CONSTITUTIONALITY OF SIGN AMORTIZATION ORDINANCES

In 1971 the City and County of Denver enacted strict regulations limiting the permissible size and type of on-site electric advertising signs.[1] A municipal ordinance declared signs not meeting the designated requirements to be nonconforming[2] and provided an amortization schedule for their termination based upon the replacement cost of individual signs.[3] The maximum period allowed for retaining nonconforming signs was five years.

In *Art Neon Co. v. City & County of Denver*[4] plaintiffs, owners and lessees of on-site signs, attacked the validity of the amortization provisions under the federal constitution, as well as state case and constitutional law. The district court, however, declined to hear the state claims and dealt solely with the federal question whether the ordinance was a valid exercise of the police power or an unconstitu-

1. DENVER, COLO., REV. MUN. CODE § 613 (1971). The ordinance classified signs according to types that would be allowed in various zoning districts. It prohibited all electric signs exceeding 32 feet in height or projecting more than 24 feet from a building. All movement was to be eliminated from flashing, blinking and revolving signs within 30 days after the effective date of the ordinance. Brief for Appellee at 2, Art Neon Co. v. City & County of Denver, 488 F.2d 118 (10th Cir. 1973).

2. A nonconforming use is one that lawfully existed prior to the enactment of a zoning ordinance but that is allowed to continue even though it does not conform to the new use restrictions and even though similar uses could no longer be initiated. Note, *Termination of Nonconforming Uses—Harbison to the Present,* 14 SYRACUSE L. REV. 62 (1962); 44 TEXAS L. REV. 368 (1965).

3. Termination dates were assigned on the basis of a sign's replacement cost. The theory behind an amortization provision is that a zoning regulation may require discontinuance of a nonconforming use without compensation. This may be done if the schedule of elimination allows a reasonable period of time in which the value of the nonconforming use is deemed amortized. In this context the purpose of amortization is to effect termination at the end of a specified period during which the owner may write off his losses as an income tax expense. *See* AMERICAN SOC'Y OF PLANNING OFFICIALS, PLANNING ADVISORY SERVICE REPORT NO. 280, THE EFFECT OF NONCONFORMING LAND-USE AMORTIZATION 3 (May 1972); 1 R. ANDERSON, THE AMERICAN LAW OF ZONING § 6.65 (1968) [hereinafter cited as ANDERSON]; Katarincic, *Elimination of Non-Conforming Uses, Buildings and Structures by Amortization — Concept Versus Law,* 2 DUQUESNE L. REV. 1 (1963); Norton, *Elimination of Incompatible Uses and Structures,* 20 LAW & CONTEMP. PROB. 305, 308 (1955).

4. 357 F. Supp. 466 (D. Colo. 1973).

tional taking of private property.[5] The district court found that the ordinance constituted a confiscatory taking of property and that the amortization period did not adequately compensate the owners for the value of their signs.[6]

The Tenth Circuit reversed, holding that the ordinance was a proper exercise of the police power.[7] The court noted that all property rights

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5. In refusing to exercise pendent jurisdiction over the state claims, the court relied on United Mine Workers v. Gibbs, 383 U.S. 715 (1966), and Reetz v. Bozanich, 397 U.S. 82 (1970). The following matters were expressly left for state court determination:

> (1) The City says that some of the signs exist under revocable permit to use city-owned property. We decide nothing having to do with this contention of the city nor do we decide anything arising under plaintiffs' claim that the city is estopped to enforce revocability of any permits. . . .
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> . . . .
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> (3) The right of the city to prohibit the erection of any or all future advertising signs is not before us, and we make no decision as to the validity or invalidity of any such ordinance which may or may not be enacted in the future, although we recognize that there is much authority for upholding such prohibitions.
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> (4) We decide no questions concerning the reasonableness of the regulations as they relate to the type of business involved, the zone in which the sign is located, the comparable heights of signs in various zones, differentiations between free standing and attached signs and various other types of claimed inequality between signs.
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> (5) We make no decision as to the validity of the sign code under state law.
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> (6) We make no determination as to whether the code draws arbitrary distinction [*sic*] between various signs.

357 F. Supp. at 467-68.

The district court found, in effect, that the ordinance was an exercise of eminent domain, not the police power. It stated that the City was furthering a proper governmental purpose — the beautification of the City — by requiring the elimination of certain signs but that under Berman v. Parker, 348 U.S. 26 (1954), the owners must receive just compensation. 357 F. Supp. at 472. If regulative legislation deprives a person of virtually the complete use and enjoyment of his property it comes within the purview of the law of eminent domain. *Id.* at 480; 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.42 (3d rev. ed. P. Rohan Supp. 1973).

6. The district court held that the sign owners must be compensated for the value of the signs over their useful life under the Supreme Court decision in Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973). The useful life of a sign extends for the entire period that the sign could be utilized, regardless of the terms of its current lease. Therefore the owners would have to be compensated for the value of the expected lease renewals, which is the most profitable period in the leasing of advertising signs. The average useful life of an advertising sign is approximately 15 years. Brief for Appellee at 2, Art Neon Co. v. City & County of Denver, 488 F.2d 118 (10th Cir. 1973).

7. Art Neon Co. v. City & County of Denver, 488 F.2d 118 (10th Cir. 1973). The district court had placed great reliance on Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973). In *Almota* the Supreme Court held that the concept of "market value" in eminent domain proceedings included the requirement that improvements be valued over their useful life by determining

are held subject to a valid and reasonable exercise of the police power[8] and that no question of taking without just compensation was presented.[9] In the court's view, the dispositive question asked whether the ordinance was reasonable and therefore within the permissible scope of the police power.[10] The amortization schedule, however, which differentiated on the basis of a sign's replacement cost, was invalidated for failing to present an adequate basis for different treatment of different signs. The court ruled that reasonableness required a five-year amortization period for all signs.[11]

In determining the permissible scope of the police power, early cases held that retroactive application of zoning laws deprived landowners of existing property rights.[12] Although nonconforming uses were considered inconsistent with the basic purpose of zoning,[13] it

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what a willing buyer would have paid for the improvements. This valuation was to take into account the possibility that the lease would be renewed as well as the possibility that it would not. While recognizing *Almota's* significance, the Tenth Circuit stated that the district court had mistakenly relied on it in that *Almota* was limited to eminent domain questions and had no application in a police power context. 488 F.2d at 123. By confining *Almota* to instances of eminent domain, the court eliminated the problems that could arise when amortization is employed to eliminate a property right that will produce income until an indefinite future time.

8. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962); Mugler v. Kansas, 123 U.S. 623 (1887). The court stressed that the amortization scheme was part of a city-wide zoning plan. 488 F.2d at 120.

9. 488 F.2d at 123. The constitutional provisions that require just compensation and thereby limit the power of eminent domain have no application to, and impose no limitation upon, the proper exercise of the police power. Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968); 1 P. NICHOLS, *supra* note 5, at § 1.42(3). For a discussion of the demarcation between compensable controls under eminent domain and non-compensable controls under the police power see D. MANDELKER, THE ZONING DILEMMA (1971); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

10. The court rejected contentions that the ordinance had been pre-empted by the Highway Beautification Act, 23 U.S.C. § 131 (1970), or was an unconstitutional impairment of contracts under article 1, section 10, of the federal constitution. 488 F.2d at 123.

11. 488 F.2d at 122.

12. *See, e.g.*, Note, *Nonconforming Uses in Iowa: The Amortization Answer*, 55 IOWA L. REV. 998 (1970); Comment, *Amortization of Nonconforming Uses*, 7 WAKE FOREST L. REV. 255 (1971); 44 CORNELL L.Q. 450, 451 (1959).

13. Historically, the desire to eliminate nonconforming uses is derived from the traditional purposes of zoning — to ensure the health, safety and general welfare of citizens. The goal of such elimination is to further zoning's primary purpose of confining certain classes of buildings and uses to certain localities. Lathrop v.

was generally accepted that their termination required compensation.[14] The use of eminent domain powers to condemn nonconforming uses was seldom employed because of the large financial burden it placed upon the municipality.[15] Unless the law of nuisance could be invoked to require immediate termination,[16] nonconforming uses were allowed to continue, subject to limited restrictions.[17] The restrictions were intended to bring about the eventual demise of nonconforming uses by natural processes.[18] The failure of such processes to achieve the desired result, however, led to the adoption of amortization as a means of eliminating nonconforming uses.[19]

The Supreme Court of Louisiana was the first to give judicial approval to the amortization principle.[20] Relying on the Supreme

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Town of Norwich, 111 Conn. 616, 151 A. 183 (1930); Miller v. Cain, 40 Wash. 2d 216, 242 P.2d 505 (1952); *see* AMERICAN SOC'Y OF PLANNING OFFICIALS, *supra* note 3, at 1; D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 82-86 (1971); Note, *Amortization: A Means of Eliminating the Nonconforming Use in Ohio*, 19 CASE W. RES. L. REV. 1042 (1968).

14. For a discussion of the compensation requirement see Edmonds v. County of Los Angeles, 40 Cal. 2d 642, 255 P.2d 772 (1953); Kenney v. Building Comm'n, 315 Mass. 291, 52 N.E.2d 683 (1943); People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952); Molnar v. George B. Henne & Co., 377 Pa. 571, 105 A.2d 325 (1954).

15. Aside from the financial aspect, courts have expressed doubt that such use of the eminent domain power would constitute a taking for a public purpose. ANDERSON, *supra* note 3, at § 6.70; Katarincic, *supra* note 3, at 4.

16. *See* City of Fredericktown v. Osborn, 429 S.W.2d 17 (Mo. Ct. App. 1968); Elkins v. State, 21 Tenn. 543 (1841); Wood, *Termination of a Nonconforming Use*, in INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 65, 76 (1973); 29 FORDHAM L. REV. 749 (1961).

17. The regulatory methods that have been employed to restrict the continuance of nonconforming uses include the following: prohibiting the resumption of a nonconforming use after its abandonment or discontinuance, prohibiting the rebuilding or alteration of nonconforming structures or structures occupied for nonconforming uses, and prohibiting or rigidly restricting a change from one nonconforming use to another. Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965); D. HAGMAN, *supra* note 13, at §§ 82-86; Norton, *supra* note 3, at 308; O'Reilly, *The Non-Conforming Use and Due Process of Law*, 23 GEO. L.J. 218 (1934); 44 CORNELL L.Q. 450, 452 (1959).

18. It was believed that nonconforming uses would eventually disappear through abandonment, destruction and other changes. *See* Comment, *Amortization of Non-Conforming Uses*, 24 MD. L. REV. 323, 324 (1964).

19. The restrictions only limited the continuance of nonconforming uses and in many cases were not enacted or, if enacted, were not enforced. *See, e.g.*, Grant v. Mayor & City Council, 212 Md. 301, 129 A.2d 363 (1957); AMERICAN SOC'Y OF PLANNING OFFICIALS, *supra* note 3, at 3.

20. State *ex rel.* Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929); State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, *cert. denied*, 280 U.S. 556 (1929).

Court's validation of prospective zoning in *Village of Euclid v. Ambler Realty Co.*,[21] the court concluded that the power to remove an existing nonconforming use was implicit in the power to prevent a future use.[22] In *City of Los Angeles v. Gage*[23] a California court extended this rationale, finding that the distinction between an ordinance that restricts future uses and one that requires the termination of existing uses after a reasonable time is a difference in degree, not in kind.[24] *Gage* held that an amortization scheme provides an equitable means of reconciling the conflicting interests of the property owner and the public, thereby satisfying due process requirements.[25]

In recent years the majority of courts, following the *Gage* rationale,[26] have upheld amortization provisions on the ground that, since they are simply a method of implementing a zoning ordinance, they are valid if they have a reasonable relationship to the public health, safety or welfare.[27] These courts have generally ignored the question

21. 272 U.S. 365 (1926).

22. The court upheld an ordinance with a one year amortization provision as applied to a retail grocery store. The court stated that since the village had the authority to maintain a purely residential district, it could remove any business or trade from such district and limit the time for removal as long as such ordinance was not unreasonable. State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613, *cert. denied*, 280 U.S. 556 (1929); *see* Comment, *The Abatement of Pre-existing Nonconforming Uses Under Zoning Laws: Amortization*, 57 NW. U.L. REV. 323 (1962).

23. 127 Cal. App. 2d 442, 274 P.2d 34 (Dist. Ct. App. 1954). The court upheld an ordinance that required the discontinuance of nonconforming commercial and industrial uses of residential buildings located in the "R" zone at the end of a five year period.

24. The court stated that nonconforming uses were not intended to be perpetual and that therefore it was reasonable to set a time limit on those uses "commensurate with the investment involved, and based on the nature of the use." *Id.* at 459, 274 P.2d at 43.

25. *Id.* at 460, 274 P.2d at 44; *accord*, Schifflett v. Baltimore County, 247 Md. 151, 230 A.2d 310 (1967); *see* ANDERSON, *supra* note 3, at § 2.22; Olson, *The Role of "Fairness" in Establishing a Constitutional Theory of Taking*, 3 URBAN LAW. 440 (1971).

26. *See* notes 23-25 and accompanying text *supra.*

27. *E.g.*, Grant v. Mayor & City Council, 212 Md. 301, 129 A.2d 363 (1957), upholding an ordinance requiring the removal of billboards situated in residential and office districts within five years after the passage of the ordinance. The court stated that "constitutionality depends on overall reasonableness, on the importance of the public gain in relation to the private loss." *Id.* at 315, 129 A.2d at 369. This statement summarizes the view that amortization provisions are valid if reasonable. *See* E.B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970) (billboards adjoining the highway system); Standard Oil Co. v. City of Tallahassee, 87 F. Supp. 145 (N.D. Fla. 1949),

of whether termination of a nonconforming use by amortization requires just compensation, reasoning that the reduction of private property values will not prevent operation of the police power when exercised for proper purposes.[28] A minority of courts have disapproved of the reduction of value theory as a justification for amortization provisions.[29] These courts have held that when a zoning ordinance attempts to deprive the owner of the reasonable use of his property, it goes beyond the proper scope of the police power. Under this view, the fourteenth amendment gives the property owner a vested property right that cannot be terminated without just compensation, and amortization provisions are inadequate to achieve that end.[30]

In *Art Neon Co.* the court adopted the majority view that the police power may be invoked to eliminate nonconforming uses. The

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aff'd, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950) (gasoline station in residential district); National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 464 P.2d 33, 83 Cal. Rptr. 577 (1970) (billboards in residential districts); Village of Gurnee v. Miller, 69 Ill. App. 2d 248, 215 N.E.2d 829 (1966) (junk yard in residential district); Spurgeon v. Board of Comm'rs, 181 Kan. 1008, 317 P.2d 798 (1957) (auto wrecking yard in residential district); Eutaw Enterprises, Inc. v. Mayor & City Council, 241 Md. 686, 217 A.2d 348 (1966) (check cashing operation in residential district); Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968) (billboards in residential districts); Wolf v. City of Omaha, 177 Neb. 545, 129 N.W.2d 501 (1964) (dog kennels in residential districts); LaChapelle v. Town of Goffstown, 107 N.H. 485, 225 A.2d 624 (1967) (junk yard in residential district); Swain v. Board of Adjustment, 433 S.W.2d 727 (Tex. Civ. App. 1968) (gasoline station in residential district); Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968) (billboards adjacent to highway system); City of Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602 (1959) (business in residential district).

28. An exercise of the police power frequently impairs rights in property because the exercise of those rights is detrimental to the public interest. *Cf.* United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Miller v. Schoene, 276 U.S. 272 (1927); Gorieb v. Fox, 274 U.S. 603 (1927); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

29. *See, e.g.*, Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965); Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958) (Van Voorhis, J., dissenting); City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953); Pittsburgh Outdoor Advertising Co. v. City of Clairton, 390 Pa. 1, 133 A.2d 542 (1957); James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955). Other courts have invalidated amortization provisions on the ground that they are not specifically authorized by state enabling legislation. *See, e.g.*, DeMull v. Lowell, 368 Mich. 242, 118 N.W.2d 232 (1962); United Advertising Corp. v. Borough of Raritan, 11 N.J. 144, 93 A.2d 362 (1952). *See also* Katarincic, *supra* note 3; Comment, *The Abatement of Pre-Existing Nonconforming Uses Under Zoning Laws*, *supra* note 22; Comment, *Amortization of Nonconforming Uses*, *supra* note 12; Annot., 22 A.L.R.3d, 1134, 1159 (1968).

30. *See* cases cited note 29 *supra*.

court did not challenge the amortization concept, finding that it "has been established by the authorities as a proper method to terminate nonconforming uses."[31]

Although recognizing that an ordinance requiring the elimination of nonconforming signs must be reasonably related to a permissible purpose within the scope of the police power,[32] the court significantly limited the scope of judicial inquiry, stating that "the legislative determination must only meet the test of 'reasonableness,' that is, the *plan* for termination must be 'reasonable.' "[33] The court therefore

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31. 488 F.2d at 122.

32. Courts generally review the purpose underlying the ordinance to determine whether it has a reasonable relationship to a proper legislative purpose. Nebbia v. New York, 291 U.S. 502 (1933); *see, e.g.*, E.B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970) (removal of billboards to promote aesthetics); Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968) (removal of billboards to promote traffic safety).

33. 488 F.2d at 121 (emphasis added). The court noted that in applying the reasonableness test to the legislative determination other courts have used a variety of factors:

> These include the nature of the nonconforming use, the character of the structure, the location, what part of the individual's total business is concerned, the time periods, salvage, depreciation for income tax purposes, and depreciation for other purposes, and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area. Where signs are concerned, the courts usually mention the fact that the use is also of public streets since the message is directed to the passerby.

Id. at 122. The court went on to note that when these factors were applied to the Denver ordinance, it was basically reasonable.

The list of factors cited by the court is largely concerned with the effect on the owner of eliminating the nonconforming use. The court found that the ordinance "does not deprive the users of advertising signs, whether they be lessees or owners, of such use." *Id.* This conclusion ignores the real effect of the ordinance, which is to regulate the use of existing signs to the point of exclusion. The signs could not be displayed in any district in the City, and in any case, they lost their advertising value when taken from the business site. *See* DENVER, COLO., REV. MUN. CODE § 613 (1971).

This appears to be an extreme use of amortization. Except for situations in which the nonconforming use amounts to a nuisance, *see* Green v. Castle Concrete Co., ... Colo. ....., 509 P.2d 588 (1973); LaChapelle v. Town of Goffstown, 107 N.H. 485, 225 A.2d 624 (1967), amortization is most commonly employed to remove a nonconforming use from a residential district. Recently it has also been employed to eliminate billboards from the federal and state highway systems. *See, e.g.*, Santa Barbara v. Modern Neon Sign Co., 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (Dist. Ct. App. 1961); Board of Supervisors v. Miller, 170 N.W.2d 358 (Iowa 1969); Shifflett v. Baltimore County, 247 Md. 151, 230 A.2d 310 (1967); Harbison v. City of Buffalo, 4 N.Y.2d 533, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958); 2 ANDERSON, *supra* note 3, at § 11.76; W. EWALD & D. MANDELKER, STREET GRAPHICS 127 (1971): text in note 27 *supra*. *In re* Appeal of Ammon R. Smith Auto Co., 423 Pa. 493, 223 A.2d 683 (1966), held that an ordinance

confined its review to the method of elimination provided under the ordinance rather than undertaking the traditional review as to permissible use of the police power.[34]

While purportedly applying a narrower standard, the court in fact applied the traditional test to the portion of the ordinance requiring the elimination of flashing signs. It found that a sufficient relationship existed between such signs, which distracted motorists, and the promotion of traffic safety to warrant their elimination within a 30 day period.[35] The legislative judgment that the regulation was necessary was sufficient in itself to uphold the remaining provisions of the ordinance.[36]

In *Mayor of Baltimore v. Mano Swartz, Inc.*[37] the Maryland Court of Appeals employed a different approach to a similar problem. Confronted with an ordinance designed to regulate signs in Baltimore's

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placing a ban on all "off-site" sign advertising was patently unreasonable and invalid. The court stated that the ordinance attempted to prohibit, not regulate, without any regard for the districts set up in the zoning ordinance. *But see* Kenyon Peck Inc. v. Kennedy, 210 Va. 60, 168 S.E.2d 117 (1969), in which the court upheld a ban on moving signs (pennants) on the ground of traffic safety. *Cf.* Gough v. Board of Zoning Appeals, 21 Md. App. 697, 321 A.2d 315 (1974). The *Gough* court upheld an amortization provision that sought to eliminate in a two year period nonconforming uses that were conducted primarily on open land and did not *utilize any permanent building or structure. Id.* at ....., 321 A.2d at 317.

34. The court seemed to disregard the established rule that a municipality may bring the nonconforming use to its predestined terminal point, provided the termination provisions are reasonable as to time and *directed toward some reasonable aspect of land use regulation under properly designated police power.* 1 P. NICHOLS, *supra* note 5, at § 1.42(8); 2 E. YOKLEY, ZONING LAW AND PRACTICE § 16-14 (3d ed. 1965); *cf.* Williamson v. Lee Optical Co., 348 U.S. 483 (1954); St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269 (1919); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E.2d 309 (1930); 7 URBAN L. ANN. 304 (1974).

35. 488 F.2d at 123. The ordinance did not require elimination of the signs but only that their apparent movement be stopped. *Accord,* Franklin Furniture Co. v. City of Bridgeport, 142 Conn. 510, 115 A.2d 435 (1955); Kenyon Peck, Inc. v. Kennedy, 210 Va. 60, 168 S.E.2d 117 (1969). *But see* City of Santa Barbara v. Modern Neon Sign Co., 189 Cal. App. 2d 188, 11 Cal. Rptr. 57 (Dist. Ct. App. 1961).

36. 488 F.2d at 121. The court disregarded defendant's attempt to justify the ordinance on economic grounds. Brief for Appellant at 5, Art Neon Co. v. City & County of Denver, 488 F.2d 118 (10th Cir. 1973).

37. 268 Md. 79, 299 A.2d 828 (1973).

central business district,[38] the court examined both the face of the ordinance and the underlying legislative intent.[39] It found that the sole purpose of the ordinance was the achievement of an aesthetically pleasing result.[40] Although the court held that this purpose was not a permissible use of the police power, it did review the objective of the ordinance rather than merely upholding it on the basis of the presumption of constitutionality traditionally afforded zoning ordinances.[41] By not inquiring into the purpose of the legislation, the court in *Art Neon Co.* in effect permitted a legislative body to expand the definition of "public welfare" without subjecting the definition to judicial scrutiny.[42] In determining whether a regulation is within the permissible scope of the police power, regulatory measures based on aesthetic considerations arguably promote the general welfare and are therefore valid.[43] Such a conclusion is one that the judiciary might

38. The ordinance at issue in *Mano Swartz* did not contain an amortization provision as such but did provide a five year moratorium before the City could seek enforcement of the ordinance's proscription of signs projecting more than 12 feet from building or from roof tops. *Id.* at 83, 299 A.2d at 831.

39. *Id.* at 86, 299 A.2d at 832.

40. *Id.*

41. As a general rule, zoning acts and amendments to zoning ordinances are presumed to be constitutional and valid. Gorieb v. Fox, 274 U.S. 603 (1926); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); 1971 WASH. U.L.Q. 673. Nonetheless, a zoning ordinance must be reasonably related to an end that the state has a right to achieve. *Id.* at 675.

42. The courts will generally uphold a zoning ordinance only after deciding that the ordinance is within the permissible scope of the municipal zoning power. City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (Dist. Ct. App. 1954).

43. "Historically, the process of extending the application of the police power can be traced to efforts to complement nuisance law [*i.e.* tangible harmful effect of land uses upon surrounding territory]." Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain*, 3 LAND & WATER L. REV. 33, 36 (1968). When zoning for aesthetic objectives diminishes the analogy between zoning and nuisance law, courts tend to justify such zoning by placing greater emphasis upon the "general welfare" aspect of the police power. *See* United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964); Saveland Park Holding Co. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955). *See generally* Note, *Nonconforming Uses in Iowa*, *supra* note 12; Comment, *The Abatement of Pre-existing Nonconforming Uses Under Zoning Laws*, *supra* note 22.

For sources stating that the police power is broad enough to include reasonable regulation of property use for aesthetic reasons only see Murphy, Inc. v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944); Dade County v. Gould, 99 So. 2d 236 (Fla. 1957); State v. Diamond Motor Inc., 50 Hawaii 33, 429 P.2d 825 (1967) (based on constitutional provision); City of Shreveport v. Brock, 230 La.

reasonably reach.[44]

Once it is determined that a valid purpose for invoking the police power exists, it must be determined whether the methods employed are reasonable.[45] The determination of reasonableness is based on a two-fold test. First, a court will attempt to balance the burden placed on the individual against the public good sought to be achieved.[46] Prior decisions examined the particular factual situation to ascertain whether the ordinance was being applied reasonably.[47] The court in

651, 89 So. 2d 156 (1956); Preferred Tires, Inc. v. Village of Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374 (Sup. Ct. 1940); 2 ANDERSON, *supra* note 3, at § 11.76; W. EWALD & D. MANDELKER, *supra* note 33, at 107, 110; Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955); Comment, *Outdoor Advertisements — Aesthetics and the "Public Right"*, 33 TUL. L. REV. 852 (1959).

44. If the court was hesitant to recognize aesthetic objectives, it could have based its holding on economic grounds (the elimination of nonconforming signs to enhance property values) and could have held that aesthetics is a proper secondary purpose under the police power. *See, e.g.*, Welch v. Swasey, 214 U.S. 91 (1909); E.B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970); Desert Outdoor Advertising Inc. v. County of San Bernadino, 255 Cal. App. 2d 765, 63 Cal. Rptr. 543 (Dist. Ct. App. 1967); Mayor of Baltimore v. Mano Swartz, Inc., 268 Md. 79, 299 A.2d 828 (1973); United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963); Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968). *See also* W. EWALD & D. MANDELKER, *supra* note 33, at 110; Comment, *The Aesthetic Factor in Zoning*, 11 DUQUESNE L. REV. 204 (1972).

45. *See* note 34 *supra*.

46. Courts applying the value diminution rule often couple it with an attempt to weigh the potential social benefit derived from the enforcement of a regulation against the private loss. The whole basis of police power restrictions upon property rights has been a weighing of the benefit to the community against the loss suffered by the property owner. The public benefit is indicated by the degree to which the use is inconsistent with the community as it exists and with the plan for the development of the community. Thus, a regulation that confers only a marginal social benefit may be held invalid in a particular application when the loss to the landowner is great. *See* Miller v. Schoene, 276 U.S. 272 (1927); Board of Supervisors v. Miller, 170 N.W.2d 358 (Iowa 1969).

47. *See, e.g.*, National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 464 P.2d 33, 83 Cal. Rptr. 577 (1970); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (Dist. Ct. App. 1954); Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958); Bernstein v. Board of Appeals, 60 Misc. 2d 470, 302 N.Y.S.2d 141 (Sup. Ct. 1969).

The *Gage* court stated that the validity of an amortization ordinance depends on a balance between the public gain and the private loss. It took into consideration the investment involved and the nature of the use in discussing the reasonableness of the amortization provision. City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 460, 274 P.2d 34, 44 (Dist. Ct. App. 1954). In *Bernstein* the court

Art Neon Co. did not subject the ordinance to this test. Instead, the court stated that the balancing of interests is a legislative function.[48] Therefore, the court did not inquire into the effect the ordinance would have on plaintiffs' businesses or on the public but gave blanket approval to the use of amortization in this situation.[49]

The second step in the analysis determines whether the amortization schedule provides a sufficient period before termination.[50] Prior decisions are not entirely consistent. Yet, there is general judicial agreement that amortization is a technique that allows for at least partial recoupment of the owner's investment in an asset.[51] Therefore an amortization period is generally considered reasonable if it is based upon the remaining useful life of the nonconforming use[52] or upon the owner's initial investment.[53] In contrast, the *Art Neon Co.* court

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required the board to strike a reasonable balance between social harm and private loss in determining the period for which a nonconforming use might continue. The case involved an ordinance requiring a nonconforming nursery school to terminate within two years of the date of the ordinance. The court agreed that a reasonable amortization would legally eliminate nonconforming uses but that until the social harm, private investment, and expected annual return was considered, the court could not conclude that the ordinance was reasonable. Bernstein v. Board of Appeals, 60 Misc. 2d 470, 479, 302 N.Y.S.2d 141, 152 (Sup. Ct. 1969). *See also* Grant v. Mayor of Baltimore, 212 Md. 301, 129 A.2d 363 (1957). The *Grant* court was convinced that billboards had a detrimental effect on residential districts and were a serious factor in the creation of blight.

48. 488 F.2d at 121.

49. *But see* note 46 *supra.*

50. *See, e.g.*, Schifflett v. Baltimore County, 247 Md. 151, 162, 230 A.2d 310, 315 (1967); Harbison v. City of Buffalo, 4 N.Y.2d 553, 561, 152 N.E.2d 42, 46, 176 N.Y.S.2d 598, 604 (1958); *cf.* Standard Oil Co. v. City of Maryville, 279 U.S. 582 (1929).

51. *See* note 3 *supra.*

52. *See, e.g.*, Grant v. Mayor of Baltimore, 212 Md. 301, 129 A.2d 363 (1957); Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968); Harbison v. City of Buffalo, 4 N.Y.2d 533, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958); 44 CORNELL L.Q. 450 (1959).

The *Grant* court stated that the amortization provision should "determine the normal useful remaining economic life of the structure worked to the use and prohibit the offending use after the operation of that time." 212 Md. at 308, 129 A.2d at 365. In *Naegele* the court held that "useful life corresponds roughly to the amortization period." 281 Minn. at 501, 162 N.W.2d at 213. The *Harbison* court noted that a three year amortization period for a junk yard in a residential district equalled "the useful life" of a junk yard without extensive repairs. 4 N.Y.2d at 561, 152 N.E.2d at 46, 176 N.Y.S.2d at 604.

53. National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 364 P.2d 33, 83 Cal. Rptr. 577 (1970) (upholding an ordinance with respect to signs that had been fully amortized by the removal date according to Internal Revenue

significantly altered the concept of amortization, stating that in a zoning context it "is no more than *notice* to the owner and user of the sign that they have a period of time to make whatever adjustments or other arrangements they can."[54] Although the five year amortization period approved by the court in *Art Neon Co.* may allow some owners to receive a reasonable return on their investment,[55] the court's view of amortization as merely a notice requirement may be used in the future to justify the elimination of nonconforming uses long before the owner realizes any return. Such a result would be contrary to the principle that amortization is an equitable means of reconciling conflicting interests by reducing the owner's loss to a point at which it is insubstantial.[56]

Municipalities have a legitimate interest in preventing the perpetuation of nonconforming uses. Constitutional protections, however, should not be lightly cast aside, nor should the desire for complete conformity demand unreasonable individual sacrifices by reducing amortization to a mere concept of notice to the property owner. The

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Service requirements); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (Dist. Ct. App. 1954) (ruling that a time limit placed upon the continuance of existing nonconforming uses should be commensurate with the investment involved); Harbison v. City of Buffalo, 4 N.Y.2d 533, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958) (holding that an ordinance can provide for termination of a prior nonconforming use after a period long enough to allow the owner a fair opportunity to amortize his investments and make future plans); City of University Park v. Benners, 485 S.W.2d 773 (Tex. 1972) (holding that the property owner must be afforded an opportunity to recover his investment in the structure); *cf.* COMM'N ON HIGHWAY BEAUTIFICATION, STAFF WORKING PAPER ON CONTROL OF ON-PREMISE SIGNS (1973).

54. 488 F.2d at 121 (emphasis added). The court also noted that amortization in the field of zoning contains no connotation of compensation. *Id.*

55. The court invalidated the amortization schedule contained in the ordinance on the ground that the termination provision bore no reasonable relationship to the amount of the property owner's investment. *Id.* at 122. The court's approval of a five year amortization period for all nonconforming signs is consistent with a line of cases upholding one termination date for all nonconforming cases within a class. *See, e.g.*, E.B. Elliott Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970); Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968). Yet this causes the owners with the largest investment to sustain the greatest loss, which is contrary to the equitable principles underlying amortization. One commentator states the basic test employed to determine whether the amortization period is reasonable: "[C]an the owner of the property recoup the investment that he had in the property at the start of the amortization period?" Wood, *supra* note 16, at 81. The provision upheld in *Art Neon Co.* does not fulfill this basic test.

56. *See, e.g.*, Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958).

courts should look instead to the particular facts and circumstances of each case before passing on the validity of a sign amortization ordinance.[57] To do so requires balancing the interests of individuals and the community, including the amount an owner has invested in the business, the suitability of relocating the use, the expense of relocation, the protection afforded the public, the uses of property in surrounding areas, and the character of the nonconforming use itself.[58] The *Art Neon Co.* court's failure to confront the issue of aesthetic zoning is also unfortunate. In light of the growing public interest in maintaining pleasant surroundings, the court had ample authority for finding that aesthetics are a proper ground for invoking the police power.[59] At the same time, a straightforward treatment of the aesthetics issue would have provided guidelines for future legislative enactments. Reluctance to require justification for legislative action may lead to unquestioned acceptance of legislation that crosses the line separating a proper exercise of the police power from a taking of property.

Ilene Dobrow

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57. *See* note 46 and accompanying text *supra.*

58. 44 TEXAS L. REV. 368 (1965).

59. While aesthetic legislation has gained substantial support in recent years, only a minority of courts will uphold legislation on purely aesthetic grounds. *See* Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964); Sun Oil Co. v. City of Madison Heights, 41 Mich. App. 47, 199 N.W.2d 525 (1972); Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965). Yet the majority of courts have held, in effect, that aesthetic legislation is valid if it is thinly veiled by some other legitimate interest. *See, e.g.*, Rotenberg v. City of Port Pierce, 202 So. 2d 782 (Fla. Dist. Ct. App. 1967); Stoner McCray Sys. v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956); State *ex rel.* Wilkerson v. Murray, 471 S.W.2d 460 (Mo. 1971); United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964) (dictum). *See generally* Anderson, *Regulation of Land Use for Aesthetic Purposes — An Appraisal of People v. Skuer*, 15 SYRACUSE L. REV. 33 (1964); Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1973); Steinbach, *Aesthetic Zoning: Property Values and the Judicial Decision Process*, N.J.L.J., Dec. 17, 1970, at 1, col. 4.