stating that moving to another location was feasible but that no evidence of moving costs was shown. See *People v. Gates*, 41 Cal. App. 3d 590, 116 Cal. Rptr. 172 (1974) (owners of nonconforming auto-wrecking yard could move operation within 18 months and had failed to present any evidence of moving expenses); *Shifflett v. Baltimore County*, 247 Md. 151, 230 A.2d 310 (1967) (plaintiff owners of junkyards failed to show that they were unable to obtain other land for that purpose). Cf. *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 562, 152 N.E.2d 42, 47, 176 N.Y.S.2d 598, 605 (1958) (if courts prohibited amortization laws, the owner of a business or other use could utilize the land for that purpose in perpetuity, despite changes in neighborhood and despite ready transferability of the use to another site).

128. See *Northend Cinema, Inc. v. City of Seattle*, 90 Wash. 2d 709, 585 P.2d 1153 (1978), cert. denied, 441 U.S. 946 (1979) (upholding an ordinance requiring that adult motion picture theaters be located only in certain downtown areas and terminating all nonconforming theater uses within 90 days).

129. See *Board of Supervisors v. Miller*, 170 N.W.2d 358 (Iowa 1969) (protesting property owner made no showing of business investments, value of improvements on land, or extent of hardship in complying with the ordinance).

130. See *Village of Oak Park v. Gordon*, 32 Ill. 2d 295, 205 N.E.2d 464 (1965) (undisputed that owner of rooming house would suffer financial loss if required to comply with amortization ordinance; no evidence that public interest would be served). Cf. *Town of Hempstead v. Romano*, 33 Misc. 2d 315, 226 N.Y.S.2d 291 (N.Y. Sup. Ct. 1962) (court would not enforce zoning ordinance against nonconforming junkyard and automobile-wrecking business when owners would suffer financial loss and the municipality had failed to act for more than 18 years on its alleged right to terminate the use).

131. See *Village of Gurnee v. Miller*, 69 Ill. App. 2d 248, 215 N.E.2d 829 (1966);

volved, the nature of that use may, along with the above-mentioned "investment factors," affect the validity of the prescribed amortization period.<sup>132</sup> In some cases, the use may justify a shorter period than would otherwise be permissible, such as when the use constitutes a nuisance. A court can even order the immediate termination of a nuisance when necessary to protect the public safety, health or general welfare.<sup>133</sup> Furthermore, courts may also uphold short amortization periods for nonconforming uses with near-nuisance characteristics.<sup>134</sup>

There are other factors that cast doubts on the validity of amortization provisions or that require a longer grace period. For instance, amortization without compensation may be unconstitutional when the nonconforming use is the only practical use for the property in question.<sup>135</sup> In such cases, there is a strong argument that since amortization of the nonconforming use would leave the property unusable for

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*Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977), *appeal dismissed*, 439 U.S. 809 (1978).

132. See *Spurgeon v. Board of Comm'rs*, 181 Kan. 1008, 317 P.2d 798 (1957) (automobile-wrecking business); *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964) (dog kennel in residential neighborhood); *White v. City of Dallas*, 517 S.W.2d 344 (Tex. Civ. App. 1974) (automobile-wrecking yard in residential district). See generally 82 AM. JUR. 2d *Zoning and Planning* § 189, at 703-04 (1964) (observing that some courts place "particular importance on the relationship between the length of the amortization period and the nature of the nonconforming use. On the public benefit side of the scale, the degree of offensiveness of the nonconforming use, in view of the surrounding neighborhood's character, has often been significant").

133. See *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (ordinance prohibiting brickyards in residential area held valid as applied to existing brickyard); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (regulation against stables applied to preexisting stable in business area). Cf. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (regulation upheld though it rendered continued operation of preexisting quarry nearly impossible); *People v. Miller*, 304 N.Y. 105, 106 N.E.2d 34 (1952) (ordinance forbidding the keeping of pigeons in residential area validly applied to preexisting use). See generally D. HAGMAN & J. JUERGENSEMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* § 4.36, at 127-29 ("Immediate Termination of Nuisance") (1986). In order for a court to justify immediate termination, the nuisance usually must amount to a public, not merely a private, nuisance. In other words, the use in question will have to involve a violation of some criminal law and an interference with a public right, or at least with a substantial number of people. See Reynolds, *Public Nuisance: A Crime in Tort Law*, 31 OKLA. L. REV. 318 (1978). See generally Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

134. *McKinney v. Riley*, 105 N.H. 249, 197 A.2d 218 (1964) (court gave owner of automobile junkyard only one year to terminate that use due to possible public and private nuisance).

135. See *Town of Surry v. Starkey*, 115 N.H. 31, 332 A.2d 172 (1975) (court held unreasonable an ordinance that prohibited property owner from using land within 200 feet of highway centerline for gravel bank and that barred owner from removing part of

any reasonably profitable activity, there would be a taking without just compensation. Local governments must therefore use less drastic alternatives, such as limiting, rather than terminating, the nonconforming use.<sup>136</sup> Cases in which the only reasonable use for the property is nonconforming are rare. Furthermore, the suitability of the particular piece of land for various possible uses is not the controlling issue. Rather, the key factor in determining the ordinance's validity is the best interest of the entire zoning district.<sup>137</sup>

A more common problem with imposing an amortization period is the nonconforming use that involves an exercise of freedom of speech, such as a motion picture theater or a billboard. Even if the law of a particular state clearly permits amortization of nonconforming uses, courts should strictly scrutinize such ordinances to determine whether they affect first amendment rights.

One example is the now-popular "spacing" ordinances applied to adult theaters.<sup>138</sup> Many such ordinances contain grandfather clauses

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its top soil or subsoil as applied to land that could not be used except for gravel removal).

136. *Id.* The *Starkey* court suggested that public health and safety could be protected by enactments setting standards for issuance of permits for continued removal of gravel or specifying limits for expansion. *Cf. Bither v. Baker Rock Crushing Co.*, 249 Or. 640, 440 P.2d 368 (1968) (court would enjoin only rock quarrying or crushing activities constituting an increase of volume or level that existed at time of adoption of interim zoning law).

137. *See City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 452, 274 P.2d 34, 40 (1954) (citing *Reynolds v. Barrett*, 12 Cal. 2d 244, 83 P.2d 29 (1938)).

138. *See Ellwest Stereo Theaters Inc. v. Byrd*, 472 F. Supp. 702 (N.D. Tex. 1979). Many local legislatures have passed these ordinances in the wake of *Young v. American Mini-Theatres*, 427 U.S. 50 (1976). *Young* upheld, against first and fourteenth amendment attacks, ordinances prohibiting operation of any "adult" movie theater, bookstore, etc., within 1,000 feet of any other such establishment, or within 500 feet of a residential area. *See generally* Annot., *Validity of "War Zone" Ordinances Restricting Location of Sex-Oriented Businesses*, 1 A.L.R.4th 1297 (1980). Subsequently, the U.S. Supreme Court also upheld an ordinance that, instead of dispensing "adult" uses as in *Young*, concentrated such uses in certain limited areas. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Some courts, however, have invalidated spacing restrictions on grounds of vagueness. *See Harris Books, Inc. v. City of Santa Fe*, 98 N.M. 235, 647 P.2d 868 (1982) (ordinance forbidding location of adult bookstores within 1,000 feet of residential area unconstitutionally vague where "residential area" not defined); or on grounds of improper delegation of governmental power, *see Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (statute vesting in the governing bodies of churches and schools the power to veto liquor licenses within 500-foot radius of the church or school delegates governmental power to private entities and violates establishment clause of first amendment). *See generally* Pearlman, *Zoning and the First Amendment*, 16 URB. LAW. 217 (1984).

that allow the continuation of nonconforming uses.<sup>139</sup> When legislation provides for amortization, courts may invalidate the ordinance as an excessive restriction on public access to protected speech.<sup>140</sup> If the protesting party fails to meet his burden of showing that the ordinance is unreasonable in light of the free-speech interests involved, courts will uphold amortization.<sup>141</sup>

In *Metromedia, Inc. v. City of San Diego*,<sup>142</sup> the Supreme Court recognized that legislatures may impose reasonable "time, place, and manner" restrictions on speech and may even be quite severe concerning commercial speech, although the Court there invalidated as discriminatory an ordinance that permitted certain noncommercial messages while prohibiting others. In dealing with the problem of nonconforming signs, courts are reluctant to uphold termination provisions and often find "vested rights" in signs that owners have already erected.<sup>143</sup> If the usual standard of reasonableness is met, states can require amortization of billboards and other signs so long as the law is substantially related to the public health, safety, morals, or general welfare.<sup>144</sup> Noting that signs, like other property, are owned subject to

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139. See *Genusa v. City of Peoria*, 619 F.2d 1203, 1212 n.18 (7th Cir. 1980); *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696, 702 n.9 (M.D. Fla. 1978) (both cases dealt with ordinances containing grandfather clauses).

140. *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981); *E & B Enterprises v. City of University Park*, 449 F. Supp. 695 (N.D. Tex. 1977). Cf. *Bayside Enterprises*, 450 F. Supp. at 696 (court struck down a restriction on adult bookstores and movie houses as unduly severe despite its "grandfather clause").

141. See *Castner v. City of Oakland*, 129 Cal. App. 3d 94, 180 Cal. Rptr. 682 (1982).

142. 453 U.S. 490 (1981). In *Metromedia* the U.S. Supreme Court refrained from addressing the problem of nonconforming signs. The Court remanded the case to the California Supreme Court. The California Supreme Court noted that the U.S. Supreme Court had found that the ordinance violated the first amendment because it prohibited noncommercial billboards. Therefore, the court ruled that it was impossible to construe the ordinance as constitutional. The court held that limiting the ordinance's scope to prohibit only commercial signs would be clearly contrary to the language of the law and the intent of its drafters. Moreover, such limitation would invite constitutional difficulties with respect to distinguishing between commercial and noncommercial signs. *Metromedia, Inc. v. City of San Diego*, 32 Cal. 3d 180, P.2d 902, 185 Cal. Rptr. 260, 649 (1982). For a discussion of this case's earlier history in the California courts, see notes 78, 91 and 110 *supra* and accompanying text.

143. See *Stoner McCray Sys. v. City of Des Moines*, 247 Iowa 1313, 78 N.W.2d 842 (1956).

144. See *Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir.), cert. denied, 400 U.S. 805 (1970); *Mayor & Council of New Castle v. Rollins Outdoor Advertising, Inc.*, 475 A.2d 355 (Del. Supr. 1984); *Inhabitants of Town of*

the exercise of the state's police power, the New Mexico Supreme Court upheld a law requiring owners of billboards to remove the signs at their own expense.<sup>145</sup>

Courts may also consider the location of the use when determining the validity of an amortization ordinance. Indeed, both the nature of the neighborhood surrounding the use and the proximity of an area to which the property owner could relocate are criteria to apply in determining the reasonableness of an amortization ordinance.<sup>146</sup> The offensiveness of the nonconforming use with respect to its surroundings has been of particular importance in evaluating the public benefit which a community seeks to achieve by the termination.<sup>147</sup> In considering this location factor, courts may draw on precedents from nuisance law. In nuisance law, location of the offending structure or use has always been of great significance.<sup>148</sup> A court is much more likely to uphold the application of an amortization provision to a developed area in which the nonconforming use is clearly inappropriate than to an undeveloped area or to any area with an unsettled character.<sup>149</sup> After all, it is the

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Boothbay v. National Advertising Co., 347 A.2d 419 (Me. Supr. 1975); *Beals v. County of Douglas*, 93 Nev. 156, 560 P.2d 1373 (1977); *Markham Advertising Co. v. State*, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316, *reh'g denied*, 393 U.S. 1112 (1969).

145. *National Advertising Co. v. State ex rel. State Highway Comm'n*, 91 N.M. 191, 571 P.2d 1194 (1977) (where sign permits stated that permits could be revoked at any time, removal of signs pursuant to State Highway Beautification Act was not unconstitutional and sign owners not entitled to compensation).

146. *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 563-64, 176, 152 N.E.2d 42, 47 N.Y.S.2d 598, 606 (1958). See *Graham, Legislative Techniques*, *supra* note 20, at 449.

147. See *Grant v. Mayor & City Council of Baltimore*, 212 Md. 301, 129 A.2d 363 (1957) (upholding amortization provision as to billboards in residential areas, court points out that the billboards irritated inhabitants of those areas and contributed to depreciation of property values); *Lachapelle v. Goffstown*, 107 N.H. 485, 225 A.2d 624 (1967) (amortization upheld on automobile junkyard directly across from college campus).

148. See *Mandelker, Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa*, 8 DRAKE L. REV. 23, 28-30 (1958) (noting that the Iowa court sometimes engaged in "zoning judicially in the guise of nuisance doctrine"). On the use of nuisance law as a land-use device, see generally *Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 719-24 (1973); Note, *Land Use and Environmental Policy: Litigation of Nuisances as a Land Use Control: The Spur Industries Case*, 26 OKLA. L. REV. 583 (1973). On public nuisance, see generally *Reynolds, Public Nuisance: A Crime in Tort Law*, 31 OKLA. L. REV. 318 (1978).

149. See *National Advertising Co. v. County of Monterey*, 211 Cal. App. 2d 375, 27 Cal. Rptr. 136 (1962) (amortization ordinance upheld as to developed areas, but struck down as applied to areas in which the character of development was unclear).

inappropriateness of the particular use to the particular area that justifies declaring the use "nonconforming." Thus, if the property owner can show that his use is appropriate to its location, or that his use has its greatest value in its present location, a strong case may be made for the unreasonableness of the amortization law. This burden of proof, however, is usually difficult to establish.<sup>150</sup> The primary purpose of zoning is to achieve orderly physical development of the community by confining specific kinds of structures and uses to certain areas. Therefore, nonconforming uses are at best tolerated, and should be eliminated whenever equitably possible.<sup>151</sup>

In particular cases, other noninvestment factors may also help determine the validity of amortization ordinances. For instance, if a municipality fails to exercise its power to terminate a nonconforming use for a long period of time, a court, applying principles of equity, may refuse to order termination of the use. This is particularly true if the municipality's delay in enforcement causes the owner increased loss from the termination.<sup>152</sup> Although courts generally reject the cost of relocation as a relevant factor,<sup>153</sup> courts sometimes mention it as an additional consideration, along with the feasibility of the business or use being continued in another location.<sup>154</sup> Any amortization plan should ide-

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150. *See National Advertising Co. v. County of Monterey*, 1 Cal. 3d 875, 464 P.2d 33, 83 Cal. Rptr. 577, cert. denied, 398 U.S. 946 (1970) (plaintiff billboard company failed to sustain burden of showing that its signs had value only in their particular location and for their particular use).

151. *Hay v. Board of Adjustment of Fort Lee*, 37 N.J. Super. 461, 117 A.2d 650 (1955) (enlargement of nonconforming service station prohibited).

152. *See Town of Hempstead v. Romano*, 33 Misc. 2d 315, 226 N.Y.S.2d 291 (N.Y. Sup. Ct. 1962) (court denied amortization when municipality failed to act for more than 18 years on its alleged right to terminate nonconforming junkyard and automobile-wrecking business and owners had made substantial investments in the business during that period).

153. *See supra* notes 125-127 and accompanying text.

154. *See Harbison v. City of Buffalo*, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958) (indicating that courts considering appropriate damages should consider the proximity of the nearest area to which the nonconforming use might relocate, the cost of such relocation, and any other reasonable costs bearing on the amount of damages).

Of course, whenever any use is relocated, it ordinarily must comply with the zoning for the new location unless a variance is obtained through a showing of unnecessary hardship. *See Farr v. Zoning Bd. of Appeals*, 139 Conn. 577, 95 A.2d 792 (1953) (finding insufficient showing of hardship, court denied variance to package liquor store seeking to transfer to a new location where it would be nonconforming use). *See generally* Arnebergh, *Variances in Zoning*, 24 U. KAN. CITY L. REV. 240 (1956); Comment, *Variance Law in New York: An Examination and Proposal*, 44 ALBANY L. REV. 781 (1980); Note, *Zoning Variances*, 74 HARV. L. REV. 1396 (1961). On the "unnecessary

ally consider these surrounding circumstances, though some factors, such as cost of relocation and amount of investment, are only of minimal importance.<sup>155</sup>

### C. *The Need for More Successful Use of Amortization*

Despite the recent popularity of amortization provisions and the general acceptance of their validity, such laws have been largely unsuccessful in eliminating nonconforming uses. A study by the American Society of Planning Officials in 1971 indicated that while 159 of the 489 cities and counties surveyed had amortization provisions in their zoning laws, only 27 localities had actually employed such provisions to terminate the existence of buildings or other structures.<sup>156</sup> Cities primarily used amortization against billboards or other uses involving relatively small amounts of investment. Furthermore, most zoning administrators were dissatisfied with amortization as a means of eliminating undesirable uses from the community.<sup>157</sup>

Some authorities believe that amortization is not the final solution to the problem of nonconforming uses, particularly in light of the numerous factors that legislatures and courts must weigh in determining a reasonable amortization period.<sup>158</sup> Nonetheless, there is a continuing trend toward finding valid amortization provisions that are reasonable in light of all surrounding circumstances.<sup>159</sup>

No single time period can be valid for all amortized buildings or uses. Therefore, amortization provisions must be flexible. Some com-

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hardship" standard that courts commonly employ in determining whether a variance is justified, see Note, *Zoning Variances: The "Unnecessary Hardship" Rule*, 8 SYRACUSE L. REV. 85 (1956). For a critical study of the work of boards of adjustment, which are usually empowered to grant or deny variances, see Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962).

155. See Graham, *Legislative Techniques*, *supra* note 20, at 449.

156. Scott, *The Effect of Nonconforming Land-Use Amortization*, *Planning Advisory Service Report No. 280* (May 1972), quoted in R. WRIGHT & M. GITELMAN, *LAND USE* 779 (3d ed. 1982).

157. *Id.*

158. See Note, *Termination of Nonconforming Uses—Harbison to the Present*, 14 SYRACUSE L. REV. 62, 69-70 (1962). See also Comment, *Zoning—Principle of Retroactivity and Amortization of the Non-Conforming Use—A Paradox in Property Law*, 4 VILL. L. REV. 416, 428 (1959) (suggesting that courts should reverse the normal presumption of validity of legislative enactments, including zoning laws, in the case of amortization ordinances in order to protect a nonconforming owner's rights to due process).

159. See Graham, *Legislative Techniques*, *supra* note 20, at 451-52.

mentators suggest that this flexibility could be achieved by an administrative process in which amortization periods are determined by a board of experts.<sup>160</sup> Legislation could set forth the factors that the board would weigh, and there would be a hearing at which the property owner could present his side of the case.<sup>161</sup> A California county used a similar method in evaluating an ordinance which authorized the board of supervisors to order the termination of a nonconforming use within a specified period.<sup>162</sup> As the California ordinance demonstrates, the legislation need not create a new administrative body in order for this approach to work. The state could delegate the power to establish amortization periods to existing governing bodies, such as a city council or county board of commissioners. The state could also delegate the power to a body such as the zoning or planning commission, or the board of zoning appeals, which handles other specific zoning problems, such as requests for variances or special use permits.

Much of the litigation over amortization has arisen from the tendency of zoning authorities to set an inequitable time period for the termination of nonconforming uses.<sup>163</sup> This tendency clearly contradicts repeated judicial statements that the validity of amortization orders must be determined on a case-by-case basis in which legislators consider the amount of investment and other relevant factors in the particular situation.

The suggested administrative approach would avoid many of the problems inherent in purely legislative methods. Particularly, under the legislative method, the termination period must be long enough to accommodate the most valuable and durable use to which the amortization law might be applied. Otherwise, the most valuable uses would

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160. Note, *Eliminating the Nonconforming Use in Ohio*, *supra* note 104, at 1057-58. See also Note, *A Suggested Means of Determining the Proper Amortization Period for Nonconforming Structures*, 27 STAN. L. REV. 1325, 1336 (1977) (advocating the use of a zoning commission "or similar administrative agency" to establish amortization periods).

161. Note, *Eliminating the Nonconforming Use in Ohio*, *supra* note 104, at 1058.

162. *People v. Gates*, 41 Cal. App. 3d 590, 116 Cal. Rptr. 172 (1974). When, as it did in this case, the governing body delegates power to an administrative agency, such as a zoning board, the limits of delegation must be considered. Generally, the governing body must set the basic legislative policy. Subsequently, the administrators can supply the details within the basic guidelines. See generally Note, *Delegation of Legislative Power by Municipal Corporations*, 8 VA. L. REV. 450 (1922); O. REYNOLDS, LOCAL GOVERNMENT LAW 160-70 (1982).

163. Leonard, *Amortization of Nonconforming Uses—What Are the Limits?*, 45 TEX. B.J. 1485, 1489 (1982).



escape termination on the ground that the ordinance was unreasonable as applied to them.<sup>164</sup> The administrative approach avoids this problem. Of course, the administrative method might be subject to a legislatively established maximum period of amortization. Within such limits, the legislature may vest discretion in the administrative body to determine the appropriate amortization period according to the use and investment involved, as well as to the degree of incompatibility of the particular use to its zoning district.<sup>165</sup> The administrative approach also creates the possibility that some nonconforming uses, if not overly noxious in nature, could remain in their present locations if they met certain "performance standards" regarding their potentially bothersome characteristics.<sup>166</sup>

#### IV. CONCLUSION

Basic zoning law presents an "either-or" situation, in which a forbidden use is either totally barred from a district or, if it qualifies as "nonconforming," is allowed to remain forever. Amortization has introduced much-needed flexibility into this system by providing cities the opportunity to terminate nonconforming uses after a reasonable period. Since they provide a single time period applicable to all uses and structures, amortization provisions are inherently rigid. Furthermore, such provisions disregard consideration of such factors as the amount of investment and the nature of the use that courts have required to be weighed if the amortization ordinance is to pass constitutional muster.

The prescribed period of amortization must be flexible to accommodate adequately the relevant factors of each case. States can best achieve this goal through administrative bodies similar to those employed in other areas of zoning practice.<sup>167</sup> This system would allow the public need to eliminate uses that interfere with orderly community

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164. See Graham, *Legislative Techniques*, *supra* note 20, at 450.

165. *Id.* at 451. See generally Anderson, *The Nonconforming Use—A Product of Euclidean Zoning*, 10 SYRACUSE L. REV. 214, 240 (1959) (noting that amortization may apply fairly to some uses and unjustly to others, Anderson advocates greater use of eminent domain). Political and financial considerations, however, have led most commentators to reject this idea. See Note, *Nonconforming Uses: A Rationale and an Approach*, 102 U. PA. L. REV. 91, 93 (1953).

166. As suggested in Horack, *Performance Standards in Residential Zoning*, in AMERICAN SOC'Y OF PLANNING OFFICIALS, *PLANNING 1952*, at 153 (Proceedings of Nat'l Conference 1952); Mandelker, *Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa*, 8 DRAKE L. REV. 23, 35 (1958).

167. See generally O. REYNOLDS, *LOCAL GOVERNMENT LAW* 404-14 (1982).

planning to be balanced against the individual need for assurance that a use, lawful when established, cannot be eliminated unless the state gives the owner adequate opportunity to recoup his investment. Zoning laws are responsible for the problems associated with the treatment of nonconforming uses. Therefore, zoning law can and should solve the problem<sup>168</sup> by providing an equitable balancing of public benefit and private loss.

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168. *See Grant v. Mayor & City Council of Baltimore*, 212 Md. 301, 308, 129 A.2d 363, 366 (1957) (stating that it is apparent that if state and local governments are to handle nonconforming uses effectively, they must address the problem under the law of zoning, as opposed, in particular, to the law of nuisance).